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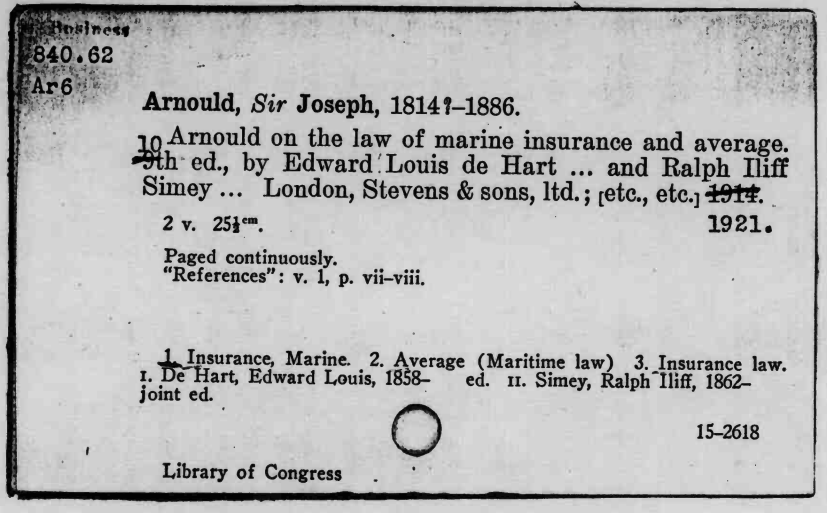

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MARINE INSURANCE.

TENTH EDITION.

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*** *The First* (1848) *and Second* (1851) *Editions by the Author*, SIR JOSEPH ARNOULD, *late Fellow of Wadham College, Oxford, and Judge of the High Court of Judicature, Bombay.*

The Third (1860), *Fourth* (1871), *Fifth* (1877) *and Sixth* (1887) *Editions by the late* DAVID MACLACHLAN, M.A., *Barrister-at-Law.*

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AND AVERAGE.

TENTH EDITION

BY

EDWARD LOUIS DE HART, M.A., LL.B. (Cantab.)

AND

RALPH ILIFF SIMEY, B.A. (Oxon.)

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PREFACE
TO THE TENTH EDITION.

THE last edition of this treatise was published in 1914, soon after the outbreak of the recent war, and the questions of marine insurance which have arisen in the interval have been mainly the result of the abnormal conditions under which trade and navigation were carried on during the continuance of hostilities.

The practice of effecting separate insurances against marine risks and war risks, though by no means new, had previously not given rise to much litigation. During the war, however, many cases came before the Courts in which it became necessary to decide, in the absence of direct evidence, whether a loss fell upon one or another set of underwriters. Other cases, more important from the point of view of the lawyer, have contributed to the development of the rule of *causa proxima* and of the law with regard to restraints, &c. of princes.

The passages which deal with national character and the law of prize have been revised in view of the many new decisions on these subjects, which have been incorporated in the work so far as they bear on the law of marine insurance.

The cases to the end of 1920 have been duly noted, and pains have been taken to ensure the accuracy of the references to the course of business in matters of marine insurance. In this connection the editors wish to express their thanks to Rear-Admiral Sir Edward Inglefield, Secretary of Lloyd's, to Mr. C. W. Wright, of Lloyd's, and to Mr. G. R. Rudolf, Member of the Association of Average Adjusters, for information which they have kindly supplied.

E. L. DE H.
R. I. S.

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February, 1921.

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ADDENDA.

The decision of the Court of Appeal in *Whittle* v. *Mountain*, [1920] 1 K. B. 447 (cited in §§ 508, 509, 694, 778, 799, 812), has been affirmed by the House of Lords: [1921] W. N. 96.

In the appeal to the House of Lords in *Gaunt* v. *British and Foreign Ins. Co.*, [1920] 1 K. B. 903 (cited in §§ 225, 799a, 861b), judgment was reserved on the 17th February, 1921.

The judgments of the Prize Court in *The Kronprinsessan Margaretha*, [1917] P. 114 (cited in §§ 659, 763), and in *The Parana*, [1919] P. 249 (cited in § 763), have been affirmed by the Privy Council: [1921] W. N. 22.

The judgments of the Prize Court in *The Prins der Nederlanden*, [1920] P. 216 (cited in § 763a), and *The Vesta*, [1920] P. 385 (cited in § 659), were reversed by the Privy Council on the 16th March, 1921.

MARINE INSURANCE.

PART I.

OF THE NATURE, FORMATION, AND SUBJECT-MATTER OF THE CONTRACT OF MARINE INSURANCE.

CHAPTER I.

THE CONTRACT OF MARINE INSURANCE GENERALLY.

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Codification of the Law of Marine Insurance.

1. UNTIL the year 1907 the Law of Marine Insurance was derived mainly from the decisions of the Courts and the treatises of text-writers; but its leading principles are now contained in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), the full title of which is "An Act to codify the Law relating to Marine Insurance" (*a*). The Act came into force on the 1st of January, 1907 (*b*).

The nature and scope of the contract of Marine Insurance are explained in the first three sections of the Act in the following terms:—

Marine insurance defined.

Section 1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured,

(*a*) The title of an Act of Parliament is now a part of the Act, and may be taken into consideration for the purpose of construing it. See May's Parliamentary Practice, 11th ed. 376, 385; Fielden *v.* Morley Corporation, [1899] 1 Ch. 1, 3; per Lord Haldane, L. C., and Lord Moulton in Vacher *v.* London Society of Compositors, [1913] A. C. 107, 113, 128. For the rules of construction applicable to a codifying statute, see per Lord Herschell, in Bank of England *v.* Vagliano, [1891] A. C. 107, 144.

(*b*) Mar. Ins. Act, 1906, s. 93.

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in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure (*c*).

Mixed sea and land risks.

Section 2.—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage (*d*).

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto (*e*); but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Marine adventure and maritime perils defined.

Section 3.—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance (*f*).

(2) In particular there is a marine adventure where—

(a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(*c*) In the seventh edition of this work Marine Insurance was defined as "a contract whereby one party, for an agreed consideration, undertakes to indemnify the other against loss arising from certain perils or sea-risks, to which his ship, merchandise, or other interest in a maritime adventure, may be exposed during a certain voyage, or a certain period of time"

(*d*) See *post*, §§ 447, 457, 460, 470, 507.

(*e*) The stamping of a policy on ship under construction or repair, or on trial, is regulated by the Revenue Act, 1903, s. 8.

(*f*) It is said that sect. 3 is intended to express the principle that the insurance is effected in respect of the pecuniary interest of the assured in a marine adventure. See Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 6. For the distinction between the *subject-matter insured*, and the *subject of a contract of Marine Insurance*, see *ibid.*, and per Brett, L. J., in Rayner *v.* Preston (1881), 18 Ch. D. 1, 7. As to the effect of illegality, see *post*, Part II. Chap. V.

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(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy (*g*).

Explanation of terms.

2. The party indemnified, called the *assured* in the Act, is sometimes also called the *insured*.

The property or thing insured itself is called in the Act the *subject-matter insured* (*h*). In earlier editions of this work it was called the *subject of insurance*.

The title or interest which the assured has in the subject-matter insured is called his *insurable interest*.

The party undertaking to indemnify the assured against loss, called the *insurer* in the Act, is also generally called the *underwriter*.

The consideration for which he so undertakes to indemnify the assured is called the *premium* (*i*).

The instrument by which the contract of indemnity is effected is called in England the *policy*.

That which is insured against is, as appears in sect. 3 (2), loss arising from maritime perils or casualties.

These casualties are in technical language called, some-

(*g*) See *post*, Part III. Chap. II., "Losses by the Perils insured against."

(*h*) See s. 6 (1), *post*, § 258, and cf. s. 3 (1), *supra*, in which a marine adventure is said to be the "subject of a contract of marine insurance."

(*i*) The word *premium* is used in the Act and in general language only to denote the stipulated sum of money which the assured usually pays to the underwriter. Lord Esher pointed out that the word might be used in a wider sense, to cover the consideration (whatever it may be) which moves from the assured to the insurer. In this sense the premium which a member of a mutual insurance association pays is his liability to contribute to the losses of other members. See Lion Insurance Association *v.* Tucker (1883), 12 Q. B. D. 176, 187. The term is not used in this sense in the Act. See s. 85 (2).

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times, *the perils insured against* and sometimes the *risks covered by the policy*, expressions which mean one and the same thing, and are employed to signify those causes of loss against the effect of which the underwriter undertakes by his contract to indemnify the assured.

The interest of the assured is technically said to be *covered by the policy*, when the sum or aggregate of sums insured in the policy is sufficient to afford him full compensation for whatever loss that interest may sustain.

If the value of his interest exceeds the sum insured, the excess of interest is said to be "*uncovered by the policy*," and the assured to be "*his own insurer in respect of the uninsured balance*" (*k*).

When the liability of the underwriter commences under the contract, the technical mode of expressing this is by saying that "*the policy attaches*," or "*the risk begins to run*," or "*the risk attaches*" (*l*) from that time.

Nature of the indemnity afforded by marine insurance.

3. The very essence of the contract of Marine Insurance is that it is a contract of INDEMNITY (*m*); its sole and exclusive object is to procure for the assured indemnity, in the strictest sense of that word, for any losses he may sustain through the

(*k*) See Mar. Ins. Act, 1906, s. 81, *post*, § 1215.

(*l*) This is the term used in the Act. See ss. 43, 44, and Schedule I., rr. 1—4.

(*m*) This principle may, however, be violated by means of a valued policy, the valuation of the subject of insurance therein being in general conclusive against both parties. Therefore it has been said that "a policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as, indeed, they may in any other contract to indemnify." Opinion of the Judges in Irving *v.* Manning (1847), 1 H. L. C. 287, 307; see also McArthur, Marine Ins. p. 68, where it is shown that in open policies on ship, in consequence of the recognized method of computing the value after a loss, the assured recovers more than his real loss when the freight is also insured. Under policies on freight, again, the assured may recover more than an indemnity, as in case of a loss he is entitled to be paid the gross freight, *i.e.*, without any deduction in respect of the expenses which would have been incurred after the loss to earn the freight. On the other hand, in respect of cargo generally, he recovers less than his loss under an open policy. See *post*, Part I. Chap. XIII. "Valuation."

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agency of those sea-risks against the effect of which the underwriter by the terms of his policy stands pledged to protect him. To prevent the assured from suffering loss by means of any of the perils insured against is the single aim of a contract of Marine Insurance, and its whole spirit would be violated if he could make the occurrence of any such casualties a means of gain, for this would be to give him an interest in procuring sea-losses, which would be opposed to every principle of commercial policy (*n*). Hence an interest in the subject-matter insured is of the very essence of the right to recover upon the contract (*o*). In the absence of such an interest the plaintiff is not damnified, although there may have been a total loss of the thing insured.

Nature and extent of the indemnity.

4. Indemnity, then, being the sole object of the contract of Marine Insurance, it becomes important to inquire into the nature and extent of the indemnity it professes to afford.

In this country and in the United States, the contract of Marine Insurance has always been considered applicable to protect men not only against such events as may occasion the deprivation of that which they may actually possess, but against those also which would intercept from them the advantage or profit which, but for such events, they would acquire in the ordinary and probable course of things (*p*).

Hence in this country, as we shall see more at large hereafter, the loss arising from the interception, by the perils insured against, of future freight and expected profit is quite as legitimate an object of that indemnity which Marine Insurance can afford as the damage actually inflicted by the same perils upon ships or merchandise (*q*).

(*n*) Assecuratus non quærit lucrum sed agit ne in damno sit. Straccha de Assecurationibus, gl. 20, No. 4.

(*o*) Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 269.

(*p*) Per Lawrence, J., in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 301.

(*q*) In France the law was formerly different; but now by Arts. 334 and 347 of the Code de Commerce, as amended by a law of the 12th Aug. 1885, insurances may be effected both on profits and on freight.

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Interest exposed to risk indispensable to every contract of marine insurance.

5. Not only, as we have already seen, must the assured have an interest in the subject-matter insured, but it is an indispensable requisite of every contract of Marine Insurance, properly so called, that the subject-matter insured should be exposed to the risk of loss from the perils insured against, upon the voyage or during the period over which the indemnity is by the terms of the contract made to extend (*r*). This is the most fundamental principle in the whole law of Marine Insurance. *Principale fundamentum assecurationis est risicum seu interesse assecuratorum; sine quo non potest subsistere assecuratio* (*s*).

The contract of Marine Insurance, in short, is nothing but a contract of indemnity against the risk of loss by sea perils, and the premium is nothing but the price paid for this indemnity; it is obvious, therefore, that if the assured is not really interested in something which he runs the risk of losing by the perils of the sea, there is no consideration for the sum he has paid: and as the foreign jurists express it, no matter on which the contract can work, for its very constituent element is the possibility of loss from marine casualties (*t*). With the commencement of exposure to the risk of loss by the perils insured against the policy or risk is said to *attach;* and any loss that occurs earlier, let the cause be what it may, is uncovered. Therefore, if the subject-matter insured be totally lost before the policy has attached, the underwriter pays nothing; but he must return the premium received, because there has been a complete failure of consideration for what was otherwise a valid and binding contract.

Distinction between contracts of marine insurance and wagers.

6. Thus it appears that two things are mainly essential to every contract of Marine Insurance:—

1. An interest in the subject-matter insured.

(*r*) 1 Emerigon, c. i. s. 1, p. 6; 1 Benecke, System des Assecuranz, c. i. p. 23.

(*s*) Casaregis, Disc. 4, No. 1, cited by Emerigon, *ubi supra*.

(*t*) Si non adest risicum assecuratio non valet, nam non adest materia in quâ forma potest fundari. Roccus, No. 88. En un mot, la perte ou le dommage considerés dans l'incertitude des évènemens sont la matière de ce contrat. 1 Emerigon, c. i. s. 1, p. 6.

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2. Exposure of that interest to risk of loss or detriment by sea perils.

It is the necessity for these requisites which entirely distinguishes contracts of Marine Insurance, properly so called, from mere wagers upon the issue of maritime adventures.

Such maritime wagers, although framed externally as policies of sea-assurance, and therefore called wager policies, were, as we shall see more at large hereafter, prohibited in this country nearly two centuries ago by a solemn act of the legislature, and in most other maritime states are either expressly forbidden or practically disused: and this on the ground that it is plainly opposed to the true interests of a mercantile state to enable those who have no real stake in the safety of a maritime adventure to give themselves (by means of such a contract) a great interest in its loss or destruction.

CHAPTER II.

FORM AND CONTENTS OF SEA-POLICIES.

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What is a policy.

7. THE instrument in which the contract of sea-insurance is generally embodied is called a policy of insurance (*a*). In the Marine Insurance Act, 1906, it is called a marine policy (*b*).

What insurances must be made by a policy.

In the interest of the revenue various Stamp Acts have made the use of stamped policies compulsory (*c*). The Stamp Act, 1891, which repealed all the enactments then in force relating to the stamping of policies, provides that a contract for sea-insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), for which the corresponding section 506 of the Merchant Shipping Act, 1894, must now be substituted (*d*)) shall not be valid unless it is expressed in a policy of sea-insurance (*e*).

(*a*) From the Italian *polizza d'assecurazione*.

(*b*) See Mar. Ins. Act, 1906, s. 22, *infra*, § 8. It may sometimes be material to consider whether a particular policy is a marine policy or not—*e.g.*, in the case of a ship insured against fire only: see In re United London, &c. Ins. Co., [1915] 1 Ch. 578; 2 Ch. 12; and see also Moore *v.* Evans, [1917] 1 K. B. 458; [1918] A. C. 185, *infra*, § 1091.

(*c*) 35 Geo. 3, c. 63; 54 Geo. 3, c. 144; 30 Vict. c. 23.

(*d*) See *infra*, note (*j*).

(*e*) 54 & 55 Vict. c. 39, s. 93 (1), re-enacting in substance the provision of 30 Vict. c. 23, s. 7, as to the stamping of the policy: see *post*, §§ 31—33. As to admitting an alleged copy of a policy when the execution of a policy is itself in issue, see Stowe *v.* Querner (1870), L. R. 5 Ex. 155.

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A policy of insurance is defined in the Stamp Act as including "every writing whereby any contract of insurance is made or agreed to be made, or is evidenced" (*f*).

For the purposes of the Stamp Act, the expression "policy of sea-insurance" (*g*) means "any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea-risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance" (*h*).

Further, by the Stamp Act, "a contract for sea-insurance" includes any agreement whereby "any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, takes upon himself any risk attending goods, merchandise, or property of any description whatever, while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage" (*i*).

The insurances referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862, and the 506th section of the Merchant Shipping Act, 1894 (*j*), which there-

(*f*) 54 & 55 Vict. c. 39, s. 91. Cf. 30 Vict. c. 23, s. 4; and see Home Mar. Ins. Co. *v.* Smith, [1898] 2 Q. B. 351.

(*g*) "Policy of sea insurance" seems in this definition to be used in the sense of "contract for sea insurance."

(*h*) 54 & 55 Vict. c. 39, s. 92 (1).

(*i*) *Ibid.* s. 92 (2).

(*j*) The former Act is repealed by the Merchant Shipping Act, 1894. S. 54, which is referred to in s. 55, is in substance re-enacted in s. 503 of the later Act. By s. 38 (1) of the Interpretation Act, 1889, the references to the sections of the repealed Act must be construed as

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fore do not require a policy, are insurances by owners of ships against claims for (1) loss of life or personal injury caused to any persons carried in such ships, (2) damage or loss caused to any goods, merchandise, or other things whatsoever on board such ships, (3) loss of life or personal injuries caused by the improper navigation of such ships to persons carried in other ships or boats, (4) loss or damage caused by the improper navigation of such ships to any goods, merchandise, or other things whatsoever on board other ships and boats.

Statutory requisites of a policy.

8. Subject to the provisions of sect. 11 of the Finance Act, 1901 (*k*), no policy of sea-insurance made for time may be made for any time exceeding twelve months (*l*).

A policy of sea-insurance is not valid unless it specifies the particular risk or adventure (*m*), the names of the subscribers or underwriters, and the sum or sums insured (*n*).

By a document called an "open cover" an underwriter agreed to re-insure an insurance company to the extent of the excess, over certain amounts mentioned in the document, of the risks to be undertaken by the company from time to time, on goods shipped by certain steamship lines. The limit of the excess on any one ship was specified. The Court of Appeal held that the document was a contract for sea-insurance within sect. 93 (1) of the Stamp Act, 1891, and that it did not specify the sum insured, and was therefore invalid as a policy (*o*).

Sect. 91 of the Marine Insurance Act, 1906, declares that

references to the corresponding sections of the Merchant Shipping Act, 1894.

(*k*) See *infra*, § 31.

(*l*) Stamp Act, 1891, s. 93 (2), (3). Similarly s. 25 (2) of the Mar. Ins. Act, 1906, declares that subject to these provisions "a time policy which is made for any time exceeding twelve months is invalid."

(*m*) See Edwards *v.* Aberayron Mutual Ship Ins. Society (1875), 1 Q. B. D. 563.

(*n*) Stamp Act, 1891, s. 93 (3). In re The Arthur Average Association (1875), L. R. 10 Ch. 542, on the similar provision in 30 Vict. c. 23, s. 7; Home Mar. Ins. Co. *v.* Smith, [1898] 2 Q. B. 351.

(*o*) *Ibid.*

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nothing therein "shall affect the provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue." The Marine Insurance Act, however, also contains provisions relating to the particulars which a policy must contain, which overlap those of the Stamp Act hereinbefore mentioned (*p*). Sect. 22 of the Marine Insurance Act declares that "subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act." By sect. 23 "a marine policy must specify (1) the name of the assured, or of some person who effects the insurance on his behalf; (2) the subject-matter insured and the risk insured against; (3) the voyage, or period of time, or both, as the case may be, covered by the insurance; (4) the sum or sums insured; (5) the name or names of the subscribers"; and sect. 24 (1) declares that "a marine policy must be signed by or on behalf of the insurer."

Classifications of policies.

9. We will now advert briefly to the division frequently made of policies into interest and wager, valued and unvalued or open, named and floating, time and voyage policies.

Interest and wager policies.

An *interest policy* is one which shows by its form that the assured has a real, substantial interest in the thing insured: in other words, that the contract embodied by the policy is a contract of indemnity, and not a wager. All the common forms of policy are adapted to transactions of this nature; and every policy is taken to be an interest policy, unless the contrary is clearly expressed on the face of it (*q*).

Definition of a wager policy.

A *wager policy* (sometimes called an *honour policy*) is one which contains words implying that the contract it embodies is not really an insurance, but a wager; *i.e.*, a pretended insurance, founded on a fictitious risk, where the assured has no interest in any thing insured, and can, therefore, sustain

(*p*) § 7, *supra*.

(*q*) See Cousins *v.* Nantes (1811), 3 Taunt. 513.

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no loss by the happening of any of the casualties against which the supposed insurance professes to protect him (*r*).

Form of a wager policy.

A wager policy is generally known by having one or other of the following clauses written on the face of it:—"interest or no interest"; or, "without further proof of interest than the policy"; or, "policy to be deemed sufficient proof of interest" (*s*); or, "without benefit of salvage to the insurer," or some analogous clause, showing that the assured means to give no proof of his having any interest whatever in the subject insured, except the mere production of the policy itself; and thereby bringing him directly within the scope of sect. 4 of the Marine Insurance Act, 1906, which prohibits all such policies, as gaming policies, except in one specified case (*t*).

Definition of a valued,

A *valued policy* is defined in sect. 27 (2) of the Marine Insurance Act, 1906, as "a policy which specifies the agreed value of the subject-matter insured."

and of an unvalued or open policy.

An *unvalued policy* is defined in sect. 28 as "a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner" specified in the Act (*u*).

Hitherto the policy called an unvalued policy in the Act has usually been called an *open policy*. The reason why the former name has been adopted in the Act is that the term *open policy* is sometimes used in mercantile language to

(*r*) Though such a policy is termed a wager policy, it may in fact be made in order to protect an insurable interest. On the other hand a policy in form an interest policy may not be intended to protect a real interest, and may be void for want of insurable interest. See *post*, § 311.

(*s*) Murphy *v.* Bell (1828), 4 Bing. 567. The clause which makes the policy itself proof of interest is commonly called the "p. p. i." clause.

(*t*) See *post*, § 313.

(*u*) The following were the definitions in earlier editions of this work:—A *valued policy* is one in which the agreed value of the subject insured, as between the assured and underwriter, for the purposes of the insurance, is expressed on the face of the policy. An *open policy* is one in which the value of the subject insured is not thus fixed or agreed in the policy, as between the assured and the underwriter, but is left to be estimated in case of loss.

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denote a floating policy (*x*) which has not been exhausted by declarations (*y*).

The chief practical difference between valued and unvalued policies in case of loss is that in the former the value is fixed by the policy; in the latter it must be proved by the production of tradesman's bills, invoices, bills of shipping charges, surveyor's estimates, and other necessary vouchers.

As the value of ship and freight is more difficult to prove in this way than the value of goods, the former interests are generally insured in valued, the latter frequently in open policies.

Voyage and time policies.

Voyage and *time policies* are defined in sect. 25 (1) of the Marine Insurance Act, 1096, in the following terms:—"Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a 'voyage policy,' and where the contract is to insure the subject-matter for a definite period of time the policy is called a 'time policy.'"

An instance of a voyage policy is where a ship is insured "at and from London to Buenos Ayres." The place at which the voyage is to begin is called the *terminus a quo*, and that at which it is to end is called the *terminus ad quem*.

An example of a time policy is an insurance on a ship "from the first day of January, 1920, to the 30th day of June, 1920, inclusive."

Sect. 25 of the Marine Insurance Act, 1906, declares that "a contract for both voyage and time may be included in the same policy." An insurance on a ship for a voyage to a named terminus and for thirty days after arrival is a contract of this kind.

Policies which in form are both time and voyage policies.

Policies are also occasionally effected which, in form, partake of the nature both of time and voyage policies; as where a ship is insured "from London to Buenos Ayres for six months"; or, "from the first of January, 1920, to the 1st of July, in the same year, on the ship at and from

(*x*) See *infra*.

(*y*) Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 45.

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London to Buenos Ayres"; or, "for twelve months from the date of sailing from Leith."

These policies, however, as we shall see more at large hereafter, are effectively time policies, the risk commencing and expiring with the limits of time specified therein.

Named and floating policies.

A *named policy* is one in which the adventure is limited to a ship specifically named therein, as where goods by the ship *Emma* are insured from Hamburg to London.

A *floating policy* is defined by sect. 29 (1) of the Marine Insurance Act, 1906, as "a policy which describes the insurance in general terms, and leaves either the name of the ship or ships or other particulars to be defined by subsequent declaration."

Our common form of sea-policy.

10. The Forms of Policy employed in different mercantile communities are exceedingly various; the merchants and underwriters of our own country have adhered with persevering tenacity to the old and hardly intelligible form which was introduced at an early period into England (*z*); and although this has always been regarded by our Courts of Law as an absurd and incoherent instrument (*a*), yet length of time and a variety of decisions have now given it such a degree of certainty that it is likely now to be retained among the chief instruments of English commerce, especially as it is recognized in the Marine Insurance Act, 1906, as the

(*z*) It was adopted as a statutory form of policy in 35 Geo. 3, c. 63, and 30 Vict. c. 23, the schedules annexed to which contained this form. The Bodleian Library possesses a copy of a policy dated the 15th February, 1613 (see Gow, Mar. Ins., App. B.), and there is at Lloyd's an original policy subscribed on the 20th January, 1680 (see copy in Lloyd's Calendar, 1920, p. 55), which are both almost in the same form as the policy now in use at Lloyd's. Lloyd's policy was adopted in 1779 in the form set out in the Marine Insurance Act, Sched. I., except that it did not contain the waiver clause. The waiver clause was added in 1874.

(*a*) Per Buller, J., 4 T. R. 210. "It is wonderful that policies should be drawn with so much laxity": Lawrence, J., in Marsden *v.* Reid (1803), 3 East, 579. "This policy of insurance is a very strange instrument, as we all know and feel": per Mansfield, C. J., in Le Cheminant *v.* Pearson (1812), 4 Taunt. 380, &c.

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standard form of policy, and is printed in the First Schedule, with a series of rules for its construction (*b*).

The following is the form of this policy:—

Common printed form of the policy in blank.

S. G. (*c*).

£ [ ] as well in

[STAMP.] [ ] own name as for and in the name and names of all and every other person or persons, to whom the same doth, may or shall appertain, in part or in all, doth make assurance, and cause (2) [ ] and them and every of them to be insured, (3) lost or not lost, at and from (4) [ ] (5) upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel, (6) called the [ ]; whereof is master, under God, for the present voyage (6) [ ], or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship or the master thereof is or shall be named and called.

(1) & (2) Blanks for the name or names of the party for whom or by whom the policy is effected.

(3) Clause "lost or not lost."

(4) Blank for the description of the voyage insured.

(5) Clause specifying the subject insured.

(6) Blanks for the name of ship and master.

(7) BEGINNING the adventure upon the said goods and merchandises from the loading thereof aboard the said ship [ ]; upon the said ship, &c. [ ], and so shall continue and endure, during her abode there, on the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at [ ]; upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed.

(7) Description of the commencement continuance, and termination of the risk.

(8) AND it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever, [ ] without prejudice to this insurance.

(8) Liberty to touch and stay.

(*b*) See Mar. Ins. Act, 1906, s. 30, sub-s. 1.

(*c*) For the suggested meanings of these letters, see Gow, Mar. Ins. p. 30.

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(9) THE said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at [ ]. (9) Valuation clause, and blank for inserting value.

(10) TOUCHING the adventures and perils which we, the assurers, are contented to bear and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. (10) Clause enumerating the perils insured against.

(11) AND in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured. (11) Sue and labour clauses.

(12) AND it is especially declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment (*d*). (12) Waiver clause.

(13) AND it is agreed by us, the insurers, that this writing, or policy of assurance, shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street or in the Royal Exchange, or elsewhere in London. (13) Clause as to the binding effect of the policy.

(14) AND so we the assurers are contented and do promise and bind ourselves, each one for his own part, our heirs, executors and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises. (14) Promise of the underwriters to indemnify.

(15) CONFESSING ourselves paid the consideration (15) Acknowledgment of

(*d*) The waiver clause is not found in the policies set out in the former Stamp Acts.

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due unto us for this assurance by the assured, at and after the rate of (16) [ ]. receipt of premium. (16) Blank for inserting rate of premium.

(17) IN witness whereof we, the assurers, have subscribed our names and sums insured in London. (17) Attestation clause.

(18) N.B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent., unless general, or the ship be stranded. (18) Common memorandum.

(19) [

£ (*sum in figures*)	A. B. (*sum in words*)			day of
£ (*ditto*)	C. D. (*ditto*)			day of
£ (*ditto*)	E. F. (*ditto*)			day of

(*and so on, until the aggregate amount of the different sums subscribed by each underwriter equals the amount required to be insured*). (19) Blank space in which is to be inserted the subscription of each underwriter, the sum he insures, and the date of his subscription.

This form of policy is known as Lloyd's policy. It has been in use not only among the underwriters at Lloyd's, but also very generally among private underwriters throughout the United Kingdom, and has been in substance adopted by the companies. Strictly speaking, however, the term "Lloyd's policy" denotes a policy with the device of an anchor in the margin, encircled by the words: "For signature by the underwriting members of Lloyd's only" (*e*). Any person who without the authority of the society, or without lawful excuse, imitates the stamp or mark used to denote a Lloyd's policy, or utters or uses a policy with such stamp or mark, is liable to a penalty under Lloyd's Act, 1871 (34 Vict. c. xxi). The peculiar value of such a policy lies in the fact that great care is exercised in the election of members of Lloyd's policy. "Anchor Policy."

(*e*) In 1918 Lloyd's underwriters agreed that they would not sign policies dated the 1st August, 1918, or later, unless they bore Lloyd's anchor seal. Consequently all policies subscribed by Lloyd's underwriters now bear the anchor seal, showing that they are signed by underwriting members of Lloyd's only.

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the society, and that each member is required on election to deposit securities of the value of at least 5,000*l.* to cover his engagements on marine and transport risks.

"Free of capture" clause.

In 1898, owing to a feeling that war risks should not be covered by any ordinary insurance, the policy in use at Lloyd's was by a resolution of the members modified by the insertion of the following clause between the clauses numbered (13) and (14) above: "Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." At the beginning of 1899, however, this resolution was superseded by another resolution which declared that all policies at Lloyd's should contain this warranty against (or, to use a more correct expression, this exception of) war risks, unless the contrary be written or printed in the slip or the agreement previously signed or initialed by the underwriters (*f*).

Since its original introduction, the scope of the clause has been widened. For the words "free of capture, seizure, and detention," the words "free of capture, seizure, arrest, restraint, or detainment" have been substituted. The added words exclude risks which are not war risks at all (*g*).

Frustration clause.

In 1919, a clause called the "frustration" clause was introduced into Lloyd's policy as an alternative to the "free of capture" clause. It runs as follows: "Warranted free of any claim based upon loss of, or frustration of, the insured voyage, or adventure, caused by arrests, restraints or detainments of Kings, Princes, or Peoples" (*h*).

At present two forms of marine policies are supplied by

(*f*) In Yuill *v.* Scott Robson, [1907] 1 K. B. 685, Channell, J., said that as between brokers and underwriters a policy "against all risks" would nevertheless contain this "free of capture" clause. See, further, as to insurances against all risks, § 156.

(*g*) *E.g.*, the claim of the assured in Miller *v.* Law Accident Society, [1903] 1 K. B. 712.

(*h*) As to this clause, see *infra*, § 832 (f).

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the Committee of Lloyds, the "A" policy and the "B" policy. In the "A" policy the "free of capture" clause is omitted, and the "frustration" clause is inserted instead between (13) and (14). In the "B" policy the "free of capture" clause is inserted after (13), followed by the words: "Should the above clause be deleted, the following clause is to operate as part of this Policy," and the "frustration" clause comes next.

Additional clauses.

Other clauses are usually inserted in policies so as to meet the circumstances of the adventure insured. In insurances on ships and freight the general practice now is to incorporate in voyage and time policies respectively a number of printed clauses, called the "Institute Voyage Clauses" and the "Institute Time Clauses." There are also Institute Clauses for builders' risks, and Institute Cargo Clauses (*i*). The Institute Clauses are revised from time to time. The most important of these clauses in policies on ships is the clause known as the *collision* or *running-down clause*, which was originally introduced in consequence of the decision in *De Vaux* v. *Salvador* (*k*), and has been expanded to meet the requirements of underwriters and assured (*l*).

The following is the collision clause in the Institute clauses for 1921:—

> And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their

(*i*) For specimens, see App. B. For the effect of the incorporation of Institute clauses, "as far as they apply," see Otago Farmers' Co-operative Assn. *v.* Thompson, [1910] 2 K. B. 145.

(*k*) (1836), 4 A. & E. 420.

(*l*) For older forms of the collision clause, and their effect, see Thompson *v.* Reynolds (1857), 7 E. & B. 172; Taylor *v.* Dewar (1864), 5 B. & S. 58; Xenos *v.* Fox (1868), L. R. 3 C. P. 630.

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respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision (*n*).

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers (*o*), for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision; or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Club policies.

Lloyd's policy is not altogether adapted to insurances by mutual insurance associations (or clubs, as they are commonly called), whose policies are by no means identical in conditions or wording. The present tendency of the associations is, however, to use policies which as to many of their clauses are the same as Lloyd's policy.

Of the usual clauses and

11. We will now consider in their order the common clauses which a Lloyd's policy usually comprises, and the

(*n*) The stipulation as to the cost of proceedings was inserted in consequence of Xenos *v.* Fox, *supra*. The present rule as to cross-liabilities was introduced in consequence of the decision in London SS. Ins. Co. *v.* Grampian SS. Co. (1889), 24 Q. B. D. 663.

(*o*) As to removal of obstructions, see Tatham *v.* Burr, [1898] A. C. 382.

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main requisites which are essential to the validity of a policy as a contract under our law.

formal requisites of the policy.

The name of the assured or his agent.

A policy without the names of the parties by or for whom it is effected is called a policy in blank, and is either prohibited by the laws, or rejected by the practice, of all mercantile states.

28 Geo. 3, c. 56.

In our own country the law used to require that no policy should be effected without first inserting therein "the name or names, or the usual style and firm of dealing," either—(1) Of one or more of the persons interested; or, (2) of the consignors or consignees of the property to be insured; or, (3) of the persons resident in Great Britain who received the order for and effected the policy; or, (4) of the persons who gave the order to the agent immediately employed to effect it (*p*).

Under the liberal construction put by the Courts of Law on this Act of Parliament, it was reduced to a mere prohibition against policies in blank; and the Marine Insurance Act, 1906, sect. 92 of which repealed it, simply provides in sect. 23 that "a marine policy must specify the name of the assured, or of some person who effects the insurance on his behalf."

In practice the name usually inserted in the policy is that of the insurance broker, who insures either in his own name and on his own account (*q*), or in his own name and on account of his principals (*r*).

In the first case the blanks marked numbers (1) and (2) in the printed form are filled up thus:—

"A. B. & Co. (style of the insurance broker's firm), as well in their own names, as for and in the name and names of all and every other persons to whom the same doth, may

(*p*) 28 Geo. 3, c. 56.

(*q*) When he insures in this way he is not bound to disclose the name of the real assured: Glasgow Ass. Corpn. *v.* Symondson (1911), 16 Com. Cas. 109.

(*r*) The practice of effecting the policy in the name of the agent is a very old one. See an allegation of custom in Ridolpho *v.* Nunez (1562), Selden Society Publications, vol. ii. p. 52.

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or shall appertain, in part or in all, do make assurance and cause themselves and them and every of them to be insured," &c.

In the second case the blanks are filled up thus:—

"A. B. & Co., as well in their own names, as for and in the name and names of all and every other persons to whom the same doth, may or shall appertain, in whole or in part, do make assurance and cause C. D. & Co (name or firm of their employers, the parties interested), and them and every of them, to be insured," &c.

If the party interested effects the policy, without the intervention of a broker, he of course expresses himself to have so effected it in his own name and on his own account, as in the first form, merely substituting the name or style of the principal for that of the broker.

Such are the usual modes in which these blanks are filled up in English policies; in practice, some slight variation of form occasionally occurs; sometimes, for instance, it is stated on the face of the policy that the party effecting it does so "as agent for," or "at the request of" the principal; but these variations are immaterial.

The party who has thus effected the policy on account of a principal is called "the nominal assured"; the principal himself, for whom it is effected, is called "the party interested," or "the assured."

Assignment clause.

12. "*For and in the names of all persons to whom the same doth, may, or shall appertain, in part or in all.*"

The insertion of this clause, which is invariably introduced into all our common printed forms of policy, is of great importance, as without it no one could take advantage of the policy except the party expressly named in it, or his principal (*s*); but by the aid of this clause, as we shall have occasion to see more at large hereafter, any party may avail

(*s*) Browning *v.* Provincial Ins. Co. of Canada (1873), L. R. 5 P. C. 263.

himself of the policy who can prove that he was interested in the subject-matter of the insurance during the risk and at the time of loss, and is the person upon whose account the insurance was *bonâ fide* intended to be made (*t*). The clause also made it possible to assign the benefit of the policy, but for this purpose is now unnecessary, as sect. 50 (1) of the Marine Insurance Act, 1906, declares that "a marine policy is assignable unless it contains terms expressly prohibiting assignment," and "may be assigned either before or after loss." An assignee of the policy may by sect. 50 (2) sue in his own name (*u*).

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"Lost or not lost" clause.

13. As policies are frequently effected on ships and goods believed to be in foreign ports, or at sea, it being then uncertain whether they may not actually have been lost before the policy was effected, these words, "lost or not lost," are inserted in every form of policy as a matter of course. Their effect is thus stated in Rule 1 of the Rules for the construction of the policy (*x*):—"Where the subject-matter is insured 'lost or not lost,' and the loss has occurred before the contract is concluded, the risk attaches unless, at such time, the assured was aware of the loss, and the insurer was not."

It has been decided that a policy containing this clause was good, where the subject of insurance was accepted for insurance, and the premium paid, before loss, although the policy was not executed until after a loss had happened, to the knowledge both of the assured and the underwriter (*y*).

If indeed the loss, at the time of effecting the policy, were known to the assured only, then, on the plainest general

(*t*) See *infra*, §§ 172, 173.

(*u*) 31 & 32 Vict. c. 86, s. 1 (repealed by the Marine Insurance Act) contained a similar provision. Neither Act requires notice of assignment such as is necessary under the Judicature Act. See *post*, § 176.

(*x*) Mar. Ins. Act, 1906, Sched. I.

(*y*) Mead *v.* Davison (1835), 3 A. & E. 303; *S. C.* 4 Nev. & Man. 701. The report in Adolphus & Ellis represents the loss as an *average* one only; that in Neville & Manning states that, before execution, an *average*, and subsequently a *total*, loss had occurred; the difference does not affect the principle of the decision.

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principles, the policy would be void; but no case has determined that an underwriter, who chooses to effect a policy with full knowledge that the loss has actually happened, may not be bound by it (*z*).

A policy with this clause affords indemnity against past losses.

A policy, indeed, containing this clause, is, in the words of Parke, B., "clearly a contract of indemnity against all past as well as all future losses sustained by the assured, in respect of the interest insured" (*a*). Accordingly, where on a policy on goods "lost or not lost" the pleadings raised the question, whether it was any answer to an action on such policy that the plaintiff did not acquire an interest in the goods till after an average loss by sea damage, the Court held that it was not (*b*). Such a contract, they considered, "operated just in the same way as if, the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that if the goods, at the time of the purchase, had sustained any damage by the perils of the sea, he would make it good" (*c*).

(*z*) Per Lord Denman in 3 A. & E. 308; per Brett, L. J., Bradford *v.* Symondson (1881), 7 Q. B. D. 456, 463.

(*a*) Per Parke, B., delivering the judgment of the Court in Sutherland *v.* Pratt (1843), 11 M. & W. 311, 312.

(*b*) Sutherland *v.* Pratt (1843), 11 M. & W. 296.

(*c*) *Ibid.* p. 312. "This decision," says Judge Duer, "does not embrace the case of a total loss by an actual destruction of the whole or part of the goods that are the subject of the contract of sale. Where such a loss has occurred, the purchaser, in proportion to its extent, is exonerated from his contract, and it is by the seller, not by himself, that the loss must be sustained. As it is not a risk to which he is subject he cannot cover it by an insurance": 2 Duer, 7. These remarks are completely borne out by the observations of Coleridge, J., in delivering the judgment of the Court of Exchequer Chamber in Hastie *v.* Couturier (1853), 9 Exch. 110: "If the goods had been totally lost before the contract of purchase was made, there would not be an insurable interest, as a person cannot buy a thing that is *totally lost*." It appears, nevertheless, to the present editors that although ordinary contracts of sale are conditional on the existence of the subject-matter intended to be sold, yet there is no reason why it should not be expressly provided that the risk of the thing having been already lost at the date of the contract should be borne by the purchaser. In such a case it is conceived that the contract of sale would be a valid one, and that the purchaser would have an insurable interest in the property, even although it had been

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Effect is given to this decision in sect. 6 (1) of the Marine Insurance Act, 1906, which qualifies the statement that the assured must be interested in the subject-matter insured at the time of the loss, by the proviso that "where the subject-matter is insured 'lost or not lost,' the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not."

Another result of the clause, as stated in sect. 84 (3) (b) of the Marine Insurance Act, 1906, is that "when the subject-matter has been insured 'lost or not lost,' and has arrived in safety at the time when the contract in concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival" (*d*).

Whether this clause is necessary.

The provisions of the Marine Insurance Act with regard to the effect of the words "lost or not lost" suggests that the words are necessary in order to make the insurance retrospective. There is, however, no statement in the Act that a policy without the clause is not retrospective. The opinion expressed in the seventh edition of this work, founded on that of the author, was that the clause does not appear to be in all cases strictly necessary, as there can be no reason why a previous loss of the subject-matter insured should prejudice an insurance subsequently effected, if at the time the assured was ignorant of the loss, or he and the underwriter were equally cognizant thereof (*e*). This view agrees with a

totally lost prior to the insurance, and would be entitled to recover under a policy "lost or not lost."

(*d*) Bradford *v.* Symondson (1881), 7 Q. B. D. 456 (C. A.), a case of a re-insurance on a ship supposed to be overdue when the policy was effected.

(*e*) See 1 Marshall, Ins. 338—340; 1 Phillips, Ins. s. 925; 3 Kent's Comm. 258, n. (*c*); 2 Parsons, Ins. 44; Lord Denman in Mead *v.* Davison, 3 A. & E. 303, 307; per Bramwell, B., Stone *v.* Marine Ins. Co. of Gothenburg (1876), 1 Ex. D. 81, 85; per Cockburn, C. J., in Gledstanes *v.* Royal Exchange Ass. Co. (1864), 34 L. J. Q. B. 30, 35; Story, J., Hammond *v.* Allen (1836), 2 Sumner's R. 397. See an interesting discussion of the "lost or not lost" clause, Gow, Mar. Ins. 33.

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decision of the Supreme Court of the United States. "It is sufficient," said the Court, "if it appear by the description of the risk and the subject-matter of the contract that the policy was intended to cover a previous loss" (*f*). Accordingly, it is submitted that a policy without the clause may be retrospective, at any rate where it appears clearly from the terms of the policy that this was the intention of the parties; for instance, if a ship were insured "from the 1st of January" by a time policy effected in February. The point does not seem, however, to have any practical importance in this country.

Description of the voyage insured.

14. In the case of a voyage policy the underwriter cannot know the nature of the risk he is asked to insure, nor, consequently, the amount of premium he ought to require, unless he knows the nature of the voyage on which the ship is to sail, or the goods are to be conveyed. It is therefore one of the most essential requisites of a policy of insurance, that it should contain an accurate description of the voyage insured. By this is meant, not that it should describe the whole course of the voyage to be actually taken by the ship; the track which she is to pursue through the waters; the straits she is to pass; the islands which she is to leave on the one side or the other; the capes she is to double; the reefs and shoals she has to avoid:—all this is supposed to be so familiar to the underwriter from his acquaintance with the course of the trade and navigation which the insurance is designed to protect, that it is never expressly inserted in any policy. All that is necessary to be expressed in the policy is the place or period at which the voyage insured is to begin, and the place or period at which it is to end, and which are called in technical language the *terminus a quo* and the *terminus ad quem* of the voyage insured, or of the risk.

The voyage need only be described by its termini.

These termini must be expressed with great care and distinctness in the policy, and any failure herein will, as we

(*f*) Insurance Co. *v.* Folsom (1873), 18 Wallace, 237; *S. C.* Folsom *v.* Mercantile Mutual Ins. Co. (1871), 8 Blatchford, 170; 9 *ibid.* 201.

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shall see hereafter, have the effect of vitiating that instrument (*g*). We shall here only mention, by way of explaining the language of the instrument, the distinction between insuring with the words "at and from" a place, and simply insuring "from" it. An insurance expressed in the policy to be "from A. to B." only protects the subject insured from the moment of the ship's sailing from A. (*h*): an insurance "at and from" protects the subject insured during her stay at the *terminus a quo* and after she has sailed from it (*i*).

As it is especially desirable, in cases where a ship is expected to arrive at a certain port abroad, to protect her during her whole stay in such port from the moment of her arrival, the form of insurance "at and from" ought always to be adopted in insuring homeward voyages; indeed, in English policies, from the many advantages it presents, it is the form almost always employed in practice.

Time policies.

What precedes is applicable chiefly, if not entirely, to voyage policies; time policies, instead of the *termini* of the adventure, contain here the limits of the period over which the insurance is to extend.

Description of the subject-matter insured.

15. It is a rule, founded on very plain principles, that every contract of insurance ought distinctly to specify the subject intended to be insured, whether it be ship, goods, freight, profit, money advanced on bottomry and respondentia, disbursements, or other interest. Accordingly, sect. 26 (1) of the Marine Insurance Act, 1906, states that "the subject-matter insured must be designated in a marine policy with reasonable certainty."

The common printed clause is only applicable to an insurance on ships and merchandise.

The clause in the common printed form of policy, in which the subject-matter of insurance is set forth, is as follows:— "Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel," &c.

(*g*) Mar. Ins. Act, 1906, ss. 43, 44. See Molloy, book ii. c. 11, s. 14, as cited 1 Marshall, Ins. 328; Syers *v.* Bridge (1780), 2 Dougl. 527.
(*h*) Mar. Ins. Act, 1906, Sched. I., rule 2.
(*i*) Per Lord Hardwicke in Motteux *v.* London Ass. (1739), 1 Atkyns, 548. See Mar. Ins. Act, 1906, Sched. I., rule 3.

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This clause is, in terms, only applicable to the case in which the same party being interested in both ship and cargo wishes to insure both in one common policy: the reason of this is, that in the earlier ages of maritime commerce, when our present form of policy was framed, merchants employed their own ships to carry on their own trade (*k*). Now, however, the trade of the ship-owner has become a distinct business from that of the merchant, and this clause, as it stands in the common printed form of policy, is wholly inadequate, without alteration, to meet the exigencies of modern commerce. Instead, however, of providing different forms to meet the various cases of insurances on ship or cargo separately, on freight, on profits, and other interests now held capable of protection by insurance, the English underwriters adhere to the old form, and for the requisite particularity of description resort to the expedient of writing in the body, at the foot, or on the margin of the policy, a statement of the real nature of the subject-matter intended to be insured (as, *e.g.*, "*on ship*," "*on goods*," *on profits*," "*on freight*," "*on bottomry*," "*on disbursements*," "*on* 100 *bales of cotton, marked, &c.*"), leaving the printed clause entirely unaltered.

How this clause is rendered applicable to other subjects of insurance.

The written words thus inserted apply indefinitely to the whole instrument, and control the sense of the general printed clause applicable to ship and goods, and narrow it to the particular species of interest, the name of which is so inserted (*l*). The policy, in fact, becomes a policy on that subject alone (*m*).

(*k*) So Arnould; but some of the earliest policies of which any records have been discovered, namely, those printed in Select Pleas in the Court of Admiralty, Vol. II. pp. 45—59, edited for the Selden Society by Mr. R. G. Marsden, are framed for an insurance on goods only. See the policy of 1547 in Broke c. Maynard, p. 47, that of 1555 in De Salizar c. Blackman (p. 49), that of 1558 in Raven c. Hopton (p. 51), and that of 1563 in Whyte c. Besswicke (p. 53). The copy of a policy of 1613, preserved in the Bodleian Library (printed in Gow, Mar. Ins., App. B.), is also applicable only to an insurance on goods.

(*l*) Per Lord Ellenborough, Robertson *v.* French (1803), 4 East, 130, 140; per Lord Penzance, Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284, 293; Haughton *v.* Ewbank (1814), 4 Camp. 89.

(*m*) See Robinson *v.* Tobin (1816), 1 Stark. 336; Marten *v.* Vestey, [1920] A. C. 307, at p. 310. For the bearing of printed clauses which relate to a different subject-matter on the construction of the policy, see *post*, § 55.

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"The meaning of this marginal memorandum," says Lord Ellenborough, in a case where the written insertion was in the margin of the policy, "may be translated thus:—We mean to insure the subject so named 'freight,' for instance, arising and accruing during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified" (*n*).

Whether the mere indorsement on the back of the policy of such written description of the subject of insurance, without reference on the face of it to such indorsement, would have the effect of thus controlling the policy, may be doubted; unquestionably it would do so, if referred to in the body of the policy, or initialed by the underwriters (*o*).

Name of the ship.

16. As the nature of the risk depends very materially on the character of the ship employed, it is of great importance to the underwriter to know the name of the ship on which the insurance is to be effected, or on which the property insured is to be embarked. Hence, as a general rule, in all insurances, whether on ship or goods, the name of the ship ought to be accurately inserted in the policy.

Principle as to naming the ship.

Yet, if the underwriter really know what ship is intended, since the purpose of inserting the name is answered in fact, an error in the name of the ship will not vitiate the policy. *On ne doit pas pointiller sur le nom du navire, pourvu que l'erreur qui s'y est glissée n'empêche pas d'en reconnaître l'identité* (*p*).

Hence, immediately following the blank left in our common policy for inserting the name of the ship or master come the words, "or by whatsoever other name or names the same ship or the master thereof is or shall be named and called."

(*n*) Per Lord Ellenborough, Robertson *v.* French (1803), 4 East, 130, 141.

(*o*) See 1 Duer, 76.

(*p*) Emerigon, c. vi. s. 2, p. 160, citing Casaregis, Disc. I. No. 159.

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Insurance on goods by ship or ships.

As, moreover, circumstances may frequently arise, especially in case of shipments made from abroad, in which the merchant, though desirous of protecting his goods by an immediate insurance, may be utterly ignorant of the particular vessel by which they may be consigned to him, a relaxation of the rule requiring the insertion of the name of the ship in the policy is in such cases permitted; and the party insuring is allowed to effect the policy on his property "on board any ship or ships," on condition of declaring, as soon as he becomes aware of it, the name of the ship or ships on board which it has actually been loaded (*q*).

Name of the master.

17. The name of the master, like that of the ship, ought, said Arnould, if known, to be truly inserted in the policy, and that for the same reason, viz., that the safety of the adventure is in some degree dependent on the character of the master.

As, however, many occasions may arise in the course of the voyage which may make it necessary to change the master, and in cases of insurance on "ship or ships" at sea, or from a distant port, the name of the master for the time being may not be known, in our common form after the blank left for the name of the master these words follow: "or whoever else shall go for master in the said ship," and the words already cited, "or by whatsoever name or names the same ship or the master thereof is or shall be named or called." It is not usual, now, to insert the name of the master in the policy (*r*).

Duration of the risk;

18. In the ordinary form of policy the duration of the

(*q*) The legality of such an insurance, which is recognized in s. 29 of the Mar. Ins. Act, 1906, *post*, § 185, was declared, more than a century ago, to be beyond dispute: Kewley *v.* Ryan (1794), 2 H. Bl. 348. In France such an insurance is expressly permitted by the Code de Commerce, art. 337. It is ably explained in 1 Emerigon, c. vi. s. 5, p. 173.

(*r*) "It is conclusively established by the evidence that the name of the master is not inserted in the policy at all, but is always left blank": Lord Salvesen in Gunford Ship Co. *v.* Thames & Mersey Mar. Ins. Co., [1910] Sess. Cas. 1072, 1084. See per Lord Alverstone, C. J., *S. C.*, [1911] A. C. at p. 533; see also McArthur, p. 79.

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risk on ship and goods is described in the following clause, the blanks in which must be filled up according to the nature of the adventure which the party effecting the policy wishes to insure.

"Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship [at A.] upon the said ship, &c. [at and from A.], and so shall continue and endure, during her abode there, on the said ship, &c.; and further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at [B.], upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises, until the same be there discharged and safely landed."

on goods,

The meaning of this clause, when stripped of its verbiage, is, that the risk upon the goods is to commence from their being loaded on board the ship wherever that may be; to continue upon them during the whole time they remain on board, and not to terminate until they have been discharged from the ship and safely landed at the port of delivery.

on ship.

The risk upon the ship is to commence at the port from which she sails on the voyage insured, wherever that may be, to continue during her stay there, and not to terminate until after she has moored at anchor for twenty-four hours in good safety at her port of destination.

The effect of this clause, however, depends, of course, upon the mode in which the blanks are filled up (*s*). The multifarious exigencies of commerce in a country like our own, which lead our merchants and shipowners to engage in enterprises almost infinitely varied, require the same diversity in describing as is displayed in undertaking them; and policies are accordingly filled up in every variety of form, in order to adapt the old policy to the widely extended commerce of modern times.

By sect. 93 (3) of the Stamp Act, 1891, a policy of sea

(*s*) See Robertson *v.* French (1803), 4 East, 130.

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insurance is not valid unless it specifies the particular risk of adventure (*t*).

Liberty to touch and stay.

19. The course of the ship's navigation is, as we have seen, never expressed in any policy. It is an implied condition of every policy, that the ship, in sailing between the termini of the voyage insured, shall pursue that course which long usage has established to be the safest and most direct mode of navigation, without deviating from it to touch at any ports or places whatsoever, unless express liberty for that purpose be inserted in the policy (*u*).

As very few voyages, however, occur, in which it is not desirable that the ship should have the power of touching at intermediate ports, the common printed form of policy invariably contains this clause: "*And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever* [ ] *without prejudice to this insurance.*" The blank is for the purpose of specifying the particular ports and places at which it is intended this liberty shall be exercised.

Valuation clause.

20. *The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at* (*x*) [ ].

(*t*) See Edwards *v.* Aberayron Mutual Ship Ins. Society (1875), 1 Q. B. D. 563. Cf. Mar. Ins. Act, 1906, s. 23, which requires, *inter alia*, the risk insured against and the voyage, or period of time, covered by the policy to be specified, and see *ibid.* s. 22. "Risk or adventure" in the Stamp Act seems to have a wider meaning than "risk" in s. 22 of the Mar. Ins. Act. In the latter it obviously does not include the voyage or period covered by the policy, nor a description of the subject-matter insured, and apparently has reference only to the perils insured against.

(*u*) See Mar. Ins. Act, 1906, s. 46.

(*x*) The words "as under" were here written in, and the following blank was not filled up; lower down in the margin was written "13,000*l.*," and opposite to this, but in the body of the policy, following the 3 per cent. memorandum clause, were written these words: "on freight, warranted free of capture, seizure," &c. This was held not to be a valued policy. Wilson *v.* Nelson (1864), 5 B. & S. 354; see also Asfar *v.* Blundell, [1895] 2 Q. B. 196, 201.

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This clause is in all the common printed forms of policy, though the blank is not always filled up; if filled up, the policy is called a *valued policy*; if not filled up, an *open* or *unvalued policy* (*y*).

When inserted, the value ought to be, but frequently is not, the real value of the ship or the prime cost of the goods at the time of effecting the policy, together with the amount of the shipping charges, premiums, and other expenses of the insurance (*z*).

As will appear from the language of the clause, this valuation is agreed to be final and conclusive "between the assured and assurers" on the particular policy; and consequently it cannot be set aside (*a*). But, as will appear hereafter, the contract is vitiated by an over-valuation which is fraudulent, or so excessive as to make the contract a mere wager (*b*), or which is material to be disclosed (*c*), yet has in fact been concealed (*d*).

Description of subject of insurance in valuation clause.

It is not unfrequently the case that where the interest intended to be insured requires a more specific description than that contained in the general printed form, such description is inserted in this clause; as, *e.g.*, the said ship and goods, &c., "are and shall be valued [at one thousand pounds, being on twenty bales of cotton, marked $\frac{1}{x}$ to $\frac{20}{x}$, the said twenty bales

(*y*) Mar. Ins. Act, 1906, ss. 27, 28.

(*z*) Stevens on Average, Pt. ii. art. i.

(*a*) Mar. Ins. Act, 1906, s. 27. See Barker *v.* Janson (1868), L. R. 3 C. P. 303; Woodside *v.* Globe Marine Ins. Co., [1896] 1 Q. B. 105.

(*b*) Per Lord Mansfield, Lewis *v.* Rucker (1761), 2 Burr. 1167, 1171; Haigh *v.* De la Cour (1812), 3 Camp. 319. See *post*, § 342.

(*c*) Ionides *v.* Pender (1874), L. R. 9 Q. B. 531; Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529. See also the questions left by Mathew, J., to the jury in Herring *v.* Janson (1895), 1 Com. Cas. 177.

(*d*) Arnould (2nd ed. p. 30) says that the valuation "cannot be set aside, except in cases of fraudulent or excessive over-valuation," and similar language is used in s. 27 (3) of the Mar. Ins. Act, 1906. It is not, however, strictly correct to say that the valuation can be set aside. In some Continental countries this can be done, and another valuation substituted; but according to English law the valuation cannot be altered, though in the cases mentioned in the text the policy can be entirely avoided. See *post*, Part I. Chap. XIII. § 341 *et seq.*

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valued at that sum] or [at one thousand pounds, being on the interest which I. S. has as owner in one-fourth share of the said ship, the said one-fourth share being valued at that sum]," or the words "valued at" are frequently struck out, and a description of the real subject of insurance then inserted without any valuation; as, *e.g.*, the said ship and goods, &c., for so much as concerns the assured and assurers in this policy are "freight," or "profits," or "money lent on bottomry."

In this case it is obvious that the words "the said ship and goods," &c. are to be read as though they meant "the subject insured by this policy, as far as concerns the assured and underwriters, is taken to be 'freight,' 'profits,' 'bottomry,'" &c.

The words "valued at" are frequently struck out, and the sum insured is then inserted, thus, "1,000*l.* on ship," or "on goods," &c.; and if the policy is intended to be a valued one, it proceeds, "1,000*l.* on ship valued at 2,000*l.*," "2,000*l.* on goods valued at 11,000*l.*"

By statute the policy is not valid unless it specifies the sum or sums insured (*e*).

The perils insured against.

21. The next clause in the policy contains an enumeration of the perils against which the underwriters undertake to insure the property on which the policy is effected.

As the underwriter is, on plain principles, considered not to be liable to indemnify the assured against loss arising from any perils not specified in the policy or embraced in the general clause, great care has been taken to make this form of words as comprehensive as possible. The effect of it is frequently modified by exceptions inserted on the face of the policy.

Sue and labour clauses.

22. "*And in case of any loss or misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns,*

(*e*) Stamp Act, 1891, s. 93 (3); cf. Mar. Ins. Act, 1906, s. 23 (4), and see *id.*, s. 22.

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to sue, labour, and travel for, in, or about the Defence, Safeguard, and Recovery of the said Goods and Merchandises, and Ship, &c., or any part thereof, without prejudice to this insurance: To the charges whereof, we, the Assurers, will contribute, each one according to the Rate and Quality of his sum herein insured."

Reason of introducing this clause.

This clause was introduced to obviate a notion which appears at one time to have prevailed, that if the assured, after a loss which threatened the total destruction of the property insured, were, either by himself or his agents, to take active measures for its recovery or restoration, he would thereby lose the right to abandon, which he might otherwise have exercised. The object of this clause, therefore, is to permit the assured in such cases to take every measure for the recovery of the property without waiving his right of abandonment, and also to bind the underwriters to contribute in proportion to the amount of their several subscriptions, to reimburse the assured for the expenses which he may thereby have incurred (*f*). The language of the clause is only permissive, but it has long since been settled that it is a clear duty of the assured so to labour for the recovery and restitution of the detained or damaged property (*g*).

The effect of it.

The clause does not entitle the assured to recover moneys spent in averting losses for which the underwriter would not have been liable if they had actually happened (*h*).

Waiver clause.

23. "*And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.*"

(*f*) Mitchell *v.* Edie (1787), 1 T. R. 608. See 2 Marshall, Ins. 625; and the elaborate discussion of this clause in the learned judgment of Willes, J., in Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535; in error (1867), L. R. 2 C. P. 357; see also Lord Blackburn's judgment in Aitchison *v.* Lohre (1879), 4 App. Cas. 755, 764.

(*d*) This is Arnould's language. See *post*, § 799a, and Mar. Ins. Act, 1906, s. 78 (4).

(*h*) Great Indian Peninsular Ry. *v.* Saunders (1861), 1 B. & S. 41; (1862), 2 *ibid.* 266; Booth *v.* Gair (1863), 33 L. J. C. P. 99; Meyer *v.* Ralli (1876), 1 C. P. D. 358.

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The object of this clause is to insure that when the assured has given notice of abandonment and claimed for a constructive total loss, the legal position of neither party shall be prejudiced by any act done by him for the purpose of averting a loss. In one case the Court of Queen's Bench expressed the opinion that the clause is superfluous (*i*).

Promise to insure and acknowledgment of receipt of premium.

24. "*And so we the insurers are contented and do promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators and assigns, for the true performance of the premises: confessing ourselves paid the consideration due unto us for this assurance by the assured*," *&c.*

The policy, it will be observed, contains only a promise *by the underwriters*, without anything in the nature of a counter-promise on the part of the assured; the reason of this is, that the premium, or, as it is described in this clause of the policy, "the consideration due unto them for the assurance," is always supposed to have been paid to the underwriters at the time the policy is subscribed by them, and is accordingly acknowledged to have been so paid on the face of the instrument.

Premium never paid beforehand in practice.

In point of fact the premium is scarcely ever, in the actual course of London business, paid till long after the policy is effected; and is in most cases never paid in money at all, but passed in account between the insurance broker and the underwriter, between whom a running account is kept of premiums and losses, which is settled from time to time.

Acknowledgment of the receipt binds the underwriter.

Although this is the actual course of practice, yet the acknowledgment of the receipt of premium in the policy is so far binding on the underwriter, as to prevent him, in the absence of fraud, from seeking to recover his premium from the assured himself (*k*). Even when the policy contains a

(*i*) Stringer *v.* English, &c. Ins. Co. (1869), L. R. 4 Q. B. 676, 686.

(*k*) Mar. Ins. Act, 1906, s. 54. See Dalzell *v.* Mair (1808), 1 Camp. 532; De Gaminde *v.* Pigou (1812), 4 Taunt. 246. Mavor *v.* Simeon (1810), 3 Taunt. 497, n.; and Foy *v.* Bell (1811), 3 Taunt. 493, are

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promise by the assured to pay the premium, the usage that the underwriter must look to the broker for payment has been held to apply (*l*).

The premium is commonly described in the policy as at so much "per cent.," meaning on the amount subscribed by the underwriter. 35 Geo. 3, c. 63, s. 11, required the premium or consideration in the nature of the premium to be expressed in the policy. There was no express provision to that effect in 30 Vict. c. 23, nor is there in the Stamp Act, 1891, or the Marine Insurance Act, 1906.

The memorandum: its object.

25. A clause called the memorandum is introduced into all policies for the purpose of exempting the underwriters from liability for trivial losses, or for partial losses in respect of certain articles of a perishable nature. In Lloyd's policy it is expressed in the following uncouth form of words:—

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded (A); sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent. (B); and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded (C) (*m*).

In order to make this form of words at all intelligible, it must be carefully borne in mind that the word "AVERAGE," as employed in this clause, means damage to or partial loss of the subject of insurance (*n*), and that the expression "WARRANTED FREE FROM AVERAGE" means, "so insured as to exclude all liability for such damage or partial loss." Hence the whole meaning of the clause is as follows:—

On certain articles of a peculiarly perishable nature,

cases in which, under peculiar circumstances, fraud on the part of the assured was alleged.

(*l*) Universo Ins. Co. *v.* Merchants' Mar. Ins. Co., C. A. [1897] 2 Q. B. 93.

(*m*) The words "sunk or burnt" are often added.

(*n*) See Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535; Oppenheim *v.* Fry (1863), 3 B. & S. 873; Ex. Ch. (1864), 5 *ibid.* 348.

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enumerated in paragraph (A), the underwriter shall be answerable for a total loss only (*o*).

On certain other articles of a less perishable nature, but still very liable to be destroyed, enumerated in paragraph (B), he shall only be answerable when the amount of damage exceeds 5 per cent. of their value.

On ship, freight, and all other goods, he shall only be liable when the amount of damage exceeds 3 per cent.

But in all the three cases alike, the clause provides that the underwriter will be liable for any amount of damage or partial loss, however small, in case the ship be stranded; and it also provides, that he shall in every case be liable for every loss, however small, of the nature of general average (*p*).

The subscription, sum insured, and date.

26. The only parties who sign their names at the foot of the policies, in other words, underwrite them, are the insurers, who are hence called the underwriters or subscribers. By sect. 24 (1) of the Marine Insurance Act, 1906, "a marine policy must be signed (*q*) by or on behalf of the insurer (*r*), provided that in the case of a corporation the corporate seal may be sufficient (*s*), but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal."

(*o*) Per Willes, J., Kidston *v.* Empire Ins. Co. (1886), L. R. 1 C. P. 535, 544.

(*p*) The bad punctuation of the Memorandum in Lloyd's form (see above) makes it read as if the words "unless general, or the ship be stranded" have no application to the articles in the five per cent. class. Such a construction of the clause, the effect of which would be to make an utterly unreasonable distinction between the articles in paragraphs (B) and (C), has, however, never been adopted in practice. The Memorandum is differently punctuated in Sched. I. of the Mar. Ins. Act, 1906 (see Vol. II. App. A.); but a comma is required after "under three pounds per cent." to make it clear that the meaning of the clause is that stated in the text.

(*q*) An impression of the names from a rubber stamp is a sufficient signature: Cope *v.* Miller (1896), 1 Com. Cas. 296; see also Bennett *v.* Brumfield (1867), L. R. 3 C. P. 28.

(*r*) The effect of s. 22 is apparently that an unsigned policy cannot be given in evidence.

(*s*) In Marine Mutual Ins. Ass. *v.* Young (1880), 43 L. T. 441, the seal of the association, attested by the manager, was held to be sufficient.

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Mode of subscribing the policy.

In policies of insurance effected with private underwriters, the first underwriter to whom the policy is tendered subscribes the policy with his name, and the sum he intends to insure, which is generally written in words at length. The next underwriter to whom the policy is tendered then, in like manner, writes under the first subscription his name and the sum he means to insure; and the rest follow in order until the aggregate of the separate sums written opposite to the name of each underwriter, or, in technical language, till the "aggregate of their several subscriptions" amounts to the sum which the party effecting the policy desires to protect by the insurance. But since the repeal (in 1825) of the 6 Geo. 1, c. 18 (which prohibited any partnership other than the two chartered companies from underwriting sea-policies), a subscription in the name of a partnership firm has been held sufficient (*t*).

Policy must specify the sum insured.

By the Stamp Act, 1891, s. 93 (3), "a policy of insurance shall not be valid unless it specifies the names of the underwriters and the sum or sums insured" (*u*). In addition to this specification of the sums underwritten, a sum large enough to cover the aggregate amount insured is usually in practice expressed in figures on the margin of the policy, either just under or just over the stamp.

Where the aggregate sum insured appears on the face of the policy, and the proportion which each underwriter bears is mentioned, "the sum or sums insured" are sufficiently described in the policy (*x*).

(*t*) Reid *v.* Allan (1849), 4 Exch. 326; Dowdall *v.* Allan (1849), 19 L. J. Q. B. 41, S. P. It is a fundamental rule of Lloyd's that no member shall in the City of London underwrite in the name of a partnership.

(*u*) See also Mar. Ins. Act, 1906, ss. 22, 23. A club policy signed "A. & B., per procuration of the several members of the A. A. Association," was held to be void because the names of the insurers were not specified: In re The Arthur Average Association (1875), L. R. 10 Ch. 542. Where the sum insured was left undetermined, because it could not be exactly fixed, the insurance was held to be void: Home Mar. Ins. Co. *v.* Smith, C. A. [1898] 2 Q. B. 351.

(*x*) Dowell *v.* Moon (1815), 4 Camp. 166; Tyser *v.* Shipowners' Syndicate, [1896] 1 Q. B. 135; 1 Com. Cas. 224.

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Each subscription makes a distinct contract.

Sect. 24 (2) of the Marine Insurance Act, 1906, provides that "where a policy is subscribed by or on behalf of two insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured" (*y*). Therefore each underwriter is, generally speaking, only liable, in case of total loss, to pay the assured to the extent of the sum he has thus written against his own name, *i.e.*, to the amount of his subscription; or, in case of partial loss, some proportion or aliquot part of that sum (*z*).

The date and subscription.

Formerly the date used not to be inserted in the body of the policy, but was affixed by each underwriter to that which forms the real contract between himself and the assured, viz., the subscription. Now, however, it is usual to insert a date in the policy, which is not necessarily that on which the underwriters actually subscribe it, and the underwriters do not usually add a date to their subscriptions (*a*). These are inserted at the foot of the policy, and generally in the blank space which is left in our common policies under the memorandum.

Supposing the sum which the party effecting the policy wishes to insure be 1,000*l.*, of which A. B. is willing to take on himself 500*l.*, C. D. 300*l.*, and E. F. 200*l.*, then the policy would be thus subscribed:—

500*l.* A. B. [*name at length*] Five hundred pounds.
300*l.* C. D. [*name at length*] Three hundred pounds.
200*l.* E. F. [*name at length*] Two hundred pounds.

Delivery of the policy.

27. After the policy has been executed in the form which is binding on the insurer, it must be delivered to make a

(*y*) See Leo SS. Co., Ltd. *v.* Corderoy (1896), 1 Com. Cas. 300, 379.

(*z*) See Tyser *v.* Shipowners' Syndicate, *supra*. If there be a partnership, the fact of there being separate subscriptions by the partners individually does not bar the assured from resorting to the partnership assets: Brett *v.* Beckwith (1856), 26 L. J. Ch. 130, *coram* M. R. A number of underwriters may have one representative insuring for all of them without being partners: per Mathew, J., Tyser *v.* Shipowners' Syndicate, *supra*.

(*a*) The Code de Commerce, Art. 332, requires the policy to be dated on the day and *hour* when executed, distinguishing whether before or after noon. The date in France is conclusive.

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valid contract. If the underwriter hands over the policy to his clerk, to be kept until called for, the presumption is that this amounts to a delivery (*b*). Little room for questions of this nature is left by the practice at Lloyd's, where it is usual for the broker to carry round the policy for the subscription of the underwriters who have initialed the slip (*c*). With companies the practice is different, for the execution usually takes place in the absence of the assured and his broker. The presumption, therefore, is that when the instrument, completed and executed, passes into the hands of the company's servants, to be kept until called for by the assured, it is already a valid policy (*d*).

Stamping the policy.

28. Every policy must be duly stamped, before it is signed or underwritten by any person, with the amount of duty required by the Stamp Act, 1891 (*e*). If not stamped in the first instance, it cannot, with two exceptions, be stamped afterwards (*f*), except on payment of a penalty of 100*l.* (*g*); and a failure to comply with the provision of the Stamp Act in this respect not only renders the policy void, but entails a considerable penalty upon all those concerned in so effecting or subscribing it (*h*). But we reserve the effect of the Stamp Laws for consideration separately.

Recapitulation.

We have seen that a contract of sea-insurance, other than such as is referred to in sect. 506 of the Merchant Shipping Act, 1894, is not valid unless expressed in a policy. In substance, a policy contains the following particulars (*i*):—

(*b*) Cope *v.* Miller (1896), 1 Com. Cas. 296.

(*c*) See § 102.

(*d*) Xenos *v.* Wickham (1867), L. R. 2 H. L. 296; Ex. Ch. (1863), 33 L. J. C. P. 13; 14 C. B. N. S. 435; Cox *v.* Troy (1822), 5 B. & Ald. 474. For limited effect that may be given to delivery out of a policy, see Morrison *v.* Universal Marine Ins. Co. (1873), L. R. 8 Ex. 197.

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 1, 95 (1), and Sched. I.

(*f*) *Ibid.* s. 95 (1) (a), (b).

(*g*) *Ibid.* s. 95 (2).

(*h*) *Ibid.* s. 97.

(*i*) The statutory requisites under the Stamp Act, 1891, are—(1) the stamp; (2) the risk or adventure; (3) the names of the underwriters; (4) the sums insured. The Mar. Ins. Act, 1906, requires—(1) the name

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1. The name of some party, either really or nominally insured. 2. A description of the voyage or risk insured. 3. Of the subject insured. 4. Of the perils insured against. 5. The name of the ship (except where the insurance is on ship or ships, or on cargo to be carried by ships unknown). 6. The premium or consideration for the risk. 7. The sums insured. 8. The subscription of the underwriter. It is, moreover, requisite that every policy should be, 9, Dated; and 10, Stamped, before execution (*k*).

Express warranties and other occasional clauses contained in policies.

29. The clauses hitherto considered are for the most part to be found in the common printed forms of policy. With the varying exigencies of commerce, however, and the fluctuating character of the political relations between mercantile states, occasions frequently arise which render the assured, on the one hand, desirous of extending the degree of indemnity which is afforded him by the common form of policy; and warn the underwriter, on the other, to limit the amount of responsibility he takes on himself, by declaring in writing on the face of the policy that he will only undertake to indemnify the assured against the usual risks upon certain specified conditions, which are inserted in writing on the face of the policy, and, in English Law, are called Express Warranties.

Form of express warranties, and mode of inserting them in policies.

The effect of these warranties will be fully discussed hereafter. With regard to their form they are generally expressed thus:—"Warranted to sail on or before the 1st day of June, 1920." "Warranted well, this 1st day of June, 1920." "Warranted to depart with convoy." "Warranted neutral ship and neutral property." "Warranted a Dane," &c.; or the word "warranted" is altogether omitted, and the words

of the assured, or of some person who effects the insurance on his behalf; (2) the subject-matter and the risk; (3) the voyage or period of time covered; (4) the sums insured; (5) the names of the insurers; (6) their signature.

(*k*) See, however, Stamp Act, 1891, s. 95, *post*, § 32, for certain exceptions, and for the stamping of a policy after execution on payment of a penalty.

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"to sail," or "to sail with convey," &c. alone inserted. The clause of warranty is sometimes introduced into the policy immediately after that describing the voyage; but this is not necessary; all that is essential is, that it should be included in, or written upon, the policy, or contained in some document incorporated by reference into the policy (*l*): it need not appear in the body of it (*i.e.*, the written or printed part); it may be written either at the foot (*m*), or on the margin of the policy (*n*), and that either in the usual way or transversely (*o*); for, wherever or however written, so long as it be on the face of the policy, it will be a good warranty; for whatever is contained in the policy at the time of signing is part of the contract, and is adopted by the signature (*p*). It is apprehended, however, that, unless initialed by the underwriters, or referred to in the body of the instrument (in either of which cases it would, no doubt, be operative (*q*)), a memorandum indorsed on the back of the policy would not be permitted to have any effect in varying or modifying its terms (*r*).

Of the implied conditions and terms contained in every policy.

30. Besides the different express clauses and stipulations, both ordinary and extraordinary, already considered, every policy of insurance implicitly contains within itself certain terms and conditions, which, though not on the face of the instrument, are of the same binding authority as though they were, and combine with the express clauses to make up the whole of the contract between the assured and the underwriters.

(*l*) Mar. Ins. Act, 1906, s. 35 (2).

(*m*) Blackhurst *v.* Cockell (1789), 3 T. R. 360.

(*n*) Bean *v.* Stupart (1778), 1 Dougl. 11.

(*o*) Kenyon v. Berthon (1778), 1 Dougl. 12, n.

(*p*) Cockran *v.* Retberg (1800), 3 Esp. 121; see also De Hahn *v.* Hartley (1786), 1 T. R. 343.

(*q*) See Laird *v.* Robertson (1791), 4 Br. P. Cases, 488; Ridsdale *v.* Shedden (1814), 4 Camp. 107; Reed *v.* Deere (1827), 7 B. & Cr. 261; and *post*, § 42.

(*r*) 1 Duer, 76. Phillips, however, vol. i. s. 68, appears to take a contrary view.

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They are, in fact, the terms upon which the parties mutually understand their contract to be based; and are regarded as so much a matter of course, that it would be a needless ceremony to express them in form. If either of the parties fail to comply with any one of these conditions, he will in most cases be entirely precluded from taking any advantage of his contract.

Representation and concealment.

1. Thus, it is an implied condition in every policy that the assured, at the time of effecting the contract, shall fairly and truly disclose to the underwriters every fact material to the risk which is exclusively within his own knowledge, and which is not embraced by some agreement in the policy: if this condition is not complied with, the policy may be avoided by the underwriter (*s*).

Implied warranty of seaworthiness.

2. Again, in voyage policies the assured is understood by the very act of procuring the insurance to warrant that the vessel is seaworthy and in every way fit for the voyage or service on which it is employed; accordingly this warranty, though it is never expressed, is uniformly implied as a part of the contract (*t*).

Usual course to be followed.

3. The actual navigation of the ship between the termini of the voyage is, as we have seen, never inserted in any policy; because every underwriter is presumed to be acquainted with the usual mode of conducting the voyage on which he has assured the risk; but, although never inserted, the usual course of the voyage is supposed to be incorporated in every policy, and as much forms part of its legal effect as though it were set out in terms on the face of the instrument (*u*).

Implied condition not to deviate.

4. It is always an implied condition of every policy, that the ship, in proceeding from one terminus to the other, shall pursue this usual course of the voyage, without any delay or deviation: this implied condition is generally termed a condition not to deviate; and any failure to comply with it exempts the underwriter from all liability from the moment of deviation (*x*).

(*s*) *Post*, Part II. Chap. II. "Concealment."

(*t*) *Post*, Part II. Chap. IV. "Seaworthiness."

(*u*) Noble *v.* Kennoway (1780), 2 Dougl. 510; Pelly *v.* Royal Exch. Co. (1757), 1 Burr. 341.

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All generally known mercantile usages are incorporated.

5. Not only the course of the voyage insured, but all generally established usages of trade and navigation, applicable to the subject of their contract, are always supposed to be known by the parties contracting for a mercantile indemnity; and therefore, though never expressly inserted in any policy, are as binding on the parties as though they were.

Real nature and effect of the contract.

6. It must never be forgotten, therefore, that the whole contract between the assured and the underwriters is only partially expressed in the policy; and that the real contract between them is, that, supposing the underwriters to have been informed beforehand of the real nature of the risk, supposing also (except in time policies) the ship to have been seaworthy when the risk commenced, and never afterwards to have deviated from the usual course of the voyage insured, and the assured not to have precluded himself from recovery on the ground of illegality of the risk, then the underwriters engage to indemnify him, according to the terms of the policy as explained by usage, for any loss he may sustain as a direct consequence of the enumerated perils.

The stamping of policies.

31. The stamping of policies in the United Kingdom is mainly regulated by the Stamp Act, 1891 (54 & 55 Vict. c. 39), by which all then-existing enactments dealing with the stamping of policies were repealed, as amended by the Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 41.

Scale of stamp duties.

All policies of sea insurance must be stamped according to the following scale (*y*):—

	Duty. £	s.	d.
(1) Where the premium or consideration does not exceed the rate of 2*s.* 6*d.* per centum of the sum insured (*z*)	0	0	1

(*x*) See *post*, Part I. Chap. XV. "Deviation."

(*y*) See Stamp Act, 1891, s. 1 and Sched. I.; Finance Act, 1920, s. 41, which in effect repeals sect. 5 of the Finance Act, 1908.

(*z*) By the Finance Act, 1912, s. 8, where such premium is subject

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	Duty. £ s. d.
(2) In any other case—	
(a) For or upon any voyage—	
where the sum insured—	
does not exceed 250*l.*	0 0 3
exceeds 250*l.* but does not exceed 500*l.* ...	0 0 6
„ 500*l.* „ „ 750*l.* ...	0 0 9
„ 750*l.* „ „ 1,000*l.* ...	0 1 0
„ 1,000*l.*, for every 500*l.* and any fractional part of 500*l.*	0 0 6
(b) For time—	
where the insurance is made for any time not exceeding six months, an amount equal to three times the amount which would be payable if the insurance were made upon a voyage;	
where the insurance is made for any time exceeding six months and not exceeding twelve months, six times the amount which would be payable if the insurance were made upon a voyage.	

By sect. 91, the expression "policy of insurance" for the purposes of the Act includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced. The meaning of the term "policy of sea insurance" for the purposes of the Act is defined in sect. 92 (*b*).

Sect. 93 (1) provides that a contract for sea insurance (other than such insurance as is referred to in sect. 55 of the Merchant Shipping Act Amendment Act, 1862, re-enacted

to an increase upon the occurrence of a specified contingency, it is still to be treated as not exceeding the rate of 2*s.* 6*d.* per cent. of the sum insured. But if, owing to the occurrence of the contingency, the premium is increased so as to exceed this rate, the policy or a new policy to be thereupon issued must be stamped with the additional sum required to represent the additional duty, and may be so stamped without penalty within thirty days after the increased premium becomes ascertained.

(*a*) A time policy embracing a number of ships with separate sums insured on each is properly stamped at the duty corresponding to the aggregate sum insured. Great Britain S.S. Premium Association *v.* White (1891), 19 Ct. of Sess. Cas. 4th Ser. 109; (1896) W. N. 91.

(*b*) See *ante*, § 7.

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in sect. 506 of the Merchant Shipping Act, 1894 (*c*)) shall not be valid unless it is expressed in a policy of sea insurance (*d*).

By sect. 93 (2), no policy of sea insurance made for time shall be made for any time exceeding twelve months.

Sect. 93 (3) declares that a policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured (*e*), and is made for a period not exceeding twelve months.

By sect. 94, where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

The prohibition of insurances for a time exceeding twelve months has been modified by sect. 11 of the Finance Act, 1901 (1 Edw. 7, c. 7), which provides that notwithstanding anything contained in the Stamp Act, 1891, a policy of sea insurance made for time may contain a continuation clause as defined in the section, and shall not be invalid on the ground only that by reason of the clause it may become available for a period exceeding twelve months (*f*). A policy with such a clause is chargeable with a stamp duty of sixpence in addition to the duty otherwise chargeable; and if the risk covered by the clause attaches, and a new policy is not issued covering the risk, the clause shall be deemed to be a separate contract of insurance, not covered by the stamp on the original policy, which must be stamped anew in respect of that contract. It may be so stamped without penalty

(*c*) *Ibid.*

(*d*) As to costs, where the insurer has successfully pleaded this provision of the Stamp Act, after leading the insured to believe that he would not rely on it, see Genforsikrings Aktieselskabet *v.* Da Costa, [1911] 1 K. B. 137.

(*e*) See also Mar. Ins. Act, 1906, ss. 22—24, *ante*, §§ 8, 26.

(*f*) See *post*, § 440, for the definition of a continuation clause.

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at any time not exceeding thirty days after the risk has so attached.

Sect. 8 of the Revenue Act, 1903 (3 Edw. 7, c. 46), provides that a policy of insurance upon any ship, or its machinery or fittings, while under construction or repair, or on trial, need only be stamped as a policy for a voyage, and though made for a time exceeding twelve months, shall not be deemed to be a policy made for time.

Effect of omission to stamp the policy under the old law.

32. The first Act relating to the stamping of sea-policies (35 Geo. 3, c. 63), declared that a policy should neither be given in evidence nor available in law or equity unless duly stamped, and it absolutely prohibited the stamping of a policy after it was underwritten (sect. 14). The effect of this provision was that a policy not properly stamped at the time when it was made was wholly null and void (*g*).

Stamping the policy after execution.

The rigour of the law has been considerably modified. Sect. 95 (1) of the Stamp Act, 1891, after declaring that a policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, makes the two following exceptions:—

(a) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp, provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover.

(b) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only.

Further, sect. 95 (2) allows a policy of sea insurance for

(*g*) Roderick *v.* Hovil (1811), 3 Camp. 103. See the 2nd edition of this work, pp. 41—50, for the law as to the stamping of policies before 30 Vict. c. 23.

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the purpose of production in evidence to be stamped after the execution thereof, on payment of a penalty of 10*l.* (*h*). This is a provision of the greatest importance. The contract is good *ab initio*, and either party can enforce it by paying the penalty. Under the old law, as we have seen, there was no enforceable contract (*i*).

Penalties for breaches of the Stamp Act.

33. Sect. 97 (1) of the Act imposes a penalty of 100*l.* on any person who becomes an insurer, or settles for a loss, or effects an insurance, or knowingly procures one to be effected, unless the insurance is expressed in a duly stamped policy of sea insurance, or who fraudulently or wilfully seeks to evade the duty payable on a policy. By sect. 97 (2), a broker, agent, or other person who negotiates a sea insurance contrary to the Act, or writes a policy upon material not duly stamped, is liable to a similar penalty, and has no legal claim to any charge for brokerage or commission, or for any money paid by him with reference to the insurance. Further, any money paid to him in respect of any such charge shall remain the property of his employer.

Sect. 97 (3) imposes a similar penalty on anyone who makes or issues a document purporting to be a copy of a policy, unless there be a duly stamped policy in existence of which it is a copy.

Spoiled stamps.

The Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38, ss. 9—12), as amended by 61 & 62 Vict. c. 46, deals with the question of allowances for spoiled stamps.

(*h*) This was first allowed in 1876, by 39 Vict. c. 6, s. 2 (repealed by the Act of 1891), which made sea-policies instruments within the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 16. Before this provision a special case stating that the parties agreed that a valid (*i.e.*, stamped) policy should be deemed to have been issued was ordered to be struck out as sanctioning an evasion of the stamp laws: Nixon *v.* Albion Marine Ins. Co. (1867), L. R. 2 Ex. 338. Where the question in issue was whether an unstamped document was a policy of insurance, an order was made at chambers that for the purposes of the trial the Court was to assume that all penalties (if any were necessary) had been paid: Home Marine Ins. Co. *v.* Smith, [1898] 2 Q. B. 351.

(*i*) Arnould, 2nd ed. pp. 43, 44.

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The slip.

34. The most difficult questions raised by the Stamp Acts relate to the legal effect of the slip.

The broker, when requested to effect an insurance, prepares a brief memorandum of the leading particulars of the proposed risk, such as convey at a glance to those who are skilled in the business a sufficient notion of the intended policy to enable them to say whether, and at what premium, they will underwrite it. This memorandum, called the *slip*, is presented, if the insurance is effected at Lloyd's, successively to the underwriters there, who, if they think well of the risk and the premium at which it is offered, initial the slip, each for the sum he thinks proper to underwrite, and so on until the whole amount is subscribed (*k*).

The legal effect of the slip was explained by Blackburn, J., in the year 1871, when the Act of 1867 (30 Vict. c. 23) was in force. "The slip," said the learned judge (*l*), "is in practice, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business.

"The Legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose (*m*). But all those enactments are repealed by the

(*k*) Another document of similar import, sometimes also called a slip, is that which is known as a *cover note* or *covering note*. It is a memorandum containing similar particulars of the terms of an insurance signed on behalf of, and issued to the broker or assured by, a company on accepting the risk. See *post*, § 102, n.

(*l*) Ionides *v.* Pacific Fire and Marine Ins. Co. (1871), L. R. 6 Q. B. 674, 684, 685; affd. on appeal (1872), L. R. 7 Q. B. 517.

(*m*) So much so that Lord Ellenborough, C. J., refused to look at it as a means of showing the order in which the underwriters had taken the risk: Marsden *v.* Reid (1803), 3 East, 572, 573; see also Warwick *v.* Slade (1811), 3 Camp. 127. 35 Geo. 3, c. 63, s. 14, provided that no insurance whereon duty was payable, nor any contract or agreement for such insurance, should be given in evidence unless stamped.

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30 Vict. c. 23; and the law is now governed by the 7th and 9th sections of that Act. By sect. 7 no contract or agreement for sea insurance shall be valid unless expressed in a policy. And by sect. 9 no policy shall be pleaded or given in evidence in any Court unless duly stamped. As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid—that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material."

Nevertheless, when a stamped policy had been issued, the Courts recognized the practice of underwriters to consider the agreement complete when the slip was initialed, to the extent of holding that any fact coming to the knowledge of the assured between the time when the slip was initialed and the execution of the policy, however material it might be, need not be communicated to the underwriter, even though the slip was initialed for the agent of the assured, subject to confirmation by his principal; and since the Act of 1867 the Courts have held that the slip could be looked at to show when the bargain was made (*n*). Now sect. 21 of the Marine Insurance Act, 1906, declares that for the purpose of showing when the contract was concluded, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

Arnould's view that the contract made by the slip was enforceable in equity.

35. Arnould was of opinion that a memorandum embodying an agreement to execute a regular stamped policy, accompanied by the payment of the premium, could be enforced in a court of equity (*o*); but in support of this view he was only

30 Vict. c. 23, only says that no unstamped policy shall be given in evidence; yet there is a wide definition of the term "policy" in s. 4 of that Act. In Fisher *v.* Liverpool Marine Ins. Co. (1873), L. R. 8 Q. B. 469, 474, Lord Blackburn hinted at a doubt whether Lord Ellenborough was right in refusing to look at the slip.

(*n*) Cory *v.* Patton (1872), L. R. 7 Q. B. 304; (1874), L. R. 9 Q. B. 577; Lishman *v.* Northern Maritime Ins. Co. (1873), L. R. 8 C. P. 216, 225; in the Exchequer Chamber (1875), L. R. 10 C. P. 179.

(*o*) 2nd ed. p. 52.

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able to cite a dictum of Lord Denman's (*p*), and a Scotch case in which the House of Lords recognized the validity of a written agreement to execute a policy. The report, however, does not state whether the memorandum was stamped, and it does not appear that any question arising out of 35 Geo. 3, c. 65, the Stamp Act then in force, was raised or considered in the case (*q*).

A subsequent decision of the Court of Exchequer Chamber shows that this opinion could not be supported under the former Stamp Acts.

Decision to the contrary.

The facts in that case (*r*) were that the London agent of the defendant company initialed a slip, and received from the brokers a copy of the slip, which he forwarded to his principals to have a policy prepared, and the amount of the premium and stamp duty was subsequently paid by the brokers to the defendants' agents. No policy was executed by the defendants, and an action was brought for damages. In the Court of Queen's Bench, Blackburn, J., held, not that the defendants were legally bound to execute a policy, but that by accepting the copy slip they agreed to use due diligence either to execute a stamped policy or to repudiate the transaction. But in this opinion he was not sustained, the other members of the Court and the Exchequer Chamber holding that the initialing of the slip and the forwarding of the copy slip were parts of one contract—a contract of insurance which could not, by reason of 30 Vict. c. 23, be enforced.

(*p*) In Mead *v.* Davison (1835), 3 A. & E. 303.

(*q*) Patterson *v.* Mills (1828), 1 Dow, N. S. 342. The case in the Court of Session is reported as Albion Life and Fire Ins. Co. *v.* Mills, 3 Wils. & Shaw, 218.

(*r*) Fisher *v.* Liverpool Marine Ins. Co. (1873), L. R. 8 Q. B. 469; in the Exchequer Chamber (1874), L. R. 9 Q. B. 418. In Morrison *v.* Universal Marine Ins. Co. (1871), 25 L. T. 108, Kelly, C. B., had previously ruled that a custom whereby an underwriter is bound to issue a policy in accordance with the terms of the slip is bad. See also Morocco Land and Trading Co. *v.* Fry (1865), 11 L. T. N. S. 618; and the opinion of Willes, J., in Xenos *v.* Wickham (1867), L. R. 2 H. L. 296, 314.

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Thus it is clear that before 1876 the assured had no remedy upon an unstamped slip, because, even if the slip satisfied the other requirements of the Stamp Acts, it was unstamped and therefore invalid as a policy (*s*).

Cases in which assured recovered without a policy.

36. Only under exceptional circumstances—for instance, where the claimant has been able to prove his case without actual production of a stamped policy—have actions been successfully maintained when no stamped policy was in existence.

Thus, in one case the assured was held entitled to receive the amount of a loss from a mutual insurance association, as on an account stated, where only an unstamped policy had been issued, but a sufficient admission of liability appeared in the books of the association (*t*).

In another case a member of such an association was held by the Court of Appeal to be liable to pay calls (although the association issued no policies), on the ground that he had assented to the payment of the losses in respect of which the calls were made, and was therefore estopped from saying that the payments were improperly made (*u*).

Is the slip a policy under the Stamp Act, 1891?

37. The question now to be considered is, whether the provision of sect. 95 (2) of the Stamp Act, 1891 (re-enacting the similar provision of the Act of 1876), which enables policies of insurance to be stamped after execution on pay-

(*s*) As we have just seen, it was held by Blackburn, J., not to be a policy under the Act of 1867; and if this be a correct interpretation of that Act, it could not have been stamped under the Act of 1876 as a policy. See per Mathew, J., in Home Mar. Ins. Co. *v.* Smith, [1898] 1 Q. B. 829, 835.

(*t*) In re Teignmouth and General Mutual Shipping Association (1872), L. R. 14 Eq. 148. It may, however, be doubted whether an account stated in respect of a contract declared by statute to be invalid is binding. See Scadding *v.* Eyles (1846), 9 Q. B. 858; Cocking *v.* Ward (1845), 1 C. B. 858, per Tindal, C. J., p. 870; but see Barrow Mutual Ship Ins. Co. *v.* Ashburner (1885), 54 L. J. Q. B. 377, for the view taken by the Court of Appeal of the effect of the Stamp Act.

(*u*) Barrow Mutual Ship Insurance Co. *v.* Ashburner, *supra*. Cf. In re London Marine Ins. Association, Smith's Case (1869), L. R. 4 Ch. 611.

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ment of a penalty, also enables a slip to be stamped so as to give it the force and effect of a policy.

By sect. 91 of the Stamp Act, 1891, the expression "policy of insurance" includes, for the purposes of the Act, every writing whereby any contract of insurance is made or agreed to be made, or is evidenced. Is a slip a writing of this kind? There can be no doubt that, according to the practice of those engaged in the business of marine insurance, the slip is the writing by which the contract is really made, although the subsequent issue of a formal policy is contemplated. But it is clear that the mere fact that the parties intend that an agreement which they have arrived at shall be subsequently embodied in a more formal document does not prevent the earlier agreement from constituting a binding engagement (*x*). *Primâ facie*, therefore, it does seem that on general principles the slip is a policy of insurance within the very wide definition of the Act. The consequences, however, of the adoption of this view, to which it must be conceded that the wording of the Act of Parliament gives great support, are curious; for it seems to follow that every broker who procures the initialing of a slip, and every underwriter who initials it, breaks the law and makes himself liable to a penalty.

Against the view that the slip is itself a policy, the decisions in the cases to which we have already referred may fairly be urged (*y*). The question in these cases was whether, where a slip had been duly followed by a formal stamped policy, the former might be looked at for the purpose of explaining the latter. The Act of 1867 (*z*), which was in force when these cases were decided, provided (sect. 9) that no policy should be given in evidence unless duly stamped;

(*x*) For the general principle see Rossiter *v.* Miller (1878), 3 App. Cas. 1124, and cases there cited.

(*y*) Ionides *v.* Pacific Fire, &c. Co. (1871), L. R. 6 Q. B. 674; (1872), 7 Q. B. 517; Cory *v.* Patton (1872), L. R. 7 Q. B. 304; (1874), 9 Q. B. 577; Lishman *v.* Northern Mar. Ins. Co. (1873), L. R. 8 C. P. 216; (1875), L. R. 10 C. P. 179.

(*z*) 30 Vict. c. 23.

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and it defined a policy (sect. 4) as "any instrument whereby a contract or agreement for any sea insurance is made or entered into." In the earliest of these cases (*a*), as we have seen, the Court of Queen's Bench held that a slip is not a policy, and in all of the cases it was held that the slip could be given in evidence.

We have already quoted from the judgment of the Court of Queen's Bench, delivered by Blackburn, J., in the earliest of these cases (*b*). Strangely enough, the learned Judge agrees that the slip is a contract for marine insurance, but does not notice the comprehensive definition of a policy in sect. 4 of the Act then in force, which we have just cited (*c*). Whether or not, had the Court duly considered this definition, they would have held, in view of their opinion that the slip was a contract of marine insurance, that the slip was nevertheless in no sense of the word a policy capable of being, and liable to be, stamped, may perhaps be open to question. And what view would now be taken in a Court of last instance as to the effect of the provisions of the Stamp Act now in force, it is equally impossible to say.

Home Marine Insurance Co. *v.* Smith.

In 1898 the question arose whether a certain covering note initialed by the underwriters was a policy of insurance within the meaning of the Stamp Act, 1891, and could be stamped after execution. Mathew, J., held that it was a slip, and that a slip is not a policy of sea insurance, and therefore cannot be stamped (*d*). The chief ground on which the learned judge based his decision was that both the language of 30 Vict. c. 23, and the cases upon the Act show that a slip was not a policy within its meaning. The Court of Appeal, on the other hand, held that the covering note was a contract for sea insurance within the meaning of the

(*a*) Ionides *v.* Pacific Fire Ins. Co., *supra*.

(*b*) *Ante*, § 34.

(*c*) *Supra*.

(*d*) Home Mar. Ins. Co. *v.* Smith, [1898] 1 Q. B. 829. Cf. Thompson *v.* Adams (1889), 23 Q. B. D. 361, where Mathew, J., held that, as the statute did not apply, a slip initialed by a Lloyd's underwriter was a valid contract of fire insurance.

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Stamp Act, 1891; though they affirmed the decision of Mathew, J., on another ground, viz., that it was invalid as a policy because it did not specify the "sum or sums insured" (*e*).

The Court were careful to limit their decision to the particular document, and to say nothing on the general question whether a slip can ever be stamped and sued upon. The decision of Mathew, J., on this point has, therefore, not been expressly overruled. It is, however, difficult to see how, in view of this decision of the Court of Appeal, it is now possible to contend that a cover note which specifies the sum insured, and in other respects conforms with the requirements of the Stamp Act, is not a valid policy (*f*). Further, it seems difficult to distinguish the covering note, either as regards its form or its object, from an ordinary slip. The result seems to follow that an ordinary slip is a policy, and that Mathew, J.'s, decision to the contrary has been impliedly overruled (*g*). The remarkable consequences, if this opinion be well founded, have already been pointed out. The language of sects. 21 and 89 of the Marine Insurance Act,

(*e*) [1898] 2 Q. B. 351.

(*f*) In Empress Ass. Corp. *v.* Bowring (1906), 11 Com. Cas. 107, however, Kennedy, J., held that an open cover slip was not a policy of sea insurance.

(*g*) In a note to this passage the question was raised in the seventh edition whether, if a slip can be considered a policy of insurance, as it can be stamped on payment of a penalty, it can ever properly be admitted in evidence when unstamped: Stamp Act, 1891, s. 14 (1). In Ionides *v.* Pacific Fire Ins. Co. (1871), L. R. 6 Q. B. 674, the Court of Queen's Bench seem clearly to have considered that if they had held the slip to be a policy, they would have been obliged to reject it as evidence. The Court of Exchequer Chamber (L. R. 7 Q. B. 517) only said that the slip, though a nullity as a contract, could be put in evidence for a collateral purpose. Now s. 21 of the Mar. Ins. Act, 1906, provides that an unstamped slip, or covering note, or other customary memorandum may be referred to for the purpose of showing when the contract was made, and s. 89 declares generally that "where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding." In view of the practice of half a century, during which slips have constantly been used in evidence, their admissibility, whatever be the answer to the question under discussion, is thus established.

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1906 (*h*), may be cited in support of the view that a slip is not a contract of insurance, but only a memorandum of such contract. This, however, does not seem to be a conclusive answer to the contention that the slip is a writing whereby a contract of insurance is evidenced, within the definition of sect. 91 of the Stamp Act, and it is a matter of regret that the Legislature did not take advantage of the opportunity given by the passing of the Marine Insurance Act to settle this question (*i*).

Does the slip contain the requisites of a valid policy?

38. We have already seen that a policy of insurance is not valid, by reason of sect. 93 (3) of the Stamp Act, 1891, unless it specifies the particular risk or adventure (*k*), the names of the subscribers or underwriters, and the sum or sums insured. Further, by sect. 23 of the Marine Insurance Act, 1906, it must specify the name of the assured, or of someone effecting the policy on his behalf, the subject-matter insured and the risk insured against (*l*), the voyage or period of time covered by the insurance, the sums insured, and the names of the insurers; and by sect. 24 it must be signed by or on behalf of the insurers. Assuming that a slip can be treated as a policy, it will not be available unless it contains these

(*h*) See note (*g*), *supra*.

(*i*) In an article in the Law Quarterly Review for January, 1914, Mr. Arthur Cohen discusses the effect of the stamp laws, and expresses the view that a slip is not a policy, but an honorary and legally unenforceable agreement as to the terms of the policy which is subsequently to be delivered, and that it cannot therefore be stamped after execution. In arriving at this conclusion he is largely influenced by the fact that s. 97 of the Stamp Act, 1891 (see *ante*, § 33), would lead to results so manifestly unjust and absurd, if a slip were held to be a policy under s. 91, that such a construction must, if possible, be avoided.

(*k*) In Edwards *v.* Aberayron Mutual Ship Ins. Society (1875), 1 Q. B. D. 563, the Court of Queen's Bench seem to have held that "risk or adventure" includes the voyage or period of time covered by the insurance. There is no clear statement on the point whether the perils insured against are part of the "risk or adventure"; but art. 83 of the articles of association, which were held to form part of the policy, does indicate that certain perils were covered.

(*l*) As has already been pointed out, "risk" seems here to be used in a narrower sense than in the Stamp Act, and to denote the perils insured against.

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particulars. There are, no doubt, slips or cover notes for floating policies in which some of these particulars are not sufficiently described; but it is submitted that the ordinary slip for a voyage or time policy contains an adequate specification of the necessary particulars (*m*).

The ordinary perils insured against are not usually specified in the slip; but there is authority for saying that these perils are not required to be expressly stated in a policy, as being the risk or adventure insured, within the meaning of the Stamp Act (*n*), and their subsequent insertion in the policy is not in consequence of any express agreement between the parties. An expert can say with certainty, from a mere perusal of the slip, what these perils and all the terms and conditions of the insurance are intended to be (*o*). It may be suggested that when the slip is only initialed the names of the underwriters do not sufficiently appear; but this is probably an ambiguity which can be explained by parol evidence. There can be little doubt that the initials are a sufficient signature within sect. 24 of the Marine Insurance Act, 1906 (*p*).

Agreements to issue policies.

39. An express agreement to issue a policy sometimes forms part of a cover note issued by a company. As by sect. 91 of the Stamp Act, 1891, the term "policy of insurance" includes every writing whereby any contract of insurance is agreed to be made, it seems that an agreement to issue a policy, if in writing, would be a policy within that Act, and that it could not be enforced unless it contained the particulars required by the Act. Moreover, any agreement to execute a policy is itself a contract of sea insurance within the meaning of sect. 93 (1) of the Act (*q*), and therefore, if verbal, is invalid under the Act (*r*).

(*m*) See Gow, Mar. Ins. 24.

(*n*) Edwards *v.* Aberayron, &c. Ins. Society, *supra*.

(*o*) A specimen of a slip for a Lloyd's policy is given in Appendix B.

(*p*) See 1 Smith's L. C. 12th ed. 374, note to Wain *v.* Walters.

(*q*) See Mallet *v.* Bateman (1865), L. R. 1 C. P. 163, that an agreement for guaranty is a guaranty within the meaning of the Statute of Frauds. See also In re London Mar. Ins. Association, Smith's Case (1869), L. R. 4 Ch. 611, per Selwyn, L. J., at p. 614, that a contract for a policy of insurance was within the terms of 35 Geo. 3, c. 63.

(*r*) Genforsikrings Aktieselskabet *v.* Da Costa, [1911] 1 K. B. 137.

(*s*) See Bhugwandass *v.* Netherlands India Ins. Co. (1888), 14 App. Cas. 83, a Rangoon case in which the Privy Council ordered specific performance of a contract to issue a policy in terms of an open cover note. Royal Exchange Ass. Co. *v.* Tod (1892), 8 Times L. R. 669, was an action before Romer, J., for specific performance of an agreement to issue a policy, in which the question at issue was what classes of voyages were covered by the slip. The claim was dismissed on the merits, and the point that an unstamped slip did not constitute an enforceable contract seems neither to have been taken by the defendant nor by the learned judge.

(*t*) 1 Phillips, s. 13. "It has long since been established that such a binding slip is itself a contract of insurance, and that a direct action at law will lie upon it, as well as a suit in equity": per Holt, D. J., in Kerr *v.* Union Mar. Ins. Co. (1903), 124 Fed. R. 835, 837.

(*u*) 1 Phillips, s. 13 *et seq*. Phillips details at length the cases on this subject; see also 1 Duer, 66, 109 *et seq*.

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Apart from the provisions of the Stamp Act, there is no reason why specific performance of an agreement to issue a policy should not be ordered in a proper case (*s*).

The practice in the United States.

In the United States, where the restrictions of the revenue law do not interfere, and the great bulk of sea insurance business is carried on by companies, it is very generally the case that a memorandum of the contract, or an agreement to insure, is made out and subscribed before executing the policy: in such case "the usual practice," says Phillips, is, "to enter the agreement on the books of the insurance company, subscribed by some officer authorized to bind the company. Such a memorandum is binding on the company to make out a policy if the premium is paid in due time" (*t*).

Many questions have arisen, and very elaborate decisions taken place, in the United States as to what will amount to the consummation of an agreement to insure between parties in different places, communicating by letter or message (*u*).

Corrections and alterations in the policy at Common Law.

40. The policy is the only legal evidence of the terms of the contract of marine insurance; and, as such, will be avoided, according to one of the best-known rules of the

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common law (*x*), as against any party, by any material alteration introduced into it, without his consent, after it has once been entered into by him (*y*).

Can a policy be rectified?

41. Whether, when there has been a mistake made in drawing up the policy, and its terms do not rightly express the true intention of the parties at the time they entered into the contract, there is power to rectify it, is a question on which there have been conflicting decisions. There can be no doubt that before the Stamp Act of 1795 the Courts of Equity did exercise such a power when, in the words of Story, J., the mistake was "made out by the clearest evidence, according to the understanding of both parties, and upon testimony entirely exact and satisfactory" (*z*).

Case in which a Court of Equity has exercised this power.

Thus, where the risk was described in the early part of a policy as a voyage "at and from Fort St. George," yet in that part of the policy which defines the duration of the risk, the words were "beginning the adventure from and immediately following the ship's departure from Fort St. George," and it was proved that the policy had been filled up from a label, signed by the agent of the assured and two of the directors of the company, in which the risk was described to be "at and from" Fort St. George, and it was not disputed by the underwriters that the label expressed the intention of both parties, Lord Hardwicke held that the policy should be considered one "at and from" (*a*).

(*x*) Master *v.* Miller (1797), 4 T. R. 320; 1 Smith's L. C. 12th ed. 803; Fairlie *v.* Christie (1817), 7 Taunt. 416; Davidson *v.* Cooper (1843), 11 M. & W. 778, 802; in error (1844), 13 M. & W. 343; Suffell *v.* Bank of England (1882), 9 Q. B. D. 555—C. A. See the cases on policies, *post*, §§ 43, 44.

(*y*) There is a questionable ruling of Lord Ellenborough's, that (although the contract of each underwriter is separate) the policy is to be deemed to be still *in fieri*, still incomplete, until the whole amount of the insurance has been subscribed: Robinson *v.* Tobin (1816), 1 Stark. 336. The point decided in that case was one of pleading.

(*z*) Andrews *v.* Essex Fire and Marine Ins. Co. (1822), 3 Mason's Rep. 6.

(*a*) Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 545. Phillips (vol. i. s. 117) remarks that the policy itself appears to have authorized such a construction, without rectification.

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Case in which the Court refused to exercise this power.

In another case, where rectification of a policy was sought, but the evidence appeared to be contradictory, Lord Hardwicke dismissed the bill, at the same time stating that while the Court of Chancery had jurisdiction to relieve in respect of a plain mistake in contracts, if reduced into writing contrary to the intention of the parties, it would only exert such power upon being satisfied by the strongest possible evidence that a mistake had really been made (*b*).

Mackenzie *v.* Coulson.

In 1869, in Mackenzie *v.* Coulson (*c*), a bill was filed by underwriters for the rectification of a policy, for the reason that the clause "warranted free of particular average" had by mistake been omitted, and they produced the slip in which the clause appeared. But James, V.-C., dismissed the bill on the ground that there can be no rectification, unless there has been an actual concluded contract antecedent to the instrument which it is sought to rectify, and that the slip did not constitute a contract (*d*).

On the other hand, Barnes, J., in a subsequent case ordered the rectification of a policy which was not in accordance with the slip (*e*); and, in a later case, in which Mackenzie *v.* Coulson was cited, Mathew, J., held that he had power to order the rectification of a policy, though in the absence of clear evidence of a common mistake he refused to do so (*f*).

(*b*) Henkle *v.* Royal Exch. Ass. (1749), 1 Ves. Sen. 317.

(*c*) (1869), L. R. 8 Eq. 368.

(*d*) The principle of this decision is approved by Sir Edward Fry; Specific Performance, s. 791. S. 21 of the Mar. Ins. Act, 1906, declares that "a contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not," and in the ordinary course of business the insurer signifies his acceptance by initialing the slip. But although the statement in s. 21 is general in its terms, it seems to be made with reference to the provisions of ss. 18 and 20.

(*e*) The Aikshaw (1893), 9 T. L. R. 605. The report does not show whether the point was taken that there was no power to rectify.

(*f*) Spalding *v.* Crocker (1897), 2 Com. Cas. 189. In Empress Ass. Corp. *v.* Bowring (1906), 11 Com. Cas. 107, Kennedy, J., although he refused to rectify the policies, obviously considered that he had power to rectify them after ascertaining the intention of the parties from the slip.

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In another case, Bigham, J., rectified a policy by inserting a clause which was not in the cover note, but was contained in an earlier policy, with which the judge found that the policy in dispute was intended to be identical in terms; and the Court of Appeal decided the case on the construction of the clause which the learned judge had inserted (*g*).

Thus the weight of authority supports the view that, notwithstanding the provisions of the Stamp Act, a policy can be rectified, and, with the exception of James, V.-C., the judges have referred to the slip or cover note in order to ascertain the intention of the parties. As sect. 89 of the Marine Insurance Act declares that "where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding," it now seems impossible in an action for rectification to reject the evidence of the slip (*h*).

Correction of a mistake in declaring interest.

The contract of the underwriters is complete in fact and in form when they have signed the policy; but a declaration of interest to be afterwards made stands on a different footing to a contract; it is the mere exercise of a power conferred on the insured, and need not of necessity be in writing; if, therefore, a broker has committed a blunder in making this declaration, as where he has declared goods by the wrong ship, this blunder may be rectified by parol evidence, either with or without the assent of the underwriters (*i*).

(*g*) North Queensland Ins. Co. *v.* Rhenish Westphalian Ins. Co., *coram* Bigham, J., 21st February, 1901, C. A., 21st March, 1902, unreported. No question was raised, either at the trial or on appeal, as to the power of the judge to rectify the policy. In Emanuel *v.* Weir (1914), 30 T. L. R. 518, Bailhache, J., rectified a policy, to make it agree with the usual form covered by the slip.

(*h*) If, indeed, the view that the ordinary slip is a valid policy be correct, the ground of James, V.-C.'s, decision no longer exists, and the only question that can arise when it is sought to rectify a policy by such a slip is whether the slip can be given in evidence without being stamped. On that question s. 89 of the Mar. Ins. Act, 1906, seems decisive.

(*i*) Mar. Ins. Act, 1906, s. 29; Robinson *v.* Touray (1811), 3 Camp. 158; *S. C.*, 1 M. & S. 217. See the usage stated in Stephens *v.* Australasian Ins. Co. (1872), L. R. 8 C. P. 18, and other cases which are noticed in Chap. IX. Part I., where such declarations are discussed.

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Corrections by consent.

42. The parties themselves may, by consent, introduce any alterations into the policy, even after it is underwritten, whether by an erasure, an interlineation (*k*), or an addition in a blank space; and such alterations, if properly signed, and not infringing the provisions of the Stamp Act, form as valid a contract between the parties as the terms of the original policy.

Alterations must be in writing,

As, however, no contract can have the effect of varying or altering another, unless it be of as high a nature as the instrument upon which it so professes to operate, these alterations must be in writing, either in a separate instrument referring to the original policy, or by memorandum on the face or back of the policy; and, in either case, subscribed by or, as is most usual in practice, signed by the initials of the underwriters who are intended to be bound by them (*l*).

initialed by the parties.

The only ground upon which a written alteration of this kind can be binding upon any of the parties to the original policy is his assent thereto signified by his signature; although, therefore, all the rest of the underwriters may have signed such an indorsement, yet if only one have not done so, he is not bound by the policy as altered (*m*).

General rule.

The general rule, then, is, that any material alteration of the policy by the assured avoids the policy, except as to those underwriters who have consented to it in writing by signing their initials to the memorandum in which the alteration is specified, or to the interlineation, erasure, or addition by which it is effected (*n*).

(*k*) Striking a pen across words is a cancelling of the words: Fairlie *v.* Christie (1817), 7 Taunt. 416.

(*l*) Kaines *v.* Knightly (1682), Skinner, 54; Robinson *v.* Tobin (1816), 1 Stark. 336.

(*m*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158; see also 1 Duer, 78—81, 142 *et seq.*

(*n*) Laird *v.* Robertson (1791), 4 Brown's Parl. Cases, 488; Langhorn *v.* Cologan (1812), 4 Taunt. 330; Fairlie *v.* Christie (1817), 7 Taunt. 416; Campbell *v.* Christie (1817), 2 Stark. 64; Sanderson *v.* Symonds (1819), 1 Brod. & B. 426; Forshaw *v.* Chabert (1821), 3 Brod. & B. 158.

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What are material alterations.

43. The question has generally been, What constitutes a material alteration? To use the language of Judge Duer, does it change the sense, or affect in any degree the substance, of the contract?

Alteration of destination.

Where a ship was insured from Virginia to Rotterdam, with leave to call at a port in England, and the assured, after the policy was underwritten, by consent of some of the underwriters (indorsed on the policy), altered her destination from Rotterdam to Hull; this was held to avoid the policy as to all the underwriters, except those who had signed the indorsement (*o*).

The insertion of a subject of insurance.

Altering time of sailing.

Adding alternative *terminus ad quem*.

So the insertion of a specific subject of insurance in a policy which had been executed in blank (*p*); the alteration of the specified day in a warranty as to the time of sailing (*q*); the alteration of a policy "from Colmar to Portsmouth" into a policy "from Colmar to Portsmouth, or Weymouth" (*r*), were held to be material alterations which prevented the assured from recovering against those underwriters who had not subscribed the alteration.

Inserting liberty to call.

So, where a ship was insured from Cuba to Liverpool, with liberty to touch and stay at and discharge and take in at any ports or places whatsoever:—after the subscription of the policy a leave "to call off Jamaica" was inserted in the body of it. The Court held, that, as Jamaica was out of the direct course of the voyage insured, this was a material alteration which avoided the policy as to an underwriter who had not signed it (*s*).

Immaterial alterations.

44. On the other hand, where the alteration is not material, it will not vitiate the policy; but in such case, if some of the underwriters have consented to the alteration, after the policy is executed, and others refuse, those who

(*o*) Laird *v.* Robertson (1791), 4 Brown's Parl. Cases, 488.
(*p*) Langhorn *v.* Cologan (1812), 4 Taunt. 330.
(*q*) Fairlie *v.* Christie (1817), 7 Taunt. 416; *S. C.* at N. P. (1816), Holt, 331.
(*r*) Campbell *v.* Christie (1817), 2 Stark. 64.
(*s*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158.

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consent make the altered instrument their own; but those who do not, remain liable on their original contract (*t*).

The following alterations have been considered not to be material. A policy was originally filled up, "on the Three Sisters, at and from Cadiz and Seville to Liverpool": after the policy was underwritten the broker added the words "Tres Hermanas" (Spanish for "the Three Sisters") and also the words "both or either" to the description of the voyage: Lord Ellenborough said that, "as the English name, the Three Sisters, did not amount to a warranty that the ship was an English ship, the policy was not avoided by merely inserting the equivalent Spanish name of 'Tres Hermanas.'" As to the words "both or either," his Lordship said, that "as the ship, as originally insured, had the option of going both to Seville and Cadiz or not, as it might suit the exigencies of the adventure, these words did not give any additional liberty, and therefore did not affect the legal operation of the instrument" (*u*).

"Tres Hermanas," inserted after "The Three Sisters," as the Spanish name of the ship.

A ship was insured from Liverpool to ports in Africa, "during her stay there" and back to the United Kingdom, with liberty to touch and stay at any places wheresoever, and to sell, barter, and exchange, and load, unload, or reload goods at any of the places she might call at. The broker, after the subscription of the policy, fearing that the words employed might not be sufficiently extensive to include a trading, added the words "and trade" after the words "during her stay." The defendant, however, when asked to initial the alteration, refused to do so, alleging that he never underwrote trading policies to Africa. It was contended that, as the defendant had expressly refused to underwrite a trading policy to Africa, the alteration in question must be deemed material; but the Court were clearly of opinion that it was not so, because the plaintiff had, upon the

"To trade," inserted in a liberty "to sell, barter, and exchange."

(*t*) Per Richardson, J., in Sanderson *v.* M'Callum (1819), 4 J. B. Moore, 5.
(*u*) Clapham *v.* Cologan (1813), 3 Camp. 382.

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true construction of the policy as it originally stood, liberty to trade (*x*).

Material alterations on the face,

45. There seems no doubt that a material alteration, unassented to, will avoid the policy wherever made on the face thereof, *i.e.*, in the margin as much as in the body of the instrument: (in fact, in Fairlie *v.* Christie, cited above, the alteration was in the margin). With regard to memoranda on the back of the policy, and not signed by any of the underwriters, as they could not generally be operative, Judge Duer (no doubt with reason) thinks they would not avoid the policy, even if embodying material alterations (*y*).

and on the back of the policy.

Alterations in relation to the Stamp Act.

46. The cases hitherto considered were decided upon the principles of the common law. We will now discuss the effect of the stamp laws upon the same subject.

S. 96 of 54 & 55 Vict. c. 39.

The Stamp Act, 1891, s. 96, in effect provides, that even where the underwriter has consented to the alteration in the policy, the altered policy cannot be enforced without a fresh stamp (*z*) unless the alteration comply with all the requisites specified in the clause. The clause is as follows: "Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea-insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made

(*x*) Sanderson *v.* Symonds (1819), 1 Brod. & Bing. 426; Sanderson *v.* M'Callum (1819), 4 J. B. Moore, 5, S. P. See the remarks of Duer, vol. i. pp. 78—81, on the general principle involved in the cases, and pp. 142—146 for illustrations, including some American authorities: see also 1 Phillips, s. 109 *et seq.*

(*y*) 1 Duer, 82; see also Henderson *v.* Stevenson (1875), L. R. 2 H. of L. (Sc.) 470. Duer also thinks that the addition of a new clause will not avoid the policy, if it has a new date affixed to it, subsequent to that of the policy, since the invalidity of the alteration, when not signed by the insurers, is then apparent on its face, and hence the possibility of fraud is excluded: 1 Duer, 82.

(*z*) See *ante*, § 32, as to stamping a policy after execution, on payment of a penalty.

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beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration."

Effect of the provision in this section.

This section (which ought to have a liberal construction (*a*)) does not legalize any alteration in policies, which would have been illegal at common law, without the assent of the underwriter; but even though the underwriter have assented to it, the policy if not re-stamped cannot be enforced, unless the alteration comply with all the requisites of this section.

Cases on the construction of the section.

47. From the cases on the similarly worded section of 35 Geo. 3, c. 63 (s. 13), it appears that by the words "before notice of the determination of the risk originally insured" is meant that determination of the risk which is caused "by the loss, or safe arrival, of the thing insured, or by the final end and conclusion of the voyage" (*b*).

Extending time of sailing.

Hence the determination of the risk by non-compliance with a warranty to sail before a given day is not within the meaning of this term. Thus, where a policy "on goods to be shipped on board ship or ships which should sail between the 1st of October, 1799, and the 1st of June, 1800," was altered by a memorandum extending the time of sailing until the 1st of August, 1800, after the original time for sailing had expired, but before the loss happened, Lord Ellenborough and the Court of King's Bench held that this was an alteration made before notice of the determination of the risk (*c*).

Change of terminus.

Where a ship was insured "from Stockholm to Swine-

(*a*) Per Lord Tenterden in Brockelbank *v.* Sugrue (1830), 1 B. & Ad. 88, on the similar provision of 35 Geo. 3, c. 63.

(*b*) Per Lord Ellenborough in Kensington *v.* Inglis (1807), 8 East, 291.

(*c*) Kensington *v.* Inglis (1807), 8 East, 273; see also Hubbard *v.* Jackson (1811), 4 Taunt. 169; Ridsdale *v.* Shedden (1814), 4 Camp. 107.

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munde," and while she was lying at Wisby for repairs, as it was doubtful whether the enemy might not be at Swinemunde, the underwriters consented to alter the policy by adding the words "Kœnigsberg or Memel" after the word "Swinemunde," the Court held that the alteration was made while there was only an intention to determine the risk originally insured, and before its actual determination (*d*). If, indeed, the change of terminus were such as to involve the entire substitution of a new adventure for that originally insured, the case would, no doubt, be different (*e*).

A release from a warranty to sail before a certain day which has the effect of changing a summer risk to a winter risk is not the substitution of a new adventure. It is, therefore, not a determination of the risk, but only a change in the conditions of the policy, which may be made without a fresh stamp (*f*).

Condition that the thing insured shall remain the property of the same person.

48. Another of the conditions on which an alteration may be made in the terms of the policy is that "the articles insured shall remain the property of the same person or persons."

"The words, the thing insured shall remain the property, &c., appear to us," says Lord Ellenborough, "properly to require and apply to one identical and continued subject-matter of insurance, . . . and to be ill-suited to a case where the thing last insured is not only in fact, but in name and in kind (as a specific subject of insurance), essentially different from the thing first insured" (*g*).

"Ship and outfit" altered to "ship and goods."

Hence where a policy was effected "at and from London to the South Seas, during the ship's stay and fishing there, and at and from thence to Great Britain," "on ship and outfit"; and then, with the consent of the underwriters, after the subscription of the policy, but before notice of loss,

(*d*) Ramstrom *v.* Bell (1816), 5 M. & S. 267; see also Brockelbank *v.* Sugrue (1830), 1 B. & Ad. 81.

(*e*) See 1 Duer, 84; the argument for the defendant in Brockelbank *v.* Sugrue, *supra;* and Lord Tenterden's illustration in the same case of a change to a voyage requiring a different stamp.

(*f*) Hubbard *v.* Jackson (1811), 4 Taunt. 169.

(*g*) Per Lord Ellenborough in Hill *v.* Patten (1807), 8 East, 375.

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was altered into a policy "on ship and goods"; it was held, that the policy after this alteration required a new stamp, because the outfit originally insured was a totally different kind of thing, on a whaling voyage, from "goods" to which the altered policy was made to apply (*h*).

The subject of insurance need not continue the same specific thing, only the same denomination of thing.

It must, however, be borne in mind, that the above decision is confined to cases where, by the alteration, the kind or description of the original subject of insurance is wholly changed: it is not at all intended that the subject of insurance should, throughout the voyage, continue the same specific thing, but only the same denomination of thing.

Thus, where an insurance was effected "on goods, which should first sail on board any ship or ships sailing between the 1st of October, 1799, to the 1st of June, 1800, to the amount of 45,000*l.*," it was held, that an alteration extending the time of sailing from the 1st of June to the 1st of August did not require a new stamp; for it was a mere alteration in the terms and conditions of the policy, and not in the subject-matter of the insurance; for, *non constat,* that the goods shipped on board before the altered time of sailing were different goods from those intended to be shipped on board originally (*i*). So, where a policy was "on hemp, marked R.," it was held that a memorandum withdrawing the mark did not make a fresh stamp necessary (*k*).

Memorandum waiving implied warranty of seaworthiness.

49. We have already seen that an express warranty may be altered without a fresh stamp (*l*); it has also been decided that a memorandum by which the underwriter consents to waive the implied warranty that the ship was seaworthy at the time of sailing is not such an alteration of the policy as to require a fresh stamp, for such consent prevents the inference which would otherwise arise, that the unseaworthiness was a determination of the risk (*m*).

(*h*) Hill *v.* Patten (1807), 8 East, 373.

(*i*) Kensington *v.* Inglis (1807), 8 East, 273.

(*k*) Hubbard *v.* Jackson (1811), 4 Taunt. 169.

(*l*) *Ante,* § 47.

(*m*) Weir *v.* Aberdein (1820), 2 B. & Ald. 320, as explained in

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Correction of a mistake.

50. Even where an alteration is not within the exemption created by sect. 96 of the Stamp Act, it will not require a fresh stamp if it be merely the correction of a mistake. There is a wide difference, as regards the stamp, between cases in which the alteration is such a correction only, and those in which it is in fact intended to make a new instrument: the one is an alteration of the contract for the mere purpose of making it express in terms what both parties intended it should express at the time of making it; the other is an alteration for the purpose of giving it a different meaning and extent to that which both parties intended it to bear at the moment of its execution. It is for this reason that alterations of the first class require no fresh stamp, while those of the second do (*n*).

Thus, in a case where, the assured having no interest in the ship, but only in the cargo, the words "on ship," which had been inserted by pure mistake, were struck out, and the words "on goods as interest may appear" substituted in their room, it was held, that the memorandum empowering this alteration required no new stamp (*o*). This case is distinguished from that of Hill *v.* Patten on the ground that there the assured was owner of the ship, and, as such, interested in the outfit: and also, that there the intention really was to alter the nature of the subject-matter; whereas here the intention only was to correct an error, and put the policy into the state originally intended.

Effect of not re-stamping on the original instrument.

51. Where no rights or liabilities can be enforced under the altered instrument by reason of the stamp laws, the rights and liabilities which existed under the original instrument are nevertheless destroyed by the alteration (*p*).

Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234. (*n*) Cole *v.* Parkin (1810), 12 East, 471.

(*o*) Sawtell *v.* Loudon (1814), 5 Taunt. 359; see also Robinson *v.* Touray (1811), 3 Camp. 158; 1 M. & S. 217. In that case the policy was on goods by "ship or ships" to be thereafter declared, and the broker by mistake made declaration of a wrong ship. It was held that a memorandum rectifying this mistake required no fresh stamp.

(*p*) Per Bayley, J., in Reed *v.* Deere (1827), 7 B. & C. 264.

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After the Court, in Hill *v.* Patten, had decided that the alteration of "outfits" into "goods" was one which could not be made without a fresh stamp, and therefore that the plaintiff could not recover on the policy as altered, the plaintiff brought an action upon the policy in its original form; but the Court held he could not recover on that either (*q*). Lord Ellenborough said, "that the altered policy, though ineffectual as an instrument to sue on, was effectual to do away with the former agreement, which was thereby abandoned" (*r*); and Le Blanc, J., asks "how the Court can enforce an agreement, after the parties themselves, upon the very face of the same instrument, have declared that it is not their agreement, and have actually written another and a different agreement in the place of it" (*s*). It would seem to make no difference whether the memorandum embodying the alteration is written on the back or the face of the original policy (*t*), provided it be signed by the underwriter.

Forfeiture of policy.

52. The assured, after acceptance of a valid policy, may forfeit all benefit under it; for instance, by breach or non-performance of one of the warranties expressed or implied in the instrument itself, or of a condition precedent under which the instrument was granted (*u*), or by such an alteration of the instrument as at common law or by virtue of the Stamp Acts renders it a nullity, or by such illegality affecting the assured adventure as makes it incapable of protection under the sanction of the law.

Waiver of forfeiture.

We have seen that a forfeiture for breach of a warranty may be waived by a memorandum endorsed on the policy and signed by the underwriter (*x*). But when a policy was vitiated by concealment of a material fact on the part of the

(*q*) (1807), 1 Camp. 72; French *v.* Patten (1808), 9 East, 351.

(*r*) *Ibid.* 355.

(*s*) *Ibid.* 357.

(*t*) Reed *v.* Deere (1827), 7 B. & C. 261.

(*u*) Hughes *v.* Tindall (1856), 18 C. B. 98; Turnbull *v.* Woolfe (1863), 9 Jur. N. S. 57.

(*x*) Weir *v.* Aberdein, *ante*, § 49.

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assured's agent, and afterwards the underwriter, upon learning what had happened, wrote to the plaintiff's agents in these words: "Understanding that the steamer B. has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired"—this letter was held not to be a waiver of the breach of the warranty (*y*).

Continuing or renewing policy.

53. Subject to the provisions of the Stamp Act being complied with, there is no reason why a time policy should not be expressed to continue or to be renewable for a further period of time, unless determined by notice (*z*).

Rescission of contract.

54. The rescission of the contract must be the act of both parties to it, the assured and the insurer. The insurance broker, acting for the former, has no implied authority, merely by virtue of his capacity as such agent, to demand or consent to the cancellation of the policy, even though it had been left in his hands (*a*). But the conduct of the principals may be so ambiguous that their intention may become a question of law for the Court upon the construction of their written communications, or a question of fact for a jury upon consideration of what was said and done between them (*b*).

A vessel insured by the defendant, an insurance broker, against fire for twelve months, ending the 29th of July, arrived at Liverpool on the 12th of April, and the assured wrote a letter to the defendant proposing a cancellation of the policy and return of premium, "say from the 12th of April." The other sent for the policy "to put forward

(*y*) Russell *v.* Thornton (1859), 4 H. & N. 788; 29 L. J. Ex. 9; in error (1860), 6 H. & N. 140; 30 L. J. Ex. 69. It was also held that the letter could not create a fresh contract, being at the utmost a mere unaccepted proposal.

(*z*) A policy cannot, of course, be prolonged, except by a continuation clause, so as to cover a period of more than one year. Stamp Act, 1891, ss. 93 (2), 96; Finance Act, 1901, s. 11. See Charlesworth *v.* Faber (1900), 5 Com. Cas. 408; *ante*, § 31; and *post*, § 440.

(*a*) Xenos *v.* Wickham (1866), L. R. 2 H. L. 296; in the Ex. Ch. (1865), 14 C. B. N. S. 435, 449, 463; see also Russell *v.* Thornton (1859), 4 H. & N. 788.

(*b*) Ionides *v.* Harford (1859), 29 L. J. Ex. 36.

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returns for cancellation," and received it. On the 21st of April the defendant cancelled it on the terms of returning premium from the 30th April to the 30th July, alleging a Liverpool custom not to reckon broken months. The ship was burnt on the 22nd April, and that same day the assured wrote a letter, withdrawing his proposal to cancel, as he had then received no answer; and whether, under these circumstances, there had been a cancellation, and on what terms, was the question. It was held that the defendant, by sending for the policy on receipt of the proposal to cancel, must be taken to have acceded to the terms proposed, and to have cancelled on those terms. The plaintiff therefore lost the insurance, and recovered a return of premium for the period between the 12th and 30th April (*c*).

A policy on ship from Liverpool to Philadelphia and United Kingdom was altered by memorandum substituting Baltimore for Philadelphia, and was afterwards further altered by this memorandum: "In consideration of an additional premium, it is hereby agreed to allow the vessel to go to Antwerp." In this state of the policy, the ship arrived at Antwerp and was ordered to Leith, but was lost on her way thither. It was held that she was uninsured at the time of the loss, as the effect of the second memorandum was to terminate the risk at Antwerp (*d*).

(*c*) Baines *v.* Woodfall (1859), 6 C. B. N. S. 657; 28 L. J. C. P. 338.

(*d*) Stone *v.* Marine Ins. Co. Ocean, Ltd. of Gothenburg (1876), 1 Ex. D. 81.

CHAPTER III.

OF THE CONSTRUCTION OF SEA-POLICIES.

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The principles of construction applicable to sea-policies.

55. THE principles which govern the construction of sea-policies do not vary from those applicable to all other mercantile instruments.

"*Primâ facie*," said Lord Sumner, delivering the judgment of the Privy Council in a recent case (*a*), "all the words which the policy contains (except parts of the general form inapplicable to the particular transaction) are words of contract." On the question, however, whether printed clauses in a marine policy which relate to a subject-matter not covered by the insurance ought to be taken into consideration in construing the contract, there was a difference of opinion in a later case in the House of Lords (*b*). As we have already seen (*c*), the ordinary English marine policy has been in use for a great number of years, and was originally framed for an insurance of ship and cargo, belonging to the same assured, by the same contract. It has, however, always been the practice to adapt it to the insurance of any subject-matter which it is desired to insure, without striking out the printed clauses which refer to a different subject-matter. In the case in question a ship was insured for a voyage ending at her "final port," the words "upon the goods and merchandises until the same be there discharged

(*a*) Yorkshire Ins. Co. *v.* Campbell, [1917] A. C. at p. 224 (P. C.).
(*b*) Marten *v.* Vestey, [1920] A. C. 307.
(*c*) *Ante*, § 10.

and safely landed" being, according to the usual practice, left in the policy. It was held by Lord Haldane and Lord Atkinson that these words ought not to be disregarded, and that they indicated an intention to make the voyage insured terminate with the discharge of the cargo. Lord Dunedin, on the other hand, dissented strongly from the view that in construing an insurance on the ship a printed clause which only referred to the duration of the risk on goods ought to be taken into consideration. "I venture to say," his Lordship observed, "that no underwriter who has undertaken a risk on ship alone by reason of a voyage policy ever dreams that his undertaking is to be read in the light of what the printed form says about goods. After all, the question is what was the contract made by the parties, and it is our business to decide that and not to form rules as to how commercial men ought to conduct their business. And in face of the universal practice of underwriters to use the form in this way, it is, in my opinion, untrue to say that they have contracted that an insurance of ship alone shall be interpreted in the light of printed words which are appropriate only when the insurance is not effected on ship alone but on goods" (*d*).

The language of sea-policies is frequently indeterminate, ambiguous, or technical. When this is so, parol evidence, as in the case of other contracts, is admissible to explain it (*e*).

(*d*) [1920] A. C. at p. 315. Cf. per Lord Penzance in Dudgeon *v.* Pembroke (1877), 2 App. Cas. at p. 293. See also the cases on the commencement of the risk on a ship "at and from" the *terminus a quo*, *post*, §§ 475 *et seq.*, which seem to have been determined without any reference to the clause by which the risk on goods begins "from the loading thereof."

(*e*) Thus where the description of the voyage insured was ambiguous, evidence that the rate of premium was the same, whether the wider or narrower meaning was given to the words, was admitted in Preston *v.* Greenwood (1784), 4 Dougl. 28. In Oceanic SS. Co. *v.* Faber (1907), 13 Com. Cas. 28, Buckley, L. J., took the smallness of the premium into consideration in determining the construction of the Inchmaree clause (see § 861 a) in a policy on port risks. In Otago Farmers' Co-op. Ass. *v.* Thompson, [1910] 2 K. B. 145, the policy contained an ambiguously worded warranty; and Hamilton, J., seems to have doubted the admissi-

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The language of sea-policies is also frequently incomplete as an expression of the meaning of the parties, because it is employed, and is understood so to be, with reference to the usages of trade (*f*): in this latter class of cases (and they are very numerous) the meaning of the contract embodied in a sea-policy may, nay must, be explained by parol evidence of those usages, a knowledge of which in such cases forms the only available key to the real intention of the parties (*g*).

Evidence of usage.

In this class of cases, even where the language of the policy is on the face of it unambiguous, yet, as without reference to the usage, the mere terms employed would not be a complete expression of the mind and intention of the contracting parties, evidence of usage, if not repugnant to the express terms of the instrument, is always admitted to show what the true nature of the contract, as mutually understood by the parties, really was.

In such cases, in the language of Lord Mansfield, "the question is, whether the usage has not explained the generality of the words. If it has, every man who contracts under a usage does it as if the point of usage were inserted in the contract in terms" (*h*).

bility of evidence (given without objection) that the rate of premium usually charged for such an insurance as, according to the contention of the assured, was effected by the policy was much higher than the premium actually charged.

(*f*) *I.e.*, as Judge Duer very correctly expresses it, "not of trade in the largest sense of the word, but of that export and import trade which is conducted by navigation." 1 Duer, 180.

(*g*) Mason *v.* Skurray (1780), 1 Marsh, 226; 1 Park, 253.

(*h*) The following is Arnould's note on this passage (see 2nd ed. of this work, p. 70):—"It is to these cases (viz., where the terms of the "policy are employed with reference to the usages of trade, and incom- "plete as an expression of the meaning of the parties without such "reference) that we must apply the strong expressions of Lord Mansfield "and some other judges as to the force of usage in interpreting policies. "Thus, in Preston *v.* Greenwood (1784), 4 Dougl. 28, Lord Mansfield "says: 'Usage is always considered in policies of insurance, even where "'the words are plain'; and Buller, J., in Long *v.* Allen, *ibid.* 276: "'In policies of insurance in particular, a great latitude of construction "'as to usage has been admitted'; and again (which is the strongest "expression on the subject to be found in the books): 'Usage not only "'explains but controls the policy.' Judge Duer considers Buller, J.,

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Provisions of Marine Insurance Act as to effect of usage.

The Marine Insurance Act, 1906, expressly recognizes the effect of usage upon the construction of the contract. By sect. 87:—

> (1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.
>
> (2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

Former notion as to construction of policies.

56. From the frequency, probably, of such cases as those just referred to in this branch of the law, a notion appears at one time to have prevailed (favoured unquestionably by certain reported expressions of the earlier judges) that sea-policies were not amenable to the rules of construction generally applicable to all other mercantile contracts, but were to be interpreted so as to carry out the assumed intentions of the parties, even though repugnant to the terms in which their intentions purported to be expressed on the face of the instrument itself.

"strictly accurate in the use of the word control, which, as he truly states, "does not necessarily imply to contradict: 'The distinction made by the "'learned judge between explaining and controlling really does exist. "'Where the words to be interpreted are indeterminate or ambiguous, "'the usage explains them; but when they convey a definite meaning that "'the Court would be bound to adopt, or their construction has been "'settled by law, the usage controls them; and in these cases it does set "'aside what, judging only from the terms of the policy or the rule of "'law, was the plain intention of the parties; but, in controlling, the "'usage does not contradict the words, it merely varies, by restraining "'or enlarging, their application.' Duer, vol. i. pp. 245, 246."

This note is retained by the present editors because of the high authority from which it emanates. It is, however, impossible not to feel the force of Phillips' criticisms (in s. 133) on Duer's explanation of the word "control." If the word means no more than to "interpret," or "explain," then clearly a usage which "controls" the policy does not necessarily contradict it; but understanding the word in the sense in which Judge Duer evidently understood it, it is difficult to see how a usage which "varies, by restraining or enlarging," the application of words does not *pro tanto* contradict them.

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Usage cannot vary express terms of policy.

This notion is now discarded as erroneous (*i*). Parol evidence, whether of usage or otherwise, can in no case be admitted to contradict or materially vary the plain and express terms of a sea-policy (*k*); it can only be admitted either to explain those terms where technical or ambiguous, or to modify and add to them where they are plainly employed with reference to some usage of trade, and without such reference would, accordingly, be incomplete as an expression of the mind of the parties contracting: in such cases the Courts may resort to any means of interpreting the policy so as to effectuate the real intention of the parties, which may be supplied either by the rules of the common law, the general usages of trade, or the particular circumstances of the case (*l*).

Rule as laid down by Lord Ellenborough in Robertson *v.* French.

"The same rule of construction," said Lord Ellenborough, "which applies to other instruments applies equally to this, viz., that it is to be construed according to the sense and

(*i*) Weston *v.* Emes (1808), 1 Taunt. 115.

(*k*) The case, however, of Universo Ins. Co. of Milan *v.* The Merchants' Mar. Ins. Co., [1897] 1 Q. B. 205; 2 Q. B. 93, is difficult to reconcile with this rule.

(*l*) See 1 Emerigon, c. i. s. 5, p. 17; and c. ii. pp. 55, 56; see the judgment of Lord Denman in Trueman *v.* Loder (1840), 11 A. & E. 589; and that of Story, J., in The Schooner Reeside, 2 Sumn. 567; and the remarks of Mathew, L. J., in Ellinger *v.* Mutual Life Ins. Co. of New York (1904), 10 Com. Cas. 22, 30; *S. C.*, [1905] 1 K. B. 31; see also the admirable remarks of Mr. Chancellor Kent (Com. iii. p. 260, n. (*f*)); and especially the two very able and elaborate chapters of Judge Duer (1 Duer, 158—311). "The meaning of the rule excluding parol evidence is, that such evidence shall never be received to show the intention of the parties to have been directly opposite to that which their language expresses, or substantially different from any meaning which the words they have used upon any construction will admit or convey; but there are cases in which the language of a policy, in entire consistency with the rules of law, may be interpreted in different senses, or with a modification which, though not express, is implied: in such cases parol evidence may be admitted to determine the construction that, following the intention, ought to be adopted. The admission of such evidence varies the construction of the contract, but does not contradict or vary the agreement embodied in the policy; on the contrary, it establishes its true meaning." 1 Duer, 176, 177.

The present editors, while retaining this note, conceive that their criticisms in note (*h*), *supra*, apply also, to some extent at least, here.

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meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense" (*m*).

"A contract of insurance," said Erle, C. J., "is a commercial instrument, and is to be construed, like all others, so as to give effect to the intention of the parties, and that intention is to be gathered from the words of the instrument interpreted by the surrounding circumstances. If the words are clear, the proper effect is to be given to them; if the words are capable of more interpretations than one, the judge, with the aid of the jury and of the surrounding circumstances, is to put the true construction upon the contract" (*n*).

57. The following are some of the more prominent rules of construction that appear to have been acted upon by our Courts in the interpretation of sea-policies.

I. Every well-settled usage of trade is *primâ facie* part of the policy.

I. Every usage of a particular branch of maritime trade which is so well settled, or so generally known, that all persons engaged in that trade may fairly be taken as contracting with reference to it, is considered to form part of every sea-policy, designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference (*o*). Nor need any evidence be given in such cases that the usage has

(*m*) Robertson *v.* French (1803), 4 East, 135. These words were cited with approval by Bowen, L. J., in Hart *v.* Standard Mar. Ins. Co. (1889), 22 Q. B. D. 499, and by Lord Halsbury in Glynn *v.* Margetson, [1893] A. C. at p. 357.

(*n*) Carr *v.* Montefiore (Ex. Ch. 1864), 33 L. J. Q. B. at p. 258.

(*o*) See, where in case of a fire policy on a ship, an alleged usage was not permitted to extend the risks, Pearson *v.* Commercial Union Ass. Co. (1873), L. R. 8 C. P. 548; 1 A. C. 498. The usage in this case was merely collateral to, and not necessarily connected with, the adventure insured.

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been communicated to the underwriter; for, as Lord Mansfield says "every underwriter is presumed to be acquainted with the usage of the particular trade he insures; and if he does not know it, he ought to inform himself" (*p*). The description of the voyage in the policy, he says, in another case, "is an express reference to the usual manner of making it, as much as if every circumstance were mentioned" on the face of the instrument. "What is usually done by such a ship, on such a cargo, in such a voyage, is understood to be referred to in every policy, and to make a part of it as much as if it was expressed" (*q*).

Evidence of usage in these and the like cases does not vary the terms of the policy; but, as it is expressed by Lord Lyndhurst, merely "introduces matter upon which the policy is silent" (*r*).

Parol agreement insufficient to exclude established usage.

It appears that an established usage, which is not expressly excluded by the terms of the written contract, cannot be excluded by parol agreement (*s*); *a fortiori* it seems to follow that a representation by an assured of an intention to vary from a usage, whether such representation amount to an agreement or not, cannot be binding on the underwriter if not made part of the written contract (*t*).

China trade.

58. The following cases illustrate the application of these principles:—It having been the universal custom for many years in the China trade, for all European ships, while at

(*p*) Lord Mansfield in Noble *v.* Kennoway (1780), 2 Dougl. 513; and Lord Ellenborough in Da Costa *v.* Edmunds (1815), 4 Camp. 143.

(*q*) Lord Mansfield in Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341.

(*r*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & Jer. 249.

(*s*) See Fawkes *v.* Lamb (1862), 31 L. J. Q. B. 98. Arnould (2nd ed. p. 577), Phillips (vol. i. s. 594), Parsons (vol. i. p. 432), and Duer (vol. ii. p. 608) state the contrary, but as Maclachlan observes, without any judicial authority in support of their view. See Maclachlan's remarks in the 6th ed. of this work, pp. 541, 542. In Burges *v.* Wickham (1863), 33 L. J. Q. B. at p. 23, Cockburn, C. J., did indeed express an opinion to the contrary, but Blackburn, J., at p. 28, strongly affirmed the view in our text.

(*t*) See Leduc *v.* Ward (1888), 20 Q. B. D. 475.

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Canton, to store all their rigging and furniture in storehouses, built for that purpose on sand banks in the Canton river, called banksauls, it was held that every underwriter insuring a risk in the Canton trade must be considered to have done so with reference to this usage; that the storing of the rigging in the banksaul must be deemed to have been quite as much part of the risk insured as though it had been expressed so to be in the policy; and that the underwriter was, therefore, as much liable for a loss by fire happening to the rigging so stored as for any similar loss occurring in any other part of the adventure (*u*).

East India trade.

It was formerly the uniform and well-known practice of the East India Company to reserve in their charter-parties the liberty of employing the vessel in what is called the country trade, that is, on intermediate voyages from one port to another in India. All parties engaged in this trade were taken to be fully cognizant of this usage; accordingly, under policies on ships employed by the company, though nothing was said of an intermediate voyage in the policy, yet, because the voyage insured was known by the underwriter to be an East India voyage, the Courts held that he must be presumed to have contracted with reference to all the known usages of the East India trade; and therefore that the construction of the policy should be the same as if liberty had been expressly reserved, on the face of it, to make such intermediate voyage (*x*).

Newfoundland trade.

In the Newfoundland and Labrador trades, where the main object of the voyage is to take fish, it was a well-known and general usage that the cargoes insured on such voyages, being chiefly salt and provisions, were taken out as they were wanted, and not landed, like other cargoes, on arrival; under an insurance, therefore, on such a fishing voyage, on "goods"

(*u*) Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341; Brough *v.* Whitmore (1791), 4 T. R. 206. So also in Dennis *v.* Home Ins. Co. (1905), 136 Fed. R. 481, the defendants were held to be liable for the loss of a ship's launch while being used between the ship and the shore.

(*x*) Salvador *v.* Hopkins (1765), 3 Burr. 1707; Gregory *v.* Christie (1784), 3 Dougl. 419; Farquharson *v.* Hunter (1785), 1 Park, 105.

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in the usual form, "until discharged and safely landed," it was held that the underwriter, who must be taken to have insured with full cognizance of this usage, could not exempt himself from liability for a loss upon the goods because such loss had not taken place until long after the time when, but for such custom of the trade, his liability under the mere terms of the policy would have been at an end (*y*).

It was also a well-understood and familiar usage of the Newfoundland trade that the ships engaged in it, after their arrival at Newfoundland, were either engaged for some time in fishing (called banking), or made intermediate voyages from one American port to another before beginning to load a cargo on the homeward voyage. It was ruled, both by Lord Eldon and Lord Ellenborough, that underwriters who had insured homeward risks on ships engaged in this trade, under policies "at and from Newfoundland," were bound to know this usage; and were not entitled to contend that such intermediate voyages vitiated the policy, so as to discharge them from a loss happening upon the final voyage home (*z*).

"According to the general import of the words 'at and from,'" says Lord Ellenborough, in one of these cases, "the policy would attach on the ship's first mooring in a harbour on the coast, but it doubtless may be explained differently by usage, and, as between these parties, the policy must be taken to be the same as if it had been expressed to attach on the expiration of the banking or intermediate voyage" (*a*). This certainly seems an instance of usage being permitted to control the general import of a clause in the policy as fixed by legal construction (*b*).

(*y*) Noble *v.* Kennoway (1780), 2 Dougl. 510. The voyage in this case was to the coast of Labrador, but evidence was admitted to show the usage in such case to be the same as on fishing voyages to the coast of Newfoundland.

(*z*) Vallance *v.* Dewar (1808), 1 Camp. 503; Ougier *v.* Jennings, *ibid. in notis*, per Lord Eldon in 1801, when Chief Justice of the Common Pleas.

(*a*) 1 Camp. 508.

(*b*) So Arnould, 2nd ed. p. 74. But is it not in reality simply a case where, the policy being on its face ambiguous as to the time when the voyage which it was intended to cover should commence, evidence was admitted to remove such ambiguity, by showing that it was a voyage home after the intermediate fishing voyage, and no other, which the parties had in their minds? See Duer, vol. i. p. 203.

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Usage governs the commencement and termination of the risk.

59. The risk on ship and goods, generally speaking, only commences at the very port or place named in the policy as that whence the ship is to sail, or where the goods are to be loaded; but if a general and well-known usage of the particular trade can be shown, that the ship under certain circumstances is to sail from, or the goods are to be loaded at, not that very port or place, but some port near it, the underwriter will be bound by such usage.

Oporto trade.

Thus, where it was shown to be a well-known usage in the Oporto trade for ships to complete their loading for the homeward voyage outside the bar, whenever from the low state of water in the River Douro they could not conveniently do so withinside the bar, Lord Ellenborough ruled, that an underwriter who had insured a ship "at and from Oporto to London" could not object that he was discharged from his liability because the ship, without his knowledge, had finished her loading outside the bar (*c*).

Florida trade.

So, where it was proved to be customary in the Florida trade for ships to take in their homeward cargoes at Tigre Island in St. Mary's River, and then drop down to Amelia Island, a little lower down the river, for the purpose of paying dues and clearing; it was held that an underwriter who had insured goods "at and from the ship's loading port or ports in Amelia Island to London" was not entitled to object that the policy never attached because the goods had been loaded, not at Amelia Island, but at Tigre Island (*d*).

Archangel.

It was formerly the well-known custom at Archangel,

(*c*) Kingston *v.* Knibbs (1808), 1 Camp. 507, *in notis*, a very strong case, as it appeared that in such policies liberty was often expressly given to load on either side the bar; so that the underwriter might not unfairly have contended that he was misled by the omission of this stipulation.

(*d*) Moxon *v.* Atkins (1812), 3 Camp. 200. In this case it should be remarked that, as there were no ports at all in Amelia Island, the policy could not be construed literally.

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on a ship's arrival, to carry the goods to the government warehouses, where they remained till the duty was paid; a merchant who had insured his goods from London to Archangel "until they should be there discharged and safely landed" was held to have no right of action against the underwriter, for any loss that had occurred on the goods after they had been landed and lodged in a government warehouse in accordance with the custom; for, as Lord Ellenborough said, the goods were then landed, according to the usual course of trade, at the port of Archangel, which was all the underwriter undertook for (*e*).

Leghorn.

So, on proof of a well-known custom at the port of Leghorn, that certain goods for that port should be landed at the Lazaretto, it was held, in the United States, that goods of this description insured "till they were safely landed at Leghorn" were not protected after they were once landed at the Lazaretto, such being by the custom of the trade equivalent to a landing at Leghorn (*f*).

Under a policy on a ship at Mauritius, and for thirty days after arrival, evidence was admitted of a usage to anchor at the Bell Buoy, outside the harbour of Port Louis, where vessels calling for orders, seeking freight, or receiving or discharging part—not the whole—of their cargo, waited, and that they were then considered to be at Mauritius, and a total loss at this place within the thirty days was held to be covered by the policy (*g*).

Particular usage prevails over general maritime usage.

60. Such are some of the applications that have occurred in practice of the principle now under consideration; those that immediately follow illustrate the position, that, where the usage of the particular trade with reference to which the

(*e*) Brown *v.* Carstairs (1811), 3 Camp. 161.

(*f*) Gracie *v.* Maryland Ins. Co. (1814), 8 Cranch's Sup. Ct. Rep. 75.

(*g*) Lindsay *v.* Janson (1859), 28 L. J. Ex. 315; 4 H. & N. 699. As to determination of risk "to Jamaica," see Camden *v.* Cowley (1762), 1 W. Bl. 417. See the effect of usage at the Port of Liverpool on the law of demurrage, Norden SS. Co. *v.* Dempsey (1876), 1 C. P. D. 654.

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underwriter insures is opposed to any of those general usages of maritime trade with reference to which all policies are *primâ facie* supposed to be made, the former is to be taken as the true key to the construction of the policy in preference to the latter.

Goods carried on deck by usage.

On an insurance on goods, the underwriter is in general entitled to expect that they will be carried in the hold, and not on deck, which is regarded as an unusual and dangerous place for that purpose. Every policy, then, in the absence of any express stipulation to the contrary, is generally read as though it contained on the face of it an exemption in terms against all liability on goods so carried (*h*). But whenever it can be shown that, by a well-settled usage of the particular trade, goods of the specific description of those insured are customarily carried on deck, the more general usage gives way to the more particular one, and the underwriter is liable for any loss upon the goods so carried, without any necessity of proving notice (*i*).

stopping at interjacent port.

In the same way it is a general usage of maritime trade, incorporated as we have seen into all policies, that the ship, in the absence of any express permission on the face of the policy to do otherwise, shall pursue a direct course between the two termini of the voyage, without stopping at any intermediate places; if, however, it be the notorious and well-settled usage of any given trade to stop at certain interjacent ports, this usage of the particular trade would doubtless countervail the general maritime usage, and the stopping at such ports, although not authorized by any express clause in the policy, be deemed no deviation (*k*).

(*h*) See the judgment of Lord Lyndhurst in Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 249, 250. In Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, Walton, J., doubted whether this rule has any application to a river voyage.

(*i*) Da Costa *v.* Edmunds (1814), 4 Camp. 142; Gould *v.* Oliver (1837), 4 Bing. N. C. 134; Milward *v.* Hibbert (1842), 3 Q. B. 120; Miller *v.* Titherington (1862), 6 H. & N. 278; 7 H. & N. 954; Johnson *v.* Chapman (1865), 35 L. J. C. P. 23; Apollinaris Co. *v.* Nord Deutsche Ins. Co., *supra*.

(*k*) 1 Marshall, 186; 1 Phillips, Ins. s. 133.

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Return of premium.

Again, it is a settled rule, that where the risk and premium are both entire, if the policy have once attached, the whole premium is to be retained. Yet Lord Mansfield, in an action for return of premium, allowed evidence of a constant and invariable usage in the trade between London and Jamaica, infringing this rule in particular cases (*l*).

Liberty "to touch" enlarged by usage.

61. Where the legal construction of a clause is not thus clearly settled and fixed, but comparatively doubtful, evidence of usage is *à fortiori* admitted to explain the sense in which it is used in the particular policy. Thus, where a clause in a policy gave a "liberty to touch" at certain islands, and the ship not only touched but took in salt there, the Court of Common Pleas, after adverting to the doubtful meaning of a liberty to touch, as contradistinguished from a liberty to "touch and stay," admitted evidence of a usage of trade for ships on the voyage insured to call at the islands in question to take in salt (*m*).

II. The usage must be general and notorious in the particular branch of trade.

62. II. The usage, in order to be binding, must be either a general and notorious trade usage of the whole mercantile world (of which the Court will take judicial notice), or a particular proved usage of universal prevalence and notoriety in the trade upon which, and of the place in respect of which, the insurance is effected: the usage of a particular place, or of a particular class of persons, cannot be binding on non-residents, or on other persons, unless they are shown to have been cognizant of it (*n*).

(*l*) Long *v.* Allen (1785), 4 Dougl. 276; 2 Park, 797; 2 Marsh. 660. Judge Duer is of opinion that where, as in these cases, evidence of usage is adduced to vary the settled construction of the policy or supersede a rule of maritime law, it must, in order to be binding, be shown to be invariable. 1 Duer, 265.

(*m*) Urquhart *v.* Bernard (1809), 1 Taunt. 450. Judge Duer cites this case as an instance of evidence of usage being admitted to control the settled legal construction of a clause in the policy. On examination of the case, however, it apparently amounts to no more than an authority for permitting evidence of usage to settle the construction in the particular policy of a clause in itself ambiguous.

(*n*) Per Lord Tenterden in Bartlett *v.* Pentland (1830) 10 B. & Cr. 760.

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It must be well settled,

"To make an usage obligatory on the parties," says Story, J., "it should be so well settled that all persons engaged in the trade must be considered as contracting with reference to it" (*o*). Hence, where, in case of an insurance effected from Liverpool to Jamaica, the ship put into the Isle of Man; and it appeared that ships bound on this voyage sometimes put in there, but not usually; it was held, that this proof did not amount to such a well-known and settled usage of the trade as to prevent this from being a deviation (*p*).

and general, if not uniform.

The usage need not, in the strict sense of the word, be uniform, that is, followed invariably and without exception at all times and by all persons in the trade to which it relates: it is enough that it should be general. Thus, in the case of intermediate voyages in the Newfoundland fishery trade, to which reference has already been made, the objection was taken before Lord Ellenborough that the suggested usage was not uniform, for whenever a ship engaged in the trade could procure a cargo on her arrival at Newfoundland, she would prefer returning direct to Europe to taking an intermediate voyage in America. As to this objection, his Lordship said, "although there should be exceptions to the usage, that would be immaterial. Things are presumed to go on in their ordinary course, and if an usage be general, though not uniform, the underwriters are bound to take notice of it" (*q*).

It must be notorious.

"The usage must be notorious; *i.e.*, it must have existed under such circumstances, or for such a length of time, as to have become generally well known to all persons concerned

(*o*) In Trott *v.* Wood (1813), 1 Gallison's Rep. 443, cited 1 Phillips, s. 138.

(*p*) 1 Marshall, Ins. 186; Salisbury *v.* Townson, Millar's Ins. 418; Martin *v.* Delaware Ins. Co. (1808), 2 Wash. C. C. 254; Condy's Marshall, 186, n.

(*q*) Vallance *v.* Dewar (1808), 1 Camp. 508; see also 1 Duer, 264, 265. Judge Duer is of opinion (p. 265) that when "the usage settles the construction of the policy, or supersedes a rule of law, its constancy of observance, to render it binding, must be invariable"; but *quære*.

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in or about the branch of trade to which it relates, and so as to warrant a presumption that contracts are made with reference to it" (*r*).

Usage may be binding although trade of recent origin.

63. If the usage proved can be shown to have been general and notorious, as long as the course of trade in which it prevails has lasted, it makes no difference that such trade is itself of recent origin.

Thus, when the trade to Labrador, which was first opened to English shipping after the Peace of Paris in 1763, had been carried on only three years, Lord Mansfield held, that a custom which had been invariably observed ever since its opening was binding on those who insured on Labrador risks. In this case, Lord Mansfield considered that evidence of a usage which had prevailed in one trade was rightly admitted to prove that the same usage was binding on those engaged in another trade of the same kind, carried on in the same way (*s*).

The usage must be reasonable.

64. It need hardly be said that such usage must be reasonable. When the case of intermediate voyages in the Newfoundland fishing trade came before Lord Eldon, he is reported to have said to the jury as to this point, "If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect." "If you think this usage does exist, if you think it reasonable, and if you think this ship acted *bonâ fide* in taking the intermediate voyage, you will find

(*r*) This test, with a slight difference in the phraseology, is adopted from the judgment of the Supreme Court of New York in Smith *v.* Wright (1803), 1 Caines, 43, cited 1 Duer, 267, n. (*a*).

(*s*) Noble *v.* Kennoway (1780), 2 Dougl. 510. Judge Duer remarks, and very properly, on this case, that as the observance of such a usage seems to have been almost a necessary result from the nature of the trade, the Court were probably satisfied with slighter proof of its existence than they would otherwise have required. 1 Duer, 255. As to when a usage of recent origin becomes binding in law, see the judgment, per Cockburn, C. J., in Goodwin *v.* Robarts (1875), L. R. 10 Ex. 337, 346; 1 App. Cas. 476; Rumball *v.* Metropolitan Bank (1877), 2 Q. B. D. 194.

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for the plaintiff" (*t*). Lord Eldon could hardly have meant by this to leave the question of reasonableness to the jury (a question which must always, it should seem, be for the Court): what he intended must have been to ask them whether they thought the evidence established the existence of such a usage as he had already pointed out as reasonable, or of one which, as he had already told them, was too dangerous to give effect to.

And not merely local or particular.

Although with regard to usages which are either common to all trades, or perfectly well known and settled in the particular course of trade to which the insurance relates, it is obviously a fair presumption that the parties to the policy, as mercantile men, are conversant with such usages, and have contracted with reference to them, with regard to usages which only prevail in a given place, or amongst a particular description of persons, the presumption is the other way; and in such cases, accordingly, it must be shown that the party sought to be affected by the usage had knowledge of it at the time of contracting. In the language of Lord Tenterden: "the usage of a particular place or a particular class of persons cannot be binding on non-residents or on other persons, unless they are shown to have been cognizant of it" (*u*).

Usage at Lloyd's.

65. Thus, even though clear proof may be given of a particular usage being established at Lloyd's, and even though the fact may be that the policy was effected by a broker at Lloyd's, in the common course of business, for a party resident in this country; yet, such party cannot be affected by the usage, unless it can be further shown, either that he was actually cognizant of it, or from his general modes of dealing, habits of life, or place of business, cannot be supposed to have been ignorant of it (*x*).

(*t*) Ougier *v.* Jennings (1808), 1 Camp. 506, *in notis;* see 1 Duer, 269.

(*u*) Per Lord Tenterden in Bartlett *v.* Pentland (1830), 10 B. & Cr. 760.

(*x*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793; Bartlett *v.* Pentland

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"Free of mortality."

A Liverpool house, through the agency of a London broker, effected a policy, at Lloyd's, on horses "warranted free of jettison and mortality," from Liverpool to Jamaica. During a storm in the course of the voyage, three of the horses were kicked to death by the others—a loss which the Court held to be owing to perils of the sea, and not to "mortality," or death from natural causes, so that the warranty did not apply. The underwriters nevertheless refused to make good this loss, on the ground that, on policies containing this warranty, it was contrary to the usage of Lloyd's to pay in respect of any loss of live stock occurring in the course of the voyage, except where the ship was lost before arrival. The facts of the case were stated in the form of a special verdict, which set out the custom at Lloyd's, as proved at the trial, but did not contain any finding that the plaintiff was cognizant of such usage. The Court, under these circumstances, held that the plaintiff was not bound by the usage: it was not found to be a general usage of the whole trade in the city of London; and therefore, in order to render it binding on the plaintiff, it ought to have been distinctly found that he was cognizant of it (*y*).

Settlement between broker and underwriter.

66. By the general usage of the law mercantile, to which effect is given in sect. 53 (1) of the Marine Insurance Act, 1906, the insurance broker is considered as debtor to the underwriter for the premiums, while the underwriter is debtor to the assured for the loss (*z*): a custom, however, has long prevailed at Lloyd's, and is well known to all who transact business there, that the brokers settle with the underwriters according to the state of their accounts with them, in which accounts the broker is made the debtor to the underwriter for

(1830), 10 B. & Cr. 760; Scott *v.* Irving (1830), 1 B. & Ad. 605; Stewart *v.* Aberdein (1838), 4 M. & W. 211; Sweeting *v.* Pearce (1861), 9 C. B. N. S. 534; 30 L. J. C. P. 109; Matvieff *v.* Crosfield (1903), 8 Com. Cas. 120.

(*y*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793.

(*z*) Per Lord Tenterden in Bartlett *v.* Pentland (1830), 10 B. & Cr. 760.

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all premiums on any policies effected by him with such underwriter, no matter on whose account; and the underwriter, in the same way, is made debtor to the broker for all losses, as between the underwriter and the broker. Such settlement on account is considered as payment according to the custom of Lloyd's; but whether the assured is bound by such a settlement, so as to oblige him to look to the broker only for what before the settlement was a debt due from the underwriter, depends upon his cognizance of the usage, as we shall see elsewhere (*a*).

Gross freight.

So strong, however, has the binding force of a usage at Lloyd's been considered, with regard to all those in the habit of transacting business there, that in one case it was even admitted to prove a mode of adjustment inconsistent with the true principles of Marine Insurance as a contract of indemnity. Thus, where in an open policy on freight the assured contended that he was entitled, in case of a total loss, to recover the amount of the gross freight without any reduction; and to establish this right called witnesses of thirty or forty years' experience at Lloyd's, who stated that, though open policies on freight were rare, yet the uniform custom of settling losses upon them had been to pay the assured the amount of the gross freight, the Court admitted the evidence, although they allowed that the practice seemed inconsistent with the true principles of indemnity (*b*).

III. Patent or latent ambiguity of words

67. III. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case.

(*a*) See *post*, § 124 *et seq.*

(*b*) Palmer *v.* Blackburn (1822), 1 Bing. 61. In this case Dallas, C. J., doubted, but Park, J., and Burroughs, J., the other two members of the Court then present, were clear that the evidence had been rightly admitted. The custom became, in consequence of this decision, a settled rule of law, which is recognized in s. 16 (2) of the Mar. Ins. Act, 1906.

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Technical or local terms.

The words and phrases employed in policies may be obscure in themselves, as when they are entirely technical and local, so as to be quite unintelligible to the generality of persons, without explanation; in this case, the ambiguity as to their meaning arises upon merely reading them as they stand in the instrument. So, again, although the words employed may have an ordinary meaning intelligible to people not engaged in the business to which they relate; yet, if they have also another meaning when employed by those engaged in that business, and the circumstances of the case show that such secondary or less general sense must have been that in which they were used in the particular instrument whose meaning is to be ascertained, parol evidence must be equally resorted to in this, as in the former case, to explain the real meaning of the contract, by showing the sense in which the parties meant it to be understood (*c*).

Terms used in a secondary sense.

Instances.

68. Several instances of the application of this rule have arisen in the construction of the memorandum, by which the underwriters exempt themselves from liability on certain perishable articles; thus, evidence of usage has been admitted to show that the term "corn," as used in the memorandum, is meant to comprehend every sort of grain, and also beans and peas (*d*) and malt (*e*); but that it does not include rice (*f*); also that the term "salt" does not include saltpetre (*g*).

Upon the same principle, in the United States, where the

(*c*) Judge Duer, whose observations on this point are eminently valuable, states, as the general conclusion from the cases, "that the question whether a particular word in the policy has acquired by the usage of trade a technical meaning, distinct from its popular sense, is always to be determined by the inquiry whether such has been its use and practical interpretation in other mercantile instruments and contracts:" 1 Duer, 184.

(*d*) Mason *v.* Skurray (1780), 1 Park, Ins. 245.

(*e*) Moody *v.* Surridge (1798), *ibid.*

(*f*) Scott *v.* Bourdillon (1806), 2 B. & P. N. R. 213.

(*g*) By Wilson, J., in Journu *v.* Bourdieu (1787), 1 Park, 245. Cf. Hart *v.* Standard Co. (1889), 22 Q. B. D. 499, where it was held that in the absence of a usage limiting the meaning of the word, "iron" in the clause "warranted no iron" included steel.

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memorandum contained the exception of roots, the evidence of mercantile men was admitted to show that the word as used in the memorandum was in practice confined in its application to perishable roots, such as beets and other garden roots; and, therefore, that sarsaparilla, being a dry hard root, and not liable to decay, was not included in the memorandum (*h*). So, in a policy on furs, similar evidence was admitted, to prove that the word "skins" in the memorandum should not exempt the underwriter from liability to an average loss on bear skins; it being shown that such skins were chiefly valuable as furs (*i*).

In a case before Lord Mansfield, where the insurance was on ship, furniture, &c., in the usual words of the printed sea-policy, the ship was employed in the Greenland fishery, and the question was whether the words of the policy covered fishing tackle and stores. His Lordship said this would depend on the usage of trade, and admitted evidence of such usage accordingly (*k*).

"With or without letters of marque."

A vessel was insured "either with or without letters of marque," the intention of course being to have the liberty of using it, but to what extent, whether solely in acting on the defensive, or in giving chase, or in cruising generally, were questions not settled by the obvious and general import of the words; Lord Ellenborough said, "it may be material to ascertain in what manner parties to contracts containing this form of words have acted upon them in former instances, and whether they have obtained, as between the assured and assurers, any known and definite import" (*l*).

(*h*) Coit *v.* Commercial Ins. Co. (1811), 7 Johnson's N. Y. Rep. 385. The words of the memorandum in this case were, "roots and all other articles of a perishable nature," so that the very language of the clause formed a clue to its construction.

(*i*) Astor *v.* Union Ins. Co. (1827), 7 Cowen's Rep. 202.

(*k*) Hoskins *v.* Pickersgill (1783), 2 Marsh. 735; 1 Park, 126.

(*l*) Parr *v.* Anderson (1805), 6 East, 207. Duer (vol. i. p. 187) observes that "this mode of interpreting a contract by a reference to the practice of other parties in similar cases is almost peculiar to a policy of insurance, nor is it easy to be reconciled with the ordinary rules of evidence," and follows with some excellent remarks in explanation.

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"Port."

69. The risk on ship and goods is often specified to begin and end from their arrival, sailing from, or loading at one port, until their arrival or safe discharge at another port; in these cases the meaning in which the word "port" is used in the policy must be ascertained by admitting parol evidence to show what meaning and extent, in the general understanding of the mercantile world, is attached to the word "port" as applied to the place where, by the policy, the risk is made to begin or end (*m*); and, although the mercantile sense attached to the term may give the port in question a greater or a less extent than its legal or political limits, yet the mercantile sense, and not the legal import of the word, shall prevail. Thus, although Llanelly is, legally speaking, considered to be a part of the port of Carmarthen, and Bridport of the port of Lyme Regis, yet neither was considered to be so within the meaning of the words "port of Carmarthen" and "port of Lyme Regis," in a policy of insurance; those words meaning, in a mercantile sense, "the town and port of Lyme Regis," and "the town and port of Carmarthen" (*n*).

70. So, again, where words descriptive of seas or countries have acquired a sense among mercantile men differing from their common geographical import, parol evidence of the meaning put upon them by the mercantile world is admissible, to show the sense put on them by the parties to the policy.

"Indian Islands."

Thus, under a policy "from Van Dieman's Land to a port or ports of loading in India and the Indian Islands," the Court held that, though, amongst geographers, Mauritius was deemed an African island, yet parol evidence was admissible to prove that, in commercial language, it was considered an Indian island (*o*). So, where an insurance

(*m*) Constable *v.* Noble (1810), 2 Taunt. 403; Payne *v.* Hutchinson (1810), *ibid.* 405, *in notis;* Cockey *v.* Atkinson (1819), 2 B. & Ald. 460; Brown *v.* Tayleur (1835), 4 A. & E. 241.

(*n*) Constable *v.* Noble (1810), 2 Taunt. 403; Payne *v.* Hutchinson (1810), *ibid.* 405, n. See per Brett, M. R., in Sailing Ship Garston Co. *v.* Hickie (1885), 15 Q. B. D. 580.

(*o*) Robertson *v.* Clarke (1824), 1 Bing. 445. See also Northey *v.*

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was made "from London to any port in the Baltic," and the vessel sailed for Revel in the Gulf of Finland, which, among geographers, is considered a different sea to the Baltic, yet, upon evidence that it is comprehended in the Baltic in commercial language, the Court gave this extension to the term "Baltic" in the policy (*p*).

"Baltic."

So, in a case of re-insurance "from the Pacific," where the evidence showed that the plaintiffs' policies with the defendants and other underwriters, containing these words, had always been limited to vessels sailing from ports on the West Coast of South America, it was held by Romer, J., that the words must be construed accordingly (*q*).

"The Pacific."

But in the absence of any such usage or custom among mercantile men, with regard to the phraseology in the policy, the meaning must be ascertained by the ordinary rules of construction. Thus in a policy on ship in which the warranty was "No St. Lawrence" between certain dates, it was held that both the river and the gulf of that name were within the terms of the warranty (*r*).

"No St Lawrence."

Parol evidence has been admitted to show that "in the month of October" means "between the 20th of October and the 1st or 2nd of November" (*s*).

As to date.

Where a question arose in an action on a policy as to the meaning of the word "cargo," Tindal, C. J., ruled that, being a term of mercantile import, its sense, as used in the policy, was a question for the jury, and could not be decided by the dictionary (*t*). So with regard to "freight," Story, J., on the ground that it was a word which, in common parlance, has several meanings, admitted parol evidence to be given of

"Cargo."

Trevillion (1902), 7 Com. Cas. 201, where with reference to an agency contract it was held that Rangoon is not in India.

(*p*) Uhde *v.* Walters (1811), 3 Camp. 16; see also Moxon *v.* Atkins (1811), *ibid.* 200.

(*q*) Royal Exch. Ass. Co. *v.* Tod (1892), 8 Times L. R. 669.

(*r*) Birrell *v.* Dryer (1884), 9 App. Cas. 345; cf. also The Beacon Fire and Life Ass. Co. *v.* Gibb (1862), 1 Moore, P. C. N. S. 73; Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(*s*) Chaurand *v.* Angerstein (1791), Peake, N. P. 73; *infra*, § 566.

(*t*) Houghton *v.* Gilbart (1836), 7 C. & P. 701.

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the circumstances under which the contract was made, in order to show its meaning in the particular case; as, for instance, to show whether it meant "goods on board ship," or "an interest in the earnings of the ship" (*u*).

"Port risk" policy.

In one case Hamilton, J., admitted evidence that the term "port risk" has a well-recognized meaning at Lloyd's, and that the risk under a "port risk" policy ceases when the insured vessel leaves her anchorage (*x*).

Warranty against "p.a. and loss."

In another case the same learned judge admitted the evidence of underwriters as to the meaning of a warranty against "particular average and loss" in policies on frozen meat (*y*).

Return of premium when "laid up in port."

Where a time policy provided for a return of premium for the period when the ship was "laid up in port," evidence was given on which Bray, J., found that "laid up" does not mean "stationary" or "tied up," but that the words have a customary meaning by virtue of which a vessel is "laid up" even when loading or discharging, or undergoing repairs (*z*).

IV. Usage only admissible to explain what is doubtful, not to contradict what is plain.

71. IV. A resort to parol evidence, however, whether of usage or otherwise, is only permitted in order either to explain the policy where it is technical or ambiguous, or to fill out and add to it where it is silent: such evidence will never be admitted to contradict, set aside or control its express, plain and unambiguous terms.

No evidence can be admitted of a usage which is at direct variance with the plain terms of the policy: it may be admitted to explain technical terms or ambiguous clauses, or "to introduce matter on which the policy is silent," but not to show that the policy has a meaning in plain opposition to its language; "usage is only admissible to explain

(*u*) Peisch *v.* Dixon (1815), 1 Mason, 10; 1 Duer, 168, 169.

(*x*) Mersey Mutual Underwriting Assn. *v.* Poland (1910), 15 Com. Cas. 205.

(*y*) Otago Farmers' Co-op. Ass. *v.* Thompson, [1910] 2 K. B. 145.

(*z*) North Shipping Co. *v.* Union Mar. Ins. Co. (1918), 24 Com. Cas. 83; affd. *ibid.* 161.

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what is doubtful, it is never admissible to contradict what is plain" (*a*).

"Usage," says Lord Campbell, "may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade; and a usage, consistent with a written contract, may be introduced into it: as both parties being aware of it, may be supposed to have intended that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting and nullifying an express written contract, would be contrary to all principle, and has been forbidden as often as the attempt has been made" (*b*).

"Where the terms," says Judge Duer, "in which the usage must be expressed, if introduced into the policy, would be directly and irreconcilably repugnant to an express clause or provision, the evidence must doubtless be rejected, otherwise the policy would be void for uncertainty. A usage may explain, modify and control (*c*), but cannot contradict a policy; by restriction or addition it may qualify the construction of particular words and clauses, but can never be permitted to nullify or expunge them" (*d*).

Parkinson *v.* Collier.

72. These principles, notwithstanding some apparent discrepancy in the expressions of the judges, have been uniformly acted upon in the construction of sea-policies. Thus, where the risk on goods was, by the policy, made to continue "till discharged and safely landed," Lord Kenyon would not admit evidence of usage to show that this expression,

(*a*) Per Lord Lyndhurst in Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 244. See Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224.

(*b*) Hall v. Janson (1855), 4 E. & B. 504; 24 L. J. Q. B. 101; cf. also Humfrey *v.* Dale (1856), 7 E. & B. 266; E. B. & E. 1004; Brown *v.* Byrne (1854), 3 E. & B. 703; L. Walford, Ltd. *v.* Les Affreteurs Réunis, [1918] 2 K. B. 498; [1919] A. C. 801.

(*c*) The word "control" was queried by Arnould (see 2nd ed. p. 88). The point is discussed *ante*, § 55, note (*d*).

(*d*) 1 Duer, 270.

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in the particular trade insured, meant "until the ship was moored twenty-four hours in safety"; because this was inconsistent with the plain meaning of the policy, which was too clearly expressed to require or allow of any such explanation (*e*).

Blackett *v.* Royal Exch. Ass. Co.

So where a policy was in the common form upon the ship, that is, "upon the body, tackel, apparel, ordnance, munition, boat, and other furniture of the ship called the 'Thames,'" Lord Lyndhurst would not admit evidence of a usage at Lloyd's, that boats slung on the ship's quarter (which was proved to be the invariable mode of carrying them on such voyages as that insured) were not protected by such policy (*f*). "The objection," said his Lordship, "to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter on which the policy was silent, but was at direct variance with the terms of the policy and in plain opposition to the language it used; that whereas the policy purported to be upon the ship, furniture and apparel generally, the usage is to say, that it is not upon all the furniture and apparel, but upon part only, excluding the boat" (*g*). On the same ground, in a case where it appeared that oil had been lost by leakage, caused by the violent labouring of the ship in a cross sea, Lord Denman refused to admit evidence of a usage of Lloyd's, to the effect, that unless the cargo shifted, or the casks were damaged, underwriters were not liable for any extent of leakage, however caused, as a loss by perils of the seas (*h*). His Lordship told the jury to consider for themselves whether, in their opinion, the damage to the oil was in fact caused by perils of the seas. "It may be very convenient for the underwriters to have such a general rule, and for the commercial world to submit to it; but if they

Crofts *v.* Marshall.

(*e*) Parkinson *v.* Collier (1797), 2 Park, 653; 1 Marshall, 255.

(*f*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 244.

(*g*) Per Lord Lyndhurst, 2 Cr. & J. 249; criticised in Myers *v.* Sarl (1860), 30 L. J. Q. B. 9; cf. also Humfrey *v.* Dale, *ubi supra*.

(*h*) Crofts *v.* Marshall (1836), 7 C. & P. 597.

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mean thereby to control the effect of a plain instrument, they should introduce its terms into the policy" (*i*).

Hall *v.* Janson.

In an action for contribution in general average against one of the underwriters on a policy "on money advanced on account of freight," containing the usual clause in the memorandum by which "freight, &c. is warranted free of average unless general or the ship be stranded," the plea set up a usage of merchants, &c., effecting and underwriting policies in London, not to pay general average contribution under such a policy. The Court held the plea bad on general demurrer, on the ground that it attempted to set up in bar to the action a usage in derogation and contradiction of the written contract which, by virtue of the clause in the memorandum, plainly and expressly rendered the underwriter on freight liable for general average without regard to the extent of the loss (*k*).

V. The written clauses have greater weight than the printed and formal parts of the policy.

73. V. The policy being a printed form with the blanks filled up in writing, it is a rule that "if there is any doubt about the sense or meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words; inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning" (*l*).

Effect of inapplicable

In a case where the Lloyd's form of policy was filled up as

(*i*) Crofts *v.* Marshall (1836), 7 C. & P. 607.

(*k*) Hall *v.* Janson (1855), 4 E. & B. 500; 24 L. J. Q. B. 97. As to the liability of the underwriter by express contract on the face of the policy, the Court says: "The policy not only contains general words to indemnify the assured on account of loss, but it expressly declares that 'freight is warranted free of average, unless general, or the ship stranded.' Therefore the underwriters on freight expressly, absolutely, and universally undertake to pay general average, however large or however minute the amount may be."

(*l*) Per Lord Ellenborough in Robertson *v.* French (1803), 4 East, 130; *per curiam*, Gumm *v.* Tyrie (1864), 33 L. J. Q. B. 97; per Blackburn, J.. in Joyce *v.* Realm Ins. Co. (1872), L. R. 7 Q. B. 583; per Lord Penzance in Dudgeon *v.* Pembroke (1877), 2 App. Cas. 293. See Hagan *v.* Scottish Ins. Co. (1901), 186 U. S. 423; 3 Kent's Comm. 260.

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printed words left in the policy.

a time policy on ship, it was argued that various clauses which were clearly only intended to refer to a voyage policy, but which had, nevertheless, been in this case, as in other similar cases, left standing, therefore applied to the policy in question. The House of Lords, however, reversing the judgment in the Exchequer Chamber, decided otherwise. "It has been suggested," said Lord Penzance, "that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the terms by which they desire to describe and limit the risk intended to be insured against, without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law, to permit of any such conclusion" (*m*).

Hence it is, that in the familiar instance of words written in the margin, or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the sense of those parts of the printed policy to which they apply.

Thus, where the word "ship," or "freight," or "goods," is written in the margin of the policy, the general terms of the policy, applicable to other subjects besides the particular one mentioned on the margin, are thereby considered as narrowed in point of construction by relation to the word so written (*n*).

Moreover, printed words of general application may be entirely rejected when they are inapplicable to the insurance intended by the parties (*o*). Thus the suing and labouring clause has been held to be inapplicable to an insurance against

(*m*) Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284; 1 Q. B. D. 96; L. R. 9 Q. B. 581.

(*n*) 4 East, 140; and see Robinson *v.* Tobin (1816), 1 Stark. 336; see also Haughton *v.* Ewbank (1814), 4 Camp. 88.

(*o*) See Hydarnes SS. Co. *v.* Indemnity, &c. Ass. Co., [1905] 1 K. B. 500 (C. A.).

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the liability of shipowners to the owners of cargo for negligence (*p*).

The subsequent portions of this work will furnish abundant instances of this rule of construction.

VI. Written words are to be more strictly construed than printed words.

74. VI. It is also a rule, founded on the same principle, that greater strictness of construction should be applied to those clauses and stipulations, which the parties have themselves introduced, than to the words of the printed formula, which are adapted to all other cases of insurance on similar subjects, and not confined to the circumstances of the particular adventure (*q*).

Frequent illustrations of this rule will be afforded when we come to speak of clauses giving a liberty to touch and stay, express warranties and other written stipulations, by which the parties to the policy seek either to enlarge or to limit the protection afforded by the common printed form.

VII. As to inexplicable ambiguity.

75. VII. If conditions which are inserted for the protection of the underwriter be ambiguous, and the ambiguity is such as to be inexplicable by extrinsic evidence if admitted, the construction will lean towards the side of the assured rather than of the insurer (*r*),

(*p*) Cunard SS. Co. *v.* Marten, [1902] 2 K. B. 624; [1903] 2 K. B. 511 (C. A.). See also Western Ass. Co. of Toronto *v.* Poole, [1903] 1 K. B. 376.

(*q*) 1 Emerigon, cii. s. 7, p. 55.

(*r*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 244. See also Birrell *v.* Dryer (1884), 9 App. Cas. 345. In a case on an accident policy, In re Etherington and Lancashire & Yorkshire Accident Ins. Co., [1909] 1 K. B. 591, 596, Vaughan Williams, L. J., began his judgment by laying down a broader rule, so far as the policies of companies are concerned. "I start with the consideration," he said, "that it has been established by the authorities that in dealing with the construction of policies, whether they be life, or fire, or marine policies, an ambiguous clause must be construed against, rather than in favour of the company." Farwell, L. J., said (p. 600): "I agree that the insurance company which prepares these documents is bound to make their meaning as clear as possible, and, if there is any ambiguity in the document, it does not lie in the mouth of the company, who may have been receiving premiums under it for years, to insist on that construction of an ambiguous clause which is in their favour." Lord Justice Vaughan

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Sect. 75. proper regard being, however, always paid to the business aspect of the case (*s*).

Williams' rule is criticized by Mr. Arthur Cohen (Laws of England, vol. xvii. § 688), who considers it inconsistent with Birrell *v.* Dryer, *supra*, and points out that a marine policy, unlike fire and life policies, is framed in accordance with the slip prepared by the assured's broker (see *post*, § 102). In the later case of National Protector Fire Ins. Co. *v.* Nivert (1913), 108 L. T. 390, the Privy Council applied the rule stated in the text to the construction of a fire policy. In America there is authority for the wider doctrine, that the whole of the policy is deemed to be the writing of the insurers, and is therefore in all cases of ambiguity to be construed against them. Parsons dissents from this doctrine (see 1 Parsons, Ins. p. 67); but it has been affirmed in recent cases. See First Nat. Bank of Kansas City *v.* Hartford F. Ins. Co. (1877), 95 U. S. 678; Travelers' Ins. Co. *v.* McConkey (1887), 127 *ibid.* 666; American SS. Co. *v.* Indemnity Mutual Ins. Co. (1901), 108 Fed. R. 421; Hagan *v.* Scottish Ins. Co. (1901), 186 U. S. 423. A number of cases are collected in the 14th vol. of Campbell's Ruling Cases, notes to Robertson *v.* French.

(*s*) Stewart *v.* Merchants' Marine Ins. Co. (1885), 16 Q. B. D. at p. 626.

CHAPTER IV.

DIFFERENT CLASSES OF INSURERS ON SEA-POLICIES.

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Who may be insurers.

76. EVERY person capable of making a contract may be an insurer, and may authorize any person capable of being an agent to underwrite policies in his name and on his behalf. The practice of insuring with individuals was the earliest in use anywhere, and long continued to be followed in this country.

Lloyd's underwriters.

77. In the time of William III. and of Queen Anne, Lloyd's Coffee-house in Tower Street, and later at the corner of Abchurch Lane, in Lombard Street, was the celebrated resort of seafaring men, and those that did business with them. There, and subsequently in Pope's Head Alley, and ultimately on the west side of the old Royal Exchange, at this coffee-house congregated the underwriters of London. For some time they had no organization; but in the latter part of the eighteenth century they formed themselves into an association or society with a committee of management, which became famous under the name of Lloyd's, and was in 1871 incorporated by a special Act of Parliament into a society under the same title (*a*). In connection with this

(*a*) Lloyd's Act, 1871, 34 Vict. c. xxi. The objects of the society were declared to be the carrying on of the business of marine insurance by the members, the protection of their interests, and the collection and diffusion of intelligence. As insurance business other than marine business has been largely carried on at Lloyd's, an amending Act was passed some years ago (Lloyd's Act, 1911, 1 & 2 Geo. 5, c. lxii.), which extended the objects of the society to the carrying on by the members of every kind of insurance business, including guarantee business.

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society they have developed a ramified system of agency radiating everywhere to the ports of the world, which is now become of imposing magnitude, essential to the business of marine insurance whether in the hands of individuals or of companies, and to the general interests of British commerce.

Lloyd's rooms.

Lloyd's underwriters now meet and carry on their business in spacious rooms in the Royal Exchange. In the underwriting room the underwriters sit at tables of the coffee-house type, while the brokers and other subscribers pass from one underwriter to another and submit their "slips."

The latest telegrams with regard to casualties, shipping movements, &c., are posted in the underwriting room for the information of members and subscribers. Losses and serious casualties are also entered in Lloyd's "Casualty Book," formerly called the "Loss Book," a large volume which occupies a prominent position in the same room (*b*).

Reports received at Lloyd's are distributed during the day to the marine insurance companies subscribing to Lloyd's, and to British and foreign newspapers, &c. They are also included in "Lloyd's List," a daily shipping and commercial newspaper which was established in 1696, and has been published continuously since 1726; as well as in "Lloyd's Daily Index," an alphabetical list of all sea-going merchant vessels, giving their latest positions at the time of going to press each day.

A large room adjoining the underwriting room is called the reading room, which contains seats for the brokers, with direct telephonic communication to their offices. In this room are kept the large registers showing the daily movements of merchant vessels. There are also other books in which are recorded the services of British mercantile marine masters, and a collection of works of reference, as well as files of newspapers, &c., for the use of members.

(*b*) "The receipt of official news of capture, &c.," being a term in a policy, news of an embargo entered in Lloyd's "Lost Book" was held by a special jury at Guildhall, Erle, C. J., presiding, to be official news: Fowler *v.* English & Scottish Marine Ins. Co., Guildhall Sittings, *post*, M. T. 1864.

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The corporate affairs of the members, as distinguished from their underwriting business, are managed by a committee, elected by and from the members of Lloyd's, and presided over by a chairman and deputy-chairman.

Lloyd's agents.

The committee, on the recommendation of an agency committee, on which Lloyd's, the marine insurance companies and shipping interests are represented, appoint agents of the corporation (generally called Lloyd's agents) in all the principal ports of the world, whose business it is regularly to forward to Lloyd's accounts of all departures from and arrivals at their ports, as well as of losses and casualties; and also general information bearing upon shipping and insurance. This information, which is, of course, largely transmitted by telegraph, is posted up when received, as mentioned above.

It should be noted that Lloyd's agents, who, as has been stated, are appointed by the corporation, are not the agents of the individual underwriters (*c*). Still, they perform very important functions (*e.g.*, as surveyors of damaged cargo), and in many ways render services to vessels putting into their ports (*d*). The committee of Lloyd's have also made arrangements whereby claims on policies underwritten at Lloyd's can be made payable by Lloyd's agents all over the world, thereby obviating the necessity of referring claims to London for settlement.

The development of the telegraphic system and especially of wireless telegraphy, which enables masters of ships in most cases to communicate quickly with their owners, and through them to obtain instructions from the underwriters, has done much to facilitate the carrying out of their duties by Lloyd's agents.

Lloyd's signal stations.

In addition to the above system of collecting shipping

(*c*) Wilson *v.* Salamandra Ins. Co. (1903), 8 Com. Cas. 129.

(*d*) S. 11 of Lloyd's Act, 1911 (1 & 2 Geo. 5, c. lxii.), authorizes the corporation to use its funds and employ agents for the taking charge of the interests of members and others in insurable property of every description.

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intelligence by means of agents, Lloyd's signal and wireless stations, both at home and abroad, are invaluable to underwriters, to shipowners, and to the commercial community in general, as they afford a means both of receiving prompt information of the movements of shipping, and of transmitting messages and orders which it is often desired to send to vessels during their voyages (*e*).

Form of underwriting.

All the underwriting business at Lloyd's is transacted by the individual members of the society, each of whom carries on his business for his own account and risk, either himself or through an authorized underwriting agent, the general practice being for several members in association, but not in partnership, to carry on their business through a single agent who underwrites and acts for the whole group, or syndicate (*f*).

Policies issued by Lloyd's underwriters have the name of each individual, whether he be acting singly or be a member of a group, inserted at the foot of the policy, and the sum insured by each underwriter or group is written in figures, and also in words, opposite the names concerned (*g*). Each thereby makes a separate contract in the terms of the instrument with the assured of the particular amount set opposite to his name. The right of action in the assured is

(*e*) By Lloyd's Signal Act, 1888 (51 & 52 Vict. c. 29), s. 2, the society may compulsorily acquire land for the purpose of erecting signal stations.

(*f*) The persons for whom he so underwrites, called his "names," have been held to possess a joint interest in the books kept by the underwriting member: In re Burnand, [1904] 2 K. B. 68 (C. A.).

(*g*) Rule 4 in the Sched. to the special Act (34 Vict. c. xxi.), incorporating the Society of Lloyd's, is as follows:—

"An underwriting member shall not, by himself or by any partner or other substitute, directly or indirectly underwrite in the city of London a policy of insurance as follows: (1) In the name of a partnership, or otherwise than in the name of one individual (being an underwriting member of the society) for each separate sum subscribed; or (2) for the account, benefit, or advantage of any company or association, unless they are subscribers to the society, nor unless every policy underwritten for their account, benefit, or advantage is underwritten in their ordinary place of business."

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consequently against each separately, and not against all jointly (*h*).

With a view to maintaining the credit of the room, the committee of Lloyd's now require a deposit of securities, of the minimum value of 5,000*l*., increasing *pro ratâ* with the amount of business transacted, to cover the engagements of each member in his capacity as an underwriter of marine and transport risks. Formerly the committee were satisfied with a written guaranty to cover these engagements, and now a guaranty is sometimes required in addition to the deposit. The corporation of Lloyd's being thus constituted trustees of the benefit of the guaranty on behalf of those who had sustained damage by the failure of the underwriting member in respect of his engagements in that capacity, were held entitled to put it in suit, although they had themselves suffered no loss (*i*).

The two Old Companies.

78. By virtue of an Act of 1719 (6 Geo. 1, c. 18), two companies, the Royal Exchange Assurance Corporation and the London Assurance Corporation, were incorporated, with the exclusive right of making sea insurances in their corporate capacity, and all others were restrained from granting insurances as companies or partnerships on a joint capital. A subsequent Act, 8 Geo. 1, c. 15, relieved them of any liability to double damages or costs at law, at that time an important privilege; and the 11 Geo. 1, c. 30, s. 43, gave them the right of pleading the general issue to all actions of debt and covenant on their policies (*j*). Their main privilege of

(*h*) See *ante*, § 26.

(*i*) Lloyd's *v.* Harper (1880), 16 Ch. D. 290. By s. 10 of Lloyd's Act, 1911 (1 & 2 Geo. 5, c. lxii.), the society has power to make bye-laws enabling it to make good any deficiency arising from the insufficiency of any security furnished by a member.

(*j*) The right to plead the general issue and give special matter in evidence was also given to the two companies when the insurance is on inland navigation by 41 Geo. 3, cc. lvii., lviii. respectively, but the latter Act was repealed by the London Assurance Act, 1891 (54 & 55 Vict. c. cxxvi.). This right of pleading the general issue was not affected by the 5 & 6 Vict. c. 97, s. 3 (Carr *v.* Royal Exch. Ass.

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exclusively granting marine policies as corporate bodies was retained by them until the year 1824, when the 5 Geo. 4, c. 114, repealed so much of the 6 Geo. 1, c. 18, as restrains "any corporation or body politic, society or partnership, or persons acting in any society or partnership," from underwriting sea-policies or lending money on bottomry.

Consequences of the repeal of the monopoly.

79. The repeal of the monopoly formerly possessed by the two old companies was succeeded by the rapid multiplication of public companies, some of them incorporated by special statutes, some by charter from the Crown, and others formed upon the provisions of a partnership deed, for the purpose of granting marine policies (*k*).

Companies under the Companies Act.

By the Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110), it was enacted that every company insuring ships and their cargoes against loss and damage must be registered (*l*). This Act was repealed by the Companies Act, 1862, which provided that every insurance company completely registered under the Act of 1844 should register itself under the Act of 1862 (*m*). By such registration these companies obtained the advantages suitable to each as provided by the Act of 1862 (*n*). By doing so, they retained all property, and all rights, interests, and obligations in connection with property, their rights and liabilities

(1861), 1 B. & S. 956; 31 L. J. Q. B. 93), and it is clearly not affected by the Public Authorities Protection Act, 1893, s. 2 (e). Whether, however, it survived the changes in pleading effected by the Rules under the Judicature Acts is a matter of some doubt. Maclachlan expressed the view that the privilege remains unchanged. (Arnould, 6th ed. vol. i. p. 151, n. (2).) In practice, the companies indicate their "Points of Defence" in the same way as other defendants.

(*k*) See Hallett *v.* Dowdall (1852), 18 Q. B. 2, 17.

(*l*) The Act of 1844 extended to companies established in England, Wales, or Ireland, or if established in Scotland, having an office in the former country: s. 2.

(*m*) Companies Act, 1862, s. 209. For the purposes of that Act, a company that carried on the business of insurance in common with any other business was deemed to be an insurance company: s. 3.

(*n*) Companies Act, 1862, ss. 6, 180, 206. The corresponding provisions of the Companies (Consolidation) Act, 1908, are in ss. 2, 249, 286.

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in respect of debts, obligations, and contracts; and the peculiar modifications impressed on their constitution—and their rights and liabilities in connection therewith—by the statute, charter, or deed, under which they might have been formed (*o*). Moreover, any stipulation or condition in any policy affecting the liability of members, or of the funds of any company, remained in full force and effect, notwithstanding registration of the company under that Act (*p*). The repeal of the Act of 1862 by the Companies (Consolidation) Act, 1908, s. 286, does not affect the position of these companies (*q*).

Any company registered under the 7 & 8 Vict. c. 110, if not registered under the Companies Act, 1862, did not become illegal, but was subjected to the following consequences:—1. It was incapable of suing, yet not incapable of being sued, either at law or in equity; 2. No dividend was payable to any of its shareholders; and 3. Each director or manager incurred a penalty of 5*l*. a day during default in registering under the Act of 1862 (*r*). Policies issued under these circumstances appear to be valid notwithstanding, and they may be enforced against the company.

No partnership or company consisting of more than twenty persons, which has been formed on or after the 2nd of November, 1862, for the acquisition of gain by the company or its members, is legal unless registered under the Act of 1862 or the Act of 1908 (*s*), or formed in pursuance of some other Act, or of letters patent. The effect of this provision on policies made by such a partnership or company, if not registered, is a point which remains unsettled. The better opinion seems to be that an illegal association and

(*o*) Companies Act, 1862, ss. 193, 194, 196, re-enacted in ss. 260, 261, 263 of the Companies (Consolidation) Act, 1908.

(*p*) Companies Act, 1862, s. 38 (6); Companies (Consolidation) Act, 1908, s. 123 (6).

(*q*) See Companies (Consolidation) Act, 1908, ss. 245, 246, 247.

(*r*) Companies Act, 1862, s. 210.

(*s*) *Ibid.* s. 4; Companies (Consolidation) Act, 1908, s. 1. See Shaw *v.* Benson (1883), 11 Q. B. D. 563; 52 L. J. Q. B. 575; In re Padstow Ass. Association (1882), 20 Ch. D. 137; 51 L. J. Ch. 344.

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its creditors who are cognizant of the illegality will not be assisted by the Courts; but that the association cannot avail itself of its illegality to defeat a claim made by a person who had contracted with it in ignorance of the illegality (*t*).

Consequences of issuing marine policies *ultra vires* of the company.

If the issue of marine policies be *ultra vires* of the company, the policies are invalid, and the premiums paid may be recovered back (*u*).

Form of underwriting by companies.

Since the 5 Geo. 4, c. 114, legalized insurance companies and partnerships, the mode of making them parties to a policy varies with the constitution of each. For this purpose, the several names of all the members of the partnership or company never were necessarily subscribed, notwithstanding the 36 Geo. 3, c. 63, s. 11 (*x*). In some cases, the matter is left as at common law, so that a valid policy is made by the subscription of the partnership firm, or the application of the seal of the body corporate (*y*). But the form of execution may be indefinitely varied by the statute, charter, deed, or articles of association under which the company is constituted (*z*).

(*t*) See Buckley on Companies, 9th ed. pp. 4, 5, where the authorities are cited; see also Lindley on Partnership, 8th ed. p. 127.

(*u*) Re Phœnix Life Ass. Co., Burges *v.* Stocks (1862), 2 J. & H. 441. Accord. Hambro' *v.* Hull & London Fire Ass. Co. (1858), 3 H. & N. 789.

That the objects of a company incorporated under the Act of 1862 or of 1908, as stated in the memorandum of association, cannot be departed from, and consequently that a contract made by the directors in respect of a matter not included in such memorandum, or not fairly incidental to the company's objects as defined therein, is *ultra vires* of the directors, and not binding on the company, is now matter of clear law. See Ashbury Railway Carriage, &c. Co. *v.* Riche (1875), L. R. 7 H. L. 653; A.-G. *v.* Gt. Eastern Ry. Co. (1880), 5 App. Cas. 473.

(*x*) Repealed by the 30 & 31 Vict. c. 23. If partners do underwrite their several names for separate sums, the right of the assured against the partnership assets is not thereby invalidated. Brett *v.* Beckwith (1856), 26 L. J. Ch. 130, *coram* M. R.

(*y*) Mar. Ins. Act, 1906, s. 24 (1), *ante*, § 26.

(*z*) See the general principle laid down and applied in Reid *v.* Allan (1849), 4 Exch. 326; Dowdall *v.* Allan (1849), 19 L. J. Q. B. 41. In an unreported case where a rule for a new trial or to enter a verdict for the defendants was obtained on the ground, among others, that the declaration purported to be on a simple contract, whereas the policy was made by a company under seal, when cause came to be shown on that point, Blackburn, J., inquired whether the seal in that case had any other legal effect than merely to put the contract in the form proper to the company. The point was not further pressed by the defendants. Roper *v.* English and Scotch Marine Ins. Co., *coram* Q. B.

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Association of shipowners for mutual assurance.

80. The business of insurance is carried on, not only by individual underwriters and companies, for the purpose of earning profits, but also largely by associations of shipowners, who agree, each entering his ships for a certain amount, to divide among themselves one another's loss. These are called mutual insurance associations or clubs.

These clubs appear to have originated in the prohibition imposed by the Act of 1719 against insurance by chartered companies, and to have been designed to afford their members a more adequate protection than that furnished by private underwriters for a smaller rate of premium than they required (*a*). The Courts, however, in their endeavour to preserve to the two old companies the monopoly secured to them by the Act of 1719, as against every other public body formed for the purposes of marine insurance, decided that the members of such associations could only be individually, and not collectively, liable to such of their members as sustained a loss (*b*). Consequently, where, in case of the insolvency of any one of the members, all the others covenanted that they would be liable to make good his losses, Lord Kenyon held that such association was illegal, although, except in case of insolvency, each member only covenanted severally to pay for his separate share (*c*). The result of these decisions, of course, was that the objects which such associations had in view were only imperfectly obtained.

Associations under the Companies Act, 1862.

The system of mutual insurance has, however, been entirely altered, in consequence of the abolition of the pro-

(*a*) See per Pollock, B., in Marine Mutual Ins. Assn. *v.* Young (1880), 4 Asp. M. C. 357.

(*b*) Harrison *v.* Millar (1796), 7 T. R. 340, n.; Lees *v.* Smith (1797), *ibid.* 338; and see Strong *v.* Harvey (1825), 3 Bing. 304.

(*c*) Lees *v.* Smith (1797), 7 T. R. 338. It was decided not to be necessary to specify on the face of the policy the respective sums for which the members severally insure. Dowell *v.* Moon (1815), 4 Camp. 166.

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hibition of insurance by corporations and partnerships, and as a result of the Companies Act, 1862. It has been established that a mutual insurance association is a company for the acquisition of gain by the company or its members within sect. 4 of that Act, and is therefore, when consisting of more than twenty members, an illegal association unless registered (*d*).

The consequence is that the associations are now always registered under the Act, usually as unlimited companies, or companies limited by guarantee (*e*). In general, it is now the association itself which is the insurer, not as formerly the individual members, and the cause of action of the member, as assured, is against the association itself, not against the other members. The consideration which the member gives for his insurance is his liability to contribute in the manner provided by the rules of the association to the losses of other members (*f*) and to the expenses of management (*g*), and often also the payment, in addition, of an initial premium, or entrance fee (*h*).

(*d*) In re Arthur Average Association (1875), L. R. 10 Ch. 542; In re Padstow Total Loss Association (1882), 20 Ch. D. 137, in which case an order for the winding-up of an unregistered association of more than twenty members was discharged.

(*e*) See Lion Mutual Marine Ins. Association *v.* Tucker (1883), 12 Q. B. D. 176; In re Bangor & North Wales Mutual, &c. Association, Baird's Case, [1899] 2 Ch. 593; and Corfield *v.* Buchanan (1913), 29 Times L. R. 258, as to the effect of a limitation by guarantee in the event of the winding-up of an association.

(*f*) See the remarks of Brett, M. R., in Lion Ins. Association *v.* Tucker (1883). 12 Q. B. D. 176, 187, on the question of consideration, where the members of the association were themselves the insurers.

(*g*) There are now some clubs, whose policy-holders are divided into two classes—(1) those who pay a fixed premium only, (2) those who are liable to contribute by calls to the losses of other members. If the fixed premiums are insufficient to meet the aggregate losses of the former class, the deficiency is made good by contributions from the members in the latter class; if they exceed the amount of such losses, the surplus is appropriated to the payment of the losses of the second class. See, *e.g.*, Corfield *v.* Buchanan (1913), 29 Times L. R. 258, *infra*, § 83.

(*h*) For a series of rules fixing the liabilities of members, see North-Eastern 100 A SS. Ins. Ass. *v.* Red "S" Steamship Co. (1906), 12 Com. Cas. 26.

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The Stamp Acts apply to mutual insurance.

At one time an opinion prevailed that a policy was not necessary for the validity of contracts of mutual insurance (*i*), but it has been established that the Stamp Acts apply to such insurances, for the validity of which, therefore, a policy containing the particulars required by the Stamp Act, 1891, is requisite (*k*).

In favour of these clubs an exception has been made to the general rule that policies may not be stamped after they have been underwritten (except on payment of a penalty). By sect. 95 of the Stamp Act, 1891, a policy of mutual insurance, originally sufficiently stamped, may, if required, be stamped with an additional stamp.

A club policy has been held to be properly signed within the meaning of the Stamp Act when sealed with the seal of the association, and attested by the manager (*l*); and sect. 24 (1) of the Marine Insurance Act, 1906, declares that the seal of a corporation may be a sufficient signature to a policy.

Mutual insurance is specifically dealt with in sect. 85 of the Marine Insurance Act, 1906, the terms of which are as follow:—

> (1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.
>
> (2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.
>
> (3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(*i*) Bromley *v.* Williams (1863), 32 L. J. Ch. 716; see also Harvey *v.* Beckwith (1864), 2 H. & M. 429.

(*k*) In re London Marine Ins. Association, Smith's Case (1869), L. R. 4 Ch. 611; In re Arthur Average Association (1875), L. R. 10 Ch. 542.

(*l*) Marine Mutual Ins. Ass. *v.* Young (1880), 43 L. T. N. S. 441.

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(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

Sub-sect. (1) does not correctly describe the existing system of mutual insurance; for, as we have seen, it is the associations, not the members, who are now the insurers.

Risks and liabilities insured by the club.

81. The system of mutual insurance is now used by shipowners, not only for the ordinary insurance of ship and freight, but also to cover a number of risks and liabilities which are not protected by the ordinary policies. The insurances are made subject to the articles of association and the rules and regulations of the particular association (*m*), which are usually by express reference incorporated into the policies issued to the members (*n*). One class of mutual insurance associations insures the ships of the members against the same risks as are undertaken by Lloyd's

Ordinary time insurances on ship.

underwriters under their ordinary policies. The policies are made subject to exceptions and special clauses similar in most respects to those contained in the time policies subscribed at Lloyd's. The exception of particular average is, however, not always the same as in the memorandum of Lloyd's policy. Sometimes the amount is not 3*l.* per cent. as in the latter, but 1*l.* per cent. or at a certain rate (*e.g.*, 3*s.*) per gross registered ton. Sometimes the ship is warranted free from particular average under a specified sum, *e.g.*, under 500*l.*

(*m*) A knowledge of the rules by which a member of an association has agreed to be bound will be imputed to him. Turnbull *v.* Woolfe (1862), 7 L. T. N. S. 483.

(*n*) A policy incorporated the provisions of the articles of association, which were indorsed on the policy. One of these articles, which provided that the assured should keep one-fifth of the ship's value uninsured, was invalid for non-compliance with the formalities of the Companies Act. The House of Lords held that the condition was nevertheless binding as a contract. Muirhead *v.* Forth, &c. Mutual Ins. Association, [1894] A. C. 72. Where the policy contained no reference to the rules, it was held that the member who had by letter agreed to be bound by the rules could be sued for a contribution, and that the letter, though unstamped, could be given in evidence. In re Albert Average Association, Blyth's Case (1872), L. R. 13 Eq. 529.

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Another class comprises mutual associations for the insurance of freight. Not only do the policies of these associations insure the members against a loss of freight in respect of which there is an insurable interest, but they commonly incorporate a rule which provides that in case of the total loss of a member's ship, the amount insured with the association shall be deemed to be his interest at risk. This provision seems to amount to an admission of interest, and to make a policy into which the rules are incorporated a wager policy (*o*).

Freight.

Mutual associations have been established to indemnify the members against loss caused by the customary deduction of "thirds" and "sixths" from the cost of new materials or of repairs to their ships (*p*).

"Thirds."

Other associations insure their members against certain kinds of losses, not covered by the ordinary insurances, which are included under the head of "small damage." Among these losses are—(1) particular average losses on ship under 3*l.* per cent. or other small particular average losses which the underwriters except in the ordinary policies; (2) the cost of the wages and provisions of the crew while the ship is ashore, or disabled, or under average repairs; (3) damage to the ship by striking the ground when such striking does not amount to stranding.

Small damage.

Other associations insure shipowners against loss caused by the detention of their ships from various causes, such as

Detention.

(*o*) See *post*, "Wager Policies," §§ 311, 312. In United Kingdom Mutual SS. Ass. Association *v.* Boulton (1898), 3 Com. Cas. 330, a rule of a freight club provided that "the interest insured shall be the amount entered in the association, which amount shall be paid in the event of the total loss of the steamship entered, whether the vessel be loaded, in ballast, or under time charter." Bigham, J., thought that the rule was framed to cover loss of freight consequent on the total loss of the ship, and not caused by perils of the sea. See also Coker *v.* Bolton, [1912] 3 K. B. 315. The plain meaning, however, of this and similar rules seems to be that the assured shall recover in the event of a total loss of ship, whether or not he has any freight at risk, and it is believed that this is the construction which in practice has been put upon these rules.

(*p*) See, as to these deductions, *post*, §§ 1024—1030.

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detention while stranded or sunk, or under repair, detention by breakdown of machinery, in quarantine, through the arrest of the ship, or when the ship is ice-bound in consequence of damage.

Protection and indemnity.

An important class of mutual insurance associations consists of those called protection and indemnity associations. Their object is not only to indemnify their members against certain liabilities, but also to assist them in certain kinds of litigation in respect of their ships, *e.g.*, with charterers, cargo-owners, seamen and public authorities. They usually undertake, *inter alia*, to indemnify their members against liabilities—(1) for life salvage, and for damages in respect of loss of life and personal injury, including now compensation payable to members of the crew and their dependants under the Workmen's Compensation Act, 1906; (2) for medical and funeral expenses, &c. incurred in respect of the crews of their ships (*q*); (3) for the loss of or damage to goods carried on their ships (*r*); (4) for the one-fourth of the damages and expenses consequent on collision, which is not covered by the ordinary collision clause; (5) for damage to harbours, piers, &c.; (6) for the expenses of raising wrecks; (7) for quarantine expenses, and the expenses of disinfection in consequence of outbreaks of disease on their ships. They also usually undertake to pay to the shipowner the cargo's proportion of general average (not including damage to the ship) when it is not recoverable from the cargo-owner or the ship's underwriter (*s*).

(*q*) See Rogers *v.* British Shipowners' Mutual Protection, &c. Association (1896), 1 Com. Cas. 414, in which it was held that the club was not liable under its rules for expenses incurred in obtaining substitutes for members of the crew disabled by illness.

(*r*) For the meaning of the term "improper navigation," where the shipowners were protected against damage to goods on board when caused by the improper navigation of their ship, see Good *v.* London SS. Owners' Mutual Protecting Association (1871), L. R. 6 C. P. 563; Carmichael *v.* Liverpool Sailing Ship Owners' Mutual Indemnity Association (1887), 19 Q. B. D. 242; Canada Shipping Co. *v.* British Shipowners' Mutual Protection Association (1889), 23 Q. B. D. 342. See also The Warkworth, C. A. (1884), 9 P. D. 145.

(*s*) It is not the practice of protection and indemnity associations to issue policies to their members. The contract between the association and the member is effected by a request, usually made on a printed form on the part of the shipowner addressed to the association, to enter the specified ship or ships for protection and indemnity for specified tonnages, and the acceptance of such request by the association. Whether or not this procedure is sufficient to make a valid contract depends on whether the contract is "a contract for sea insurance" within the meaning of s. 93 of the Stamp Act, 1891. It would, in fact, be impossible to comply with the provisions of s. 93 (3), which requires that a policy of sea insurance shall specify *inter alia* the sum or sums insured. (See also Mar. Ins. Act, ss. 22, 23 (4), 91 (1) (a).) This impossibility is due to the fact that the liability of the association is not restricted to any particular sum, and any such restriction would defeat the main object for which the association exists—*i.e.*, to protect its members against liabilities which are themselves indefinite.

A contract of this nature differs from an ordinary contract of marine insurance, inasmuch as it does not pretend to recoup a member for damage affecting any subject-matter of insurance. And it is not at all clear from the Stamp Act that an agreement of indemnity against a liability to a third person, although such liability may itself arise indirectly from a sea peril, is itself a contract for sea insurance requiring a policy. Of the liabilities ordinarily undertaken by such associations, that which it is most difficult to distinguish from a sea risk is the liability to pay the shipowner the cargo's proportion of general average in certain cases.

On the other hand, s. 93 (1) of the Stamp Act expressly exempts the insurances referred to in s. 55 of the Merchant Shipping Act Amendment Act, 1862, from the necessity of being expressed in a policy of sea insurance. These are insurances against liability for damages, in respect of which a shipowner was thereby entitled to limit his liability—*i.e.*, for loss of life and loss of or damage to goods on board his ship. This subsection is unnecessary unless a policy of sea insurance would otherwise be requisite. Its existence is, therefore, some ground for the argument that, inasmuch as the associations undertake other risks of the same nature as those referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862, which, however, are not excepted by s. 93 (1) of the Stamp Act, 1891, a policy in respect thereof is necessary.

The question might also be raised whether an agreement between such an association and a member, if containing several provisions of which some taken by themselves do, but others do not, amount to sea insurance, is severable, so that the contract would be good so far as its terms were not required to be expressed in a policy, and bad only as to the remainder; or whether, on the other hand, the whole agreement is void. In many cases there would undoubtedly be much difficulty in severing the different provisions of such an agreement from each other. It may be arguable that where the agreement between the association and the member provides for an indemnity against a large number of liabilities, only one or

Sect. 81. War risks.

In consequence of the modern practice of inserting in the ordinary policies the clause excepting capture and seizure,

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associations have also been founded for mutual insurance against war risks.

Rules of mutual insurance associations.

82. The rules of the mutual insurance associations vary according to their objects, and to some extent according to the views of their directors and members; but there are certain provisions which are almost invariably to be found in the rules of all.

It is usually provided that a person desiring to insure a ship shall deliver to the association a proposal in writing, authorizing the directors, if they accept the proposal, to enter his name in the register of members, and the insurance in the register of insurances (*t*).

We have already seen that a contract for sea insurance must, with certain exceptions, to be valid, comply with the requirements of the Stamp Act. Where, however, a member of a mutual association, having vessels on its books as insured, paid calls and otherwise acted as if he were a member, he was held to be estopped, in an action for calls on losses, from denying his liability on the ground that the losses were paid without any stamped policies having been issued (*u*). Again, where a ship insured with an association was lost, and the books showed that the sum due to the member for the loss had been assessed by the committee and paid by the members, it was held that there was a sufficient admission of liability in the books to enable the assured to recover without producing a stamped policy (*x*).

two of which require to be insured against by a policy, the contract, taken as a whole, is not one which requires to be expressed in a policy of sea insurance.

(*t*) Where a rule provided that a person became a member only by signing the articles, the association was held to be estopped from asserting that a person was not a member who had not so signed, but who had paid contributions claimed by the association from him. Edwards *v.* Aberayron Mutual Ship Ins. Society (1875), 1 Q. B. D. 563.

(*u*) Barrow-in-Furness Mutual Ship Ins. Co. *v.* Ashburner (1885), 54 L. J. Q. B. 377. See, however, In re London Marine Ins. Association, Smith's Case (1869), L. R. 4 Ch. 611.

(*x*) In re Teignmouth and General Mutual Shipping Association (1872), L. R. 14 Eq. 148; 41 L. J. Ch. 679.

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The practice is to insure by time policies from noon of the 20th of February, Greenwich time, or from noon of the date entered in the register of insurances, until noon of the following 20th of February. There is usually a rule which provides that the insurances shall be renewed from year to year on the 20th of February, unless either the member or the association gives notice to terminate the insurance in the manner and at the time prescribed by the rules (*y*).

There is almost always a rule declaring that no policy issued by the association shall be assigned, mortgaged, or disposed of, so as to pass any part of the beneficial interest in the policy, without the consent of the association endorsed upon the policy (*z*). Another usual rule provides that the association shall not be bound to take notice of the interest of any person, other than the member insuring, in any ship or insurance, unless a memorandum of the name and interest of such person has been endorsed on the policy with the consent of the association.

Usually the rules provide that the insurance shall cease on the death, insolvency, or lunacy of the member, or if the member mortgages the ship (*a*), unless a sufficient guarantee for the payment of all contributions be given to the associa-

(*y*) This rule has been held not to make a club policy a continuing policy beyond the day on which it is expressed to terminate: Lishman *v.* Northern Maritime Ins. Co. (1873), L. R. 8 C. P. 216; in the Exch. Ch. (1875), L. R. 10 C. P. 179. See *post*, § 440.

(*z*) See Laurie *v.* West Hartlepool Thirds Indemnity Association (1899), 4 Com. Cas. 323.

(*a*) See Turnbull *v.* Woolfe (1862), 7 L. T. N. S. 483; Alexander *v.* Campbell (1872), 41 L. J. Ch. 478. A rule which provided that "no vessel which is mortgaged shall be insured unless the mortgagee gives a written guarantee, &c.," was held to apply only to a ship mortgaged at the time when the insurance was made, and not to render a guarantee necessary when a ship was mortgaged afterwards. Hutchinson *v.* Wright (1858), 25 Beav. 444; 27 L. J. Ch. 834. For the construction of this rule, see also North-Eastern 100 A SS. Ins. Ass. *v.* Red "S" Steamship Co. (1905—6), 10 Com. Cas. 245; 12 Com. Cas. 26. In that case the Court of Appeal held, affirming Channell, J., that the member, although unprotected in consequence of the rule, was liable under the rules of the association to pay contributions.

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tion (*b*). In general, also, the liability to contribute to future losses ceases on the loss or sale of the ship.

In case of a dispute between a member and the association with regard to a claim, the rules almost invariably make a reference to arbitration a condition precedent to the right of the member to bring an action (*c*).

Contributions.

83. The most characteristic feature of the system of mutual insurance, viz., that the losses are divided among the members, has already been pointed out. Frequently an entrance fee is paid when a ship is accepted for insurance, and many associations require an initial premium to be paid every year in respect of each ship insured. When a claim for a loss has been allowed and there is no fund, such as the initial premiums, out of which it can be paid, the necessary

How assessed.

sum is raised by a call on all the members. The contributions are assessed on them either in proportion to the amounts for which they are insured, or in proportion to the gross registered tonnage of their ships, as the rules prescribe. Sometimes in insurances on ships, contributions in respect of total and general average losses are levied on the amounts insured, while contributions for particular average losses are assessed according to tonnage.

Claims for losses or contributions by or against part-owners other than members.

Where an association was by the terms of its policies under liability only to the member, it was held that a part-owner of a ship other than the member could not bring an action on the policy for a loss (*d*). Similarly, it was held that an association could not bring an action for contributions against a part-owner, as the undisclosed principal of the managing owner who had become a member of the association in respect

(*b*) See Hughes *v.* Tindall (1856), 18 C. B. 98.

(*c*) See Scott *v.* Avery (1855), 5 H. L. Cas. 811; 25 L. J. Ex. 308. For the effect of a rule which provided that in certain events the decision of the directors should be final, see The Warwick (1890), 15 P. D. 189. An improper hearing by the directors does not preclude a member from bringing an action. *Ibid.*; Edwards *v.* Aberayron Mutual Ship Ins. Society (1876), 1 Q. B. D. 563.

(*d*) Montgomerie *v.* United Kingdom Mutual SS. Assurance Association, [1891] 1 Q. B. 370.

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of the ship, when the policy was expressed in a form which made the member only liable upon it (*e*). Where, however, the policy issued to the managing owners of a ship, who insured her in their own names, was an adaptation of Lloyd's policy, containing the clause "as well in his or their own names as for and in the name or names of all and every other person to whom the same doth, may, or shall appertain, &c.," it was held that the other owners could be sued for contributions, as being the persons insured by the policy (*f*).

The result of the cases is that, generally speaking, under the rules and policies of the associations, the owners of a ship, who authorize a person to effect an insurance with and to become a member of an association, are liable, as assured, to be sued for contributions. They ought, therefore, on general principles to be able themselves to enforce claims for losses; but the rules often provide that claims can only be enforced by the member. The question whether the owners who authorize the insurance are themselves members was raised but not decided in one of the cases. "It may be," said Lord Esher, "that the defendants" (the assured) "are members for the purpose of paying contributions, though not for the purpose of voting, and that they are not liable to contribute to the expenses of the association other than in respect of losses of other ships insured" (*g*). Subject to any special rules of the particular association, it is submitted that this is a correct view of their position.

Issue of policies to non-members.

The memorandum of a mutual insurance association enabled it to undertake re-insurance risks generally, and the

(*e*) United Kingdom Mutual SS. Ass. Association *v.* Nevill, C. A. (1887), 19 Q. B. D. 110 See per Lord Esher, M. R., 22 Q. B. D. 719.

(*f*) Great Britain 100 A 1 SS. Ins. Association *v.* Wyllie, C. A. (1889), 22 Q. B. D. 710; following Ocean Iron SS. Association *v.* Leslie (1887), *ibid.* 722, n.; British Marine Mutual Ins. Co. *v.* Jenkins, [1900] 1 Q. B. 299. In the last-mentioned case Bigham, J., held that this liability was not inconsistent with the rule that "a member shall be uninsured in respect of any interest entered if he becomes bankrupt or insolvent," unless an approved guarantee be given.

(*g*) Great Britain 100 A 1 SS. Ins. Association *v.* Wyllie (1889), 22 Q. B. D. at p. 717.

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policies of re-insurance issued by the association at fixed rates of premium declared that the assured should not be liable for further contributions, nor entitled to share in any profit, and that they waived any right of voting at the general meetings. One of the articles of association provided that every person effecting an insurance or re-insurance should be deemed to have become a member. The House of Lords held that, notwithstanding this article, this class of policy-holders were not members, and could not be made contributories in the winding-up, and also that the issue of the fixed premium policies was not *ultra vires* (*h*).

84. Sometimes compliance with a rule which is incorporated in a policy is expressly made a condition precedent to the liability of the association (*i*). Whether a rule, not expressed to create a condition precedent, is a warranty, depends on its nature. Thus a rule providing that ships should not sail on certain voyages between certain dates was held to be a warranty; whereas a rule which provided that a vessel beaching before or after a specified time was not entitled to recover for any subsequent loss until surveyed and reported sufficient, was stated to create merely an exception as to the damage taking place between the beaching and the survey (*k*).

(*h*) Corfield *v.* Buchanan (1913), 29 Times L. R. 258.

(*i*) See Stewart *v.* Wilson (1843), 12 M. & W. 11. See Sailing Ship Dewa Gungadhur Co. *v.* United Kingdom Maritime Mutual Ins. Association (1886), 2 T. L. R. 366, for a decision on a rule providing that the insurance should cease if the member neglected to pay calls. In Williams *v.* British Mutual Marine Ins. Co. (1887), 3 T. L. R. 314, the Court of Appeal held that the member could set off against a call a loss, the amount of which had been adjusted, and that the association could therefore not forfeit the policy for non-payment of the call.

(*k*) Colledge *v.* Harty (1851), 6 Exch. 205; 20 L. J. Ex. 146. See also Harrison *v.* Douglas (1835), 3 A. & E. 396.

CHAPTER V.

OF THE ASSURED; WHO MAY BE INSURED.

SECT.
Insurances on Enemy's Property ..... 85—89
Who is for commercial purposes an Alien Enemy .....90—100

85. ALL persons, whether aliens or British subjects, may be insured, with the exception of alien enemies; that is, persons who, either by birth or domicil, belong to a state actually engaged in war with our own.

All persons may be insured except alien enemies.

This restriction is an obvious consequence of that universally recognized principle in the law of nations, viz., that the object of a maritime war is the destruction of the enemy's commerce and navigation, in order to weaken and destroy the foundations of his naval power. As marine insurance has for its object the protection of commerce and navigation, it would obviously be inconsistent with the very purposes of a maritime war, to permit insurance on the shipping and trade of the enemy. "*Hostium enim pericula in se suscipere, quid est aliud quam eorum commercia maritima promovere?*" (*a*).

Lord Mansfield upheld insurances by alien enemies.

It was for a long time, however, an unsettled question in English law, whether the insurance of enemy's property was or was not illegal at common law. Lord Hardwicke, in the year 1749, said it had never been declared in our Courts to be unlawful (*b*); and Lord Mansfield supported the practice, not apparently upon any principles of law (*c*), but on fancied grounds of expediency; supposing that English underwriters would thereby gain more in premiums than they would lose

(*a*) Bynkershoek, Quæst. Jur. Publ., l. 1, c. 21.

(*b*) Henkle *v.* Royal Exch. Co. (1749), 1 Ves. Sen. 317, 320.

(*c*) Buller, J., said that he never could get him to give any opinion as to its legality: Bell *v.* Gilson (1798), 1 B. & P. 345, 354.

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by captures (*d*). Valin, however, followed by Pothier and Emerigon, declares that owing to the permission of this practice in England, one part of our nation restored to theirs, by the effect of insurances, what the other part took from them by the rights of war (*e*).

Temporary prohibition by statute.

The English legislature by two temporary statutes, one in 1748 (*f*), and another in 1792 (*g*), prohibited the insurance of any ships or merchandise belonging to France during the wars then pending with the subjects of that nation.

Such insurances finally determined to be illegal.

At length the Courts of Westminster Hall took the whole subject into consideration upon general principles, and established, by a long course of decisions, under Lord Kenyon, Lord Alvanley, and Lord Ellenborough, that such insurances were not only illegal and void, but repugnant to every principle of public policy (*h*).

"The question is," says Lord Alvanley, "whether it be competent to an English underwriter to indemnify persons who are engaged in war with his own sovereign, from the consequences of that war; and we are all of opinion that, on the principles of the English law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such contract is as much prohibited as if it had been expressly forbidden by Act of Parliament" (*i*).

Cases which established this rule.

86. The first two cases in which the question was formally

(*d*) Planché *v.* Fletcher (1779), 1 Dougl. 251; Gist *v.* Mason (1786), 1 T. R. 88; Lavabre *v.* Wilson (1779), 1 Dougl. 284.

(*e*) 2 Valin, tit. vi. Des Assurances, art. 3, p. 215 (he is speaking of the war terminated by the Peace of Paris, 1763); Pothier, Traité, d'Assurance, No. 95; Emerigon, c. iv. s. 9, vol. i. p. 128. Boulay-Paty says that by French law such insurances are illegal; Comment. on Emerigon, vol. i. p. 131.

(*f*) 21 Geo. 2, c. 4.

(*g*) 33 Geo. 3, c. 27.

(*h*) Brandon *v.* Nesbitt (1794), 6 T. R. 23; Bristow *v.* Towers (1794), *ibid.* 35; Furtado *v.* Rogers (1802), 3 B. & P. 191; Kellner *v.* Le Mesurier (1803), 4 East, 396; Gamba *v.* Le Mesurier (1803), *ibid.* 407; Brandon *v.* Curling (1803), *ibid.* 410; M'Connell *v.* Hector (1802), 3 B. & P. 113; Le Luneville *v.* Phillips (1806), 2 B. & P. N. R. 97.

(*i*) In Furtado *v.* Rogers (1802), 3 B. & P. 198.

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decided (Brandon *v.* Nesbitt and Bristow *v.* Towers (*k*)) proceeded exclusively on the ground that such a contract could not be enforced in our Courts. They did not directly decide the question whether such insurances were absolutely illegal in their own nature. But in the case of Furtado *v.* Rogers, Lord Alvanley, then presiding in the Court of Common Pleas, laid it down decisively, that insurances effected on behalf of an alien enemy, though made previously to the commencement of hostilities, and therefore legal in their inception, could not cover a loss by British capture after war had broken out; and that no action could be brought upon them in our Courts even after the restoration of peace (*l*).

Decisions of Lord Ellenborough.

The language of Lord Ellenborough in condemning these insurances was even stronger than that of Lord Alvanley; he pronounced them to be not only illegal and void, but repugnant to every principle of public policy. Whether the loss in respect of which the assured sought to recover were a loss by British capture (*m*), or by capture by a co-belligerent (*n*); whether the insurance were effected before or after the breaking out of hostilities (*o*); or whether the action were brought during war or after the restoration of peace (*p*); Lord Ellenborough's decision was uniformly the same; and he declared, that every insurance on alien property by a British subject must be understood with this limitation, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the underwriters.

Semble, insurance on a British ship against British capture legal.

When, however, it was attempted to extend this principle still further, to an insurance on a British ship against British capture, the point was not decided, but the Court intimated a

(*k*) (1794), 6 T. R. 23, 25.

(*l*) Furtado *v.* Rogers (1802), 3 B. & P. 191.

(*m*) As in Kellner *v.* Le Mesurier (1803), 4 East, 396.

(*n*) As in Brandon *v.* Curling (1803), 4 East, 410.

(*o*) As in Furtado *v.* Rogers (1802), 3 B. & P. 191; or Brandon *v.* Curling (1803), 4 East, 410.

(*p*) As in Gamba *v.* Le Mesurier (1803), 4 East, 407.

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pretty clear opinion, that it would only be illegal in the case of a foreign ship (*q*).

Summary of Rules established during great French war.

Thus it came to be established during the great French war, 1st, that an insurance effected by an alien enemy is an illegal contract, and therefore void *ab initio;* 2ndly, that an alien enemy cannot recover for a loss occurring during the existence of the war, even though the insurance was effected before its commencement. Neither of these propositions was disputed in the case of Janson *v.* Driefontein Consolidated Mines, and both of them are confirmed by the judgments delivered therein. In that case an attempt was made to extend the rule that losses incurred by an alien enemy are not recoverable. On the 2nd of October, 1899, when the relations between the British Government and the South African Republic had become strained, a quantity of gold in transit to the United Kingdom, belonging to a company incorporated under the laws of the Republic, was seized by order of the Government of the Republic. War broke out on the 11th of October. In an action on a policy by which the gold had previously been insured against capture, the insurers contended that the company could not recover, as the gold had been seized by its own Government for the purposes of hostilities against this country; and in the Court of Appeal Vaughan Williams, L. J., held that, on grounds of public policy, a British subject cannot legally contract to indemnify the subject of a foreign state against a loss by the forcible seizure of his property by the foreign Government for the purpose of an imminent war with this country. The other members of the Court of Appeal held, however, that as at the time of the seizure the two countries were

Attempt to extend rules.

Insurers liable for capture by foreign Government in time of peace, though war imminent.

(*q*) Lubbock *v.* Potts (1806), 7 East, 449. This opinion was confirmed during the late war by the decision of Bailhache, J., and the Court of Appeal in Sanday *v.* British and Foreign Mar. Ins. Co., [1915] 2 K. B. 781, that there were no grounds of public policy which prevented a British assured from recovering against British insurers for a loss by a restraint imposed by the British Government: *S. C.* in H. L., where this point was not taken, [1916] 1 A. C. 650. See *post*, § 803.

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still at peace, the assured could recover for the loss (*r*), and the House of Lords unanimously affirmed their decision (*s*). "The authorities referred to in the argument," said Lord Halsbury, L. C., "do not justify the proposition that expected wars render a contract illegal between citizens of the two nations between whom war is anticipated, and to lay down such a rule would be to establish an entirely new code, for which there is no authority in the law."

Return of premium.

87. If the contract of insurance be effected before the commencement of hostilities, it is legal in its inception; and if the risk have once attached on such policy, there can be no return of premium (*t*). If the policy be knowingly effected after hostilities have commenced, the assured has no right to a return of premium (*u*), unless before the commencement of the risk he has duly renounced the contract (*x*). If, however, an agent in this country innocently effects an insurance for one, who has become an alien enemy by the breaking out of hostilities before the policy was effected, the agent being unaware of that fact at the time he procured it, the premium thus paid under a mistake of fact may be recovered back from the underwriter (*y*).

An alien enemy who is licensed to trade may be insured.

88. An alien enemy having a licence or privilege to trade has the right of insuring his property as incident to the right of trading (*z*). Such a licence not only legalizes the commerce, and therefore the insurance by which it is sought to

(*r*) Driefontein Consolidated Mines *v.* Janson, [1901] 2 K. B. 419, affirming the decision of Mathew, J., [1900] 2 Q. B. 339.

(*s*) Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484. The doctrine of public policy is elaborately discussed in the judgments.

(*t*) Furtado *v.* Rogers (1802), 3 B. & P. 191.

(*u*) Vandyck *v.* Hewitt (1800), 1 East, 96; Morck *v.* Abel (1802), 3 B. & P. 35; Lubbock *v.* Potts (1806), 7 East, 449.

(*x*) Palyart *v.* Leckie (1817), 6 M. & S. 290; and the cases cited *post*, Vol II. "Return of Premium."

(*y*) Oom *v.* Bruce (1810), 12 East, 225; Hentig *v.* Staniforth (1816), 5 M. & S. 122.

(*z*) Wells *v.* Williams (1697), 1 Salk. 45; 1 Lord Raymond, 282, *S. C.*

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be protected (*a*), but also enables the alien enemy, so licensed, to sue upon the policy, not only in the name of the agent, but in his own (*b*). "Whatever commerce of this kind," says Lord Ellenborough (*c*), "the Crown has thought fit to permit, must be regarded by the Courts of Law as legal with all the consequences of its being legal; one of which consequences is a right to contract with other subjects of the country for the purpose of protecting such property by insurance."

Hence, where a licence to trade with the enemy was given to three persons, two of whom themselves became alien enemies before action brought; it was held, that the broker, who had effected the policy for all the three, might, nevertheless, recover upon it (*d*).

Right to sue suspended during war.

89. Where the party intended to be insured by the policy does not become an alien enemy, until after the loss and the cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities, and revives on the restoration of peace (*e*); and where the policy had been made out in the name of a British agent, and the underwriter had only pleaded the general issue, it was held that the agent could recover on it during the war (*f*). Where the war has broken out before the loss, the policy, as we have already seen, becomes wholly illegal and void (*g*).

(*a*) Kensington *v.* Inglis (1807), 8 East, 273; Conway *v.* Gray (1809), 10 East, 536.

(*b*) Usparicha *v.* Noble (1811), 13 East, 332.

(*c*) 13 East, 341.

(*d*) De Tastet *v.* Taylor (1812), 4 Taunt. 233.

(*e*) Flindt *v.* Waters (1812), 15 East, 260. See also Alcinous *v.* Nigreu (1854), 4 E. & B. 217; 23 L. J. Q. B. 287; Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 454, at pp. 493, 499, 508. An enemy underwriter may be sued during the war in the King's Courts: Robinson *v.* Continental Ins. Co. of Mannheim, [1915] 1 K. B. 155; Ingle *v.* Continental Ins. Co. of Mannheim, [1915] 1 K. B. 227. See also as to the right to sue an enemy, Porter *v.* Freudenburg, [1915] 1 K. B. 857 (C. A.); Halsey *v.* Lowenfeld, [1916] 2 K. B. 707 (C. A.). As to joining an enemy co-partner as plaintiff in an action by a British firm, see Rodriguez *v.* Speyer Bros., [1919] A. C. 59.

(*f*) Flindt *v.* Waters, *supra*. See note (*i*), *infra*.

(*g*) Gamba *v.* Le Mesurier (1803), 4 East, 407.

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Defence that defendant an enemy not favoured.

The defence that the plaintiff is an alien enemy is not regarded in our Courts with indulgence (*h*). Thus, where a defendant had obtained time to plead, on the terms that he should plead issuably, and afterwards war was declared between this country and the state of which the plaintiff was a subject, the Court refused leave to the defendant to plead that the plaintiff was an enemy (*i*).

Who are alien enemies.

Domicil the leading test of national character.

90. An alien enemy, in the primary sense of the words, said Arnould, is the natural born subject of a state actually engaged in war with our own; but for all commercial purposes the domicil of the party, without reference to his place of birth, is the leading test of national character. Every person domiciled in a state actually engaged in hostilities with our own is an alien enemy, whether he be a subject of that state or not (*k*).

(*h*) Per Lord Kenyon, Casseres *v.* Bell (1799), 8 T. R. 166; Harman *v.* Kingston (1811), 3 Camp. 153; per Younger, J., Schaffenius *v.* Goldberg, [1916] 1 K. B. 284, at p. 296. Cf. per Scrutton, L. J., in Central India Mining Co. *v.* Société Coloniale Anversoise, [1920] 1 K. B. 753, at p. 771.

(*i*) Shepeler *v.* Durant (1854), 14 C. B. 582; 23 L. J. C. P. 140. In Driefontein Consolidated Mines *v.* Janson, [1900] 2 Q. B. 339, a company incorporated under the law of the South African Republic brought an action on a policy of insurance during the war between the Republic and this country. The parties agreed that no dilatory plea should be set up on the ground that the plaintiffs were an alien enemy, and the action was tried while a state of war existed. In the Court of Appeal Vaughan Williams, L. J., expressed a doubt whether it was not against public policy for the Court to give effect to such an agreement: [1901] 2 K. B. at p. 432; and a similar doubt was expressed in the House of Lords by Lord Davey: [1902] A. C. at p. 499. Lord Lindley, on the other hand, approved of the course taken in this case, which he considered justified by the decision in Flindt *v.* Waters: *ibid.* at p. 509.

(*k*) The Indian Chief (1801), 3 C. Rob. 12, 18. Domicil, for commercial purposes in time of war, must, however, not be confounded with domicil in the technical sense which the word has now acquired. In that sense, as Professor Dicey points out, domicil denotes the place or country which the law deems to be a person's permanent home. Thus, an Englishman who goes to a foreign country and sets up in trade there with the intention of returning in ten years, retains his English domicil of origin. But if war broke out between Great Britain and that country, and he continued to reside and trade there, he would, for commercial

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In Porter *v.* Freudenburg (*l*), Lord Reading, C. J., delivering the judgment of the full Court of Appeal, laid down the rule thus: "For the purpose of determining civil rights a British subject or the subject of a neutral state, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory." The term "domicil" does not occur in the judgment, and in a later case (*m*) Lord Cozens-Hardy, M. R., said that in Porter *v.* Freudenburg it was held that domicil is not the true test of whether a person is an "alien enemy." If "domicil" is to be taken to cover only the "civil domicil" (*n*), it is not the test of enemy character. But there is high authority for the use of the term to denote the "commercial domicil," *i.e.*, such residence as is the primary test of national character in time of war (*o*), and the editors have not thought it advisable to alter the phraseology of this treatise.

purposes, undoubtedly be regarded as an enemy. In order, therefore, to distinguish between the legal domicil and that domicil or residence which determines the character of a person in time of war, the learned professor calls the former the civil and the latter the commercial domicil. Dicey, Conflict of Laws, 2nd ed. App. n. 7, p. 741. See also per Scrutton, L. J., in Tingley *v.* Müller, [1917] 2 Ch. at pp. 172, 173. The term "domicil" is used in the latter sense by Arnould, as well as by Duer (Ins. vol. i. p. 495) and Marshall (Ins. vol. i. p. 390). Lord Stowell in his judgments uses the words "domicil" and "residence" indifferently.

The rule that national character in time of war depends on commercial domicil is recognized in the Prize Law of the United States and of Japan; but the general rule in Continental states is that the national character of property is determined by the national character of the owner.

(*l*) [1915] 1 K. B. 857, at p. 869. Cf. the Trading with the Enemy Proclamation (No. 2) of the 9th September, 1914: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country."

(*m*) Tingley *v.* Müller, [1917] 2 Ch. at p. 155.

(*n*) See note (*k*), *supra*.

(*o*) *Ibid.* The term "commercial domicil" is used in this sense by Scrutton, L. J., in Tingley *v.* Müller, [1917] 2 Ch. at p. 173, and in

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Enemy subjects permitted to reside in the Kingdom.

The test of residence is also applied to determine the national character for commercial purposes of a subject of an enemy State. When he is allowed after the outbreak of war to reside in this country by the license, express or implied, of the Crown, he is not regarded as an alien enemy. He is able, during the war, to make valid contracts and to sue in the King's Courts (*p*).

Definition of domicil.

That is properly the domicil of a person, where he has his true fixed home, and principal establishment; in which, when present, he has the intention of remaining (*animus manendi*), and from which he is never absent without the intention of returning (*animo revertendi*) directly he shall have accomplished the purpose for which he left it (*q*).

Tests of domicil.

The two great tests of domicil are: 1. The fact of residing in a place (*factum manendi*); 2. The intention of abiding there (*animus manendi*), either for a permanency or an indefinite period (*r*), or, so far as commercial domicil is concerned, even for a definite period if it be a considerable one (*s*).

the judgments in prize cases, where the national character of a person or his property was in issue. See The Flamenco (1915), 1 Brit. & Col. Prize Cases, 509; The Eumæus (1915), 85 L. J. P. 130; The Manningtry, [1916] P. 329; The Anglo-Mexican, [1916] P. 112; [1918] A. C. 422; The Hypatia, [1917] P. 36; The Posteiro (1917), 3 Brit. & Col. Prize Cases, 275.

(*p*) Porter *v.* Freudenburg, [1915] 1 K. B. 857; Schaffenius *v.* Goldberg, [1916] 1 K. B. 284, which also decided that the internment of an alien enemy under the Aliens Restriction Order, 1914, did not operate as a revocation of the license to remain in this country, which was implied in registration.

(*q*) This agrees almost verbatim with the definition given in the Civil Law, Code, lib. x. tit. 39, f. 7, as cited in Story's Conflict of Laws, c. iii. s. 42.

(*r*) Story's Conflict of Laws, c. iii. s. 44.

(*s*) Arnould seems not to have considered that an intention to reside for a definite, though lengthy, period would effect a change of commercial domicil. See, however, Lord Stowell's opinion as expressed in The Harmony (1800), 2 C. Rob. 324, 325; Dicey, Conflict of Laws, 2nd ed. 743; 1 Duer, 408, 501. In Tingley *v.* Müller, [1917] 2 Ch. at p. 173, Scrutton, L. J., says: "To gain a commercial domicil residence with no intention of leaving shortly is sufficient, and time is the principal element in the domicil."

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Presumption of domicil arises from residence. How rebutted.

Primâ facie the presumption arising from actual residence in a place, is that the party is there *animo manendi* (*t*). Directly, however, it appears that the residence was not coupled with any real *animus manendi*, the presumption arising from the mere fact of actual residence is rebutted. Hence, if a man has merely come into a foreign country to accomplish a particular purpose intending to return to his own country directly such purpose has been accomplished, he will not in general be considered to have acquired even a commercial domicil by a residence connected with such purpose (*u*). And the same principle applies to all cases of involuntary residence in a foreign country; for instance, if a man is detained on the breaking out of hostilities in an enemy's country, this forced residence will not impress him with the character of an alien enemy (*x*). In the latter class of cases there is no *animus manendi* at all, but merely a *compulsio manendi:* in the former there is no *animus manendi* in the sense requisite to gain a domicil.

Residence in belligerent country for special purpose.

91. It is principally in these cases, in which parties having originally left their own country for some special purposes of pleasure, or of business, continue to reside for a long time in a foreign country in the prosecution of such purposes, that the question of domicil becomes most difficult.

If the party continues to reside in the foreign land for some time after he has accomplished the purpose for which he originally went there, such continued residence, especially if accompanied by trading, will be held to operate a change of domicil (*y*). Further, a party cannot remain an unlimited or indefinite time in a foreign country, even for the

(*t*) The Bernon (1798), 1 C. Rob. 102; The Diana (1803), 5 C. Rob. 60; The President (1804), *ibid.* 277; The Ocean (1804), *ibid.* 90.

(*u*) The Harmony (1800), 2 C. Rob. 322.

(*x*) Per Lord Ellenborough in Bromley *v.* Hesseltine (1807), 1 Camp. 77; The Ocean (1804), 5 C. Rob. 90.

(*y*) So held in a case decided in the United States, where a foreigner, having come to New York for the recovery of his health, continued there after he had recovered, and engaged more or less in trade: Elbers *v.* United Ins. Co. (1819), 16 Johns. New York Rep. 128.

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accomplishment of a special purpose, without assuming the national character of the country of his residence (*z*). It is with reference to this class of cases that Lord Stowell says: "Be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute domicil" (*a*).

On the other hand, where there has not been originally any intention of making a protracted stay, but only of residing for a limited time, and a definite purpose; but the period of residence has been extended by direct constraint, such residence, however protracted, will not change the original domicil (*b*); and where a treaty allows aliens a definite period of time for the purpose of realizing their property and leaving the territory, no presumption of an intention to reside will arise from their stay during that period (*c*).

The great test of domicil is the *animus manendi*.

92. It may therefore be laid down as a general rule that the chief point to be considered is the *animus manendi:* even the shortest residence, if with a design of a permanent settlement, stamps the party so residing with the national character (*d*).

What will be considered as evidence of an *animus manendi*.

To ascertain the real intention of the party himself, no circumstance can be regarded as unimportant which can in any way tend to throw light upon it, and the amount of evidence required to establish an *animus manendi* must, of course, vary with the circumstances of the particular case.

Thus, slighter evidence would be required to determine the domicil of a man returning to his own country, than of the

(*z*) See the judgment of Lord Stowell in The Harmony (1800), 2 C. Rob. 322.

(*a*) The Harmony (1800), 2 C. Rob. 322, at p. 325. See also Tabbs *v.* Bendelack (1801), 4 Esp. 108; The Ann Green (1812), 1 Gallison, Adm. Rep. 274; Marryatt *v.* Wilson, Ex. Ch. (1799), 1 B. & P. 430; *S. C.*, in the K. B. (1798), 8 T. R. 31; The Friendschaft (1818), 3 Wheaton, 14, 51.

(*b*) See The Ocean (1804), 5 C. Rob. 90.

(*c*) The Diana (1803), 5 C. Rob. 60.

(*d*) The Diana (1803), 5 C. Rob. 60; The Venus (1814), 8 Cranch, S. C. R. 253; 1 Kent, Com. 76.

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same man going to reside in a foreign land. In the former case there is a natural presumption that the party is returning to re-assume his original character; in the other the natural presumption rather is, that he is not going to make his home in the foreign country, but intends to return thence to his own, when he shall have accomplished the objects of his journey. Hence a national character, acquired in a foreign country by residence, changes immediately the party has left such country *animo non revertendi;* and this is especially the case if he be returning to his native country, *sine animo revertendi*. In such case the native domicil revives while he is yet *in transitu*, for it very easily reverts, and is re-acquired the moment the foreign domicil is abandoned (*e*). But here, as in all other cases, the *animus manendi*, or, rather, the *animus non revertendi*, is the all-important test; and therefore a mere return to a man's native country, without any intention to abandon his foreign domicil, does not, as we have seen, work any change of domicil (*f*). Thus, where a British-born subject, who had been adopted, and acquired a domicil, as a citizen of the United States, returned for a few days to the British dominions, in the course of prosecuting a voyage from America to the East Indies, his native national character was held not to have reverted by this limited stay in his native country for a temporary purpose (*g*). So a British-born subject, having a mercantile establishment in Lisbon, was held, in the United States, not to have lost the Portuguese national character by returning to England for a special purpose (*h*).

Leaving a foreign country *animo non revertendi*.

(*e*) So held by Lord Stowell in The Indian Chief (1801), 3 C. Rob. 12, at p. 20. See also La Virginie (1804), 5 C. Rob. 98. This passage was quoted with approval by Scrutton, L. J., in Tingley *v.* Müller, [1917] 2 Ch. 144, at p. 174. On the other hand, Lord Cozens-Hardy, M. R., was of opinion that a German who had resided many years in England, and left after the outbreak of war with the intention of returning to Germany, did not become an alien enemy until he actually took up his residence in Germany: *ibid.*, at p. 155. On the view taken of the facts by the Court, it was unnecessary to decide this point.

(*f*) Wilson *v.* Marryatt (1798), 8 T. R. 31; The Friendschaft (1818), 3 Wheaton's Supreme Court R. 14, 51; The Ann Green (1812), 1 Gallison's R. 274; see also The Indian Chief (1801), 3 C. Rob. 12.

(*g*) Wilson *v.* Marryatt (1798), 8 T. R. 31.

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Trading the strongest proof of *animus manendi*.

93. The strongest proof of a domicil in a foreign country is a commercial establishment there; this fact alone is sufficient to impress a man with the national character as far as relates to all his property connected with such establishment, even though he may not be actually resident in the country (*i*): when coupled with the additional fact of residence, it amounts to the strongest conceivable case of domicil. "No position, in fact," says Chancellor Kent, "is more clear than this, that if a person goes into a foreign country and engages in a trade there, he is to be considered a merchant of that country, and a subject to all civil purposes, whether that country be hostile or neutral" (*k*). "Persons resident in a country and carrying on trade there, by which both they and the country are benefited, are to be considered the subjects of that country, at least, so far as to subject their property to capture by a country at war with that in which they live" (*l*). This rule applies to the consul of a neutral state in the enemy's country, when he carries on trade there (*m*).

In the same way, if the natives of a belligerent state are resident and carrying on their business in a neutral country, they are, for all commercial purposes, regarded as subjects

(*h*) The Friendschaft (1818), 3 Wheaton's Supreme Court R. 14, 51; see also the case of the Ann Green (1812), 1 Gallison, already cited *supra;* The Nereide (1815), 9 Cranch's Supreme Court R. 388.

(*i*) The Vigilantia (1798), 1 C. Rob. 1; The Portland (1800), 3 C. Rob. 41: sustained in the United States in the Antonia Johanna (1816), 1 Wheaton, 159; The Friendschaft (1819), 4 Wheaton, 105. See per Lord Lindley in Janson *v.* Driefontein Consolidated Mines, Ltd., [1902] A. C. at p. 505; The Anglo-Mexican, [1918] A. C. 422, 425.

(*k*) 1 Kent, Com. 74.

(*l*) Per Lord Kenyon in Tabbs *v.* Bendelack (1801), 4 Esp. 108; see Wilson *v.* Marryatt (1798), 8 T. R. 31; The Indian Chief (1801), 3 C. Rob. 12; The Anna Catherina (1802), 4 C. Rob. 107; The President (1804), 5 C. Rob. 277.

(*m*) The Aina (1854), Spinks' Prize Cas. 8; The Baltica (1855), *ibid.* 264.

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of the neutral state, and enjoy all the privileges, and are subjected to all the inconveniences, of a neutral trade (*n*).

Every party, in short, who resides and trades in a country is regarded, in mercantile law, as a subject of that country, and must take the advantages and disadvantages, whatever they may be, of the country of his residence.

British subjects residing and trading in hostile country deemed to be enemies.

Involuntary residence in a hostile country unaccompanied by trading not a proof of hostile character.

This general principle extends to the case of British subjects, residing either in hostile or neutral countries (*o*). The rigour of this principle, indeed, must not be extended to cases in which the residence in the hostile country is not accompanied with trading, and does not clearly appear to have been voluntary. Thus, where the partner of a mercantile house here sailed for America, with his wife and family, after war had, in fact, been declared between this country and the States, but before he knew of it, or had any reason to suspect it; and after his arrival in America he continued to reside there throughout the war, but without engaging in trade; and it did not clearly appear that his stay was not compulsory; Lord Ellenborough held, that he could not, by such residence, be considered to have acquired a hostile character (*p*).

Subject domiciled when war breaks out in the enemy's country.

The Venus.

94. If the subject of one state has acquired a domicil in a hostile state, by residing and keeping up a commercial establishment there before the breaking out of hostilities, it has been decided in the United States that his property, shipped before knowledge of the war, but while his acquired

(*n*) The Postilion, Hay & Marriott, 245; Wilson *v.* Marryatt (1798), 8 T. R. 31; M'Connell *v.* Hector (1802), 3 B. & P. 113; The Danaöus (in the House of Lords) (1802), cited 4 C. Rob. 255; Bell *v.* Reid (1813), 1 M. & S. 726; The Abo (1854), Spinks' Prize Cas. 42, 45. The cases in the United States on the same subject are referred to, 1 Kent, Com. 75, n. (*a*). The most important are The Venus (1814), 8 Cranch's Supreme Court R. 253; The Frances (1814), *ibid.* 363.

(*o*) Potts *v.* Bell (1800), 8 T. R. 548; M'Connell *v.* Hector (1802), 3 B. & P. 113; Roberts *v.* Hardy (1815), 3 M. & S. 533; Willison *v.* Patteson (1817), 7 Taunt. 439; O'Mealey *v.* Wilson (1808), 1 Camp. 482; Porter *v.* Freudenburg, [1915] 1 K. B. at p. 869; Scotland *v.* South African Territories, Ltd. (1917), 33 T. L. R. 255.

(*p*) Roberts *v.* Hardy (1815), 3 M. & S. 533, as explained in Willison *v.* Patteson (1817), 7 Taunt. 439.

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domicil continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of the hostile country. This was the point decided in the celebrated case of The Venus (*q*). In that case some American merchants, who had gained a domicil by residing and carrying on trade in England, before hearing of the declaration of war by the United States against Great Britain in 1812, and while they had no particular expectation of it, nor any intention of ceasing to reside in this country, shipped cargoes to the United States, which were captured by American cruisers, after the declaration of hostilities: a majority of the judges of the Supreme Court decided (against the opinion, however, of Marshall, C. J.) that the property was liable to capture as belonging to those who, by trading and residing in an actually hostile country, were to be regarded, for all commercial purposes, as alien enemies. Marshall, C. J., dissented, on the ground that the parties should have had an opportunity given them, after they knew of the declaration of war, to show by their acts whether or not they intended to continue to make the hostile country the place of their permanent abode (*r*).

British subjects residing in a neutral country.

95. Upon the same principle British subjects residing and carrying on trade in a neutral country are admitted, in respect to their *bonâ fide* trade, to all the privileges of a neutral character (*s*). Thus, a British subject, adopted by and trading in the United States, was permitted to prosecute a voyage from America to the East Indies in a manner which would have been illegal in a British subject, but was permitted by treaty to the citizens of the United States (*t*).

(*q*) The Venus (1814), 8 Cranch's Supreme Court R. 253; see 1 Kent, Com. 78; and the remarks of Phillips, vol. i. s. 159, and n. (*a*), who inclines to the opinion of Marshall, C. J., and refers to The Ocean (1804), 5 C. Rob. 90, as supporting his view of the case.

(*r*) This opinion was approved by Mathew, J., in Nigel Gold Mining Co. *v.* Hoade, [1901] 2 K. B. 849, 853. See § 95, *infra*.

(*s*) See The Emanuel (1799), 1 C. Rob. 302. Lord Stowell annexes to this rule the qualification that he must do nothing inconsistent with his allegiance: *Ibid.*

(*t*) Wilson *v.* Marryatt (1798), 8 T. R. 31.

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He may also, like any other neutral, carry on trade with powers at war with his own country. Thus, in the case of The Danaöus, which came before the House of Lords in 1802, a British-born subject, resident and trading in Portugal, was allowed the benefit of the Portuguese neutral character, so far as to render his trade with Holland, then at war with England, not impeachable as an illegal trade (*u*). The same rule was afterwards applied to a natural-born British subject, domiciled in the United States; and it was held that he might lawfully trade to a country at war with England, but at peace with the United States (*x*).

Alien enemy migrating *flagrante bello*.

It has, however, been decided in the United States (and the decision seems thoroughly well founded), that an alien enemy is not permitted to acquire a neutral domicil for the purpose of protecting his trade if he emigrate into the neutral country from his own, *flagrante bello*. At all events, the circumstances attending such a course will be closely scrutinized, with a view of ascertaining his object (*y*).

Neutral leaving belligerent country on outbreak of war.

Though a neutral may have been resident and carrying on trade in a foreign country, up to the time of the breaking out of hostilities between that country and our own; yet if he then, or shortly afterwards, breaks up his establishment in the enemy's country and comes to reside here, he will not be precluded from recovering in our Courts, during the war, on a policy effected before the commencement of hostilities, to protect his separate share as part owner in a ship and cargo, the other moiety of which was owned by the alien enemy, in conjunction with whom he had, before the declaration of hostilities, been carrying on his establishment in the foreign country (*z*).

(*u*) (1802); cited in 4 C. Rob. 255, n.

(*x*) Bell *v.* Reid (1813), 1 M. & S. 726.

(*y*) The Dos Hermanos (1817), 2 Wheaton's Supreme Court R. 76; cited 1 Kent, Com. 75; 1 Phillips, Ins. s. 166. See also per Sir Samuel Evans in The Flamenco (1915), 1 Brit. & Col. Prize Cases, 509, at p. 514; cf. Duguet *v.* Rhinelander (1802), 2 Johns. 476.

(*z*) Rotch *v.* Edie (1795), 6 T. R. 413. Such seems to be the true effect of the case. See a note of Lord Campbell's to his report of Bromley *v.* Hesseltine (1807), 1 Camp. 75. The rule may be stated generally

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National character of ports occupied by the enemy.

96. Where the party interested is himself a neutral, and the policy is effected to cover goods consigned to him at a neutral port, such policy is not rendered void by the neutral's happening at the time to be resident in a place, which, though situated in the dominions of a neutral, is then occupied by the troops of the enemy (*a*).

During the unexampled circumstances of Napoleon's wars, it frequently became important to decide upon the national character of ports, which, though nominally neutral, were yet under military occupation by the troops of the French Emperor. As we shall have occasion to consider these cases elsewhere, it will be sufficient in this place to state the two principles upon which they were mainly decided. 1st. That a port belonging to a neutral state, though coerced, or even occupied, by the forces of a belligerent, does not, by virtue of such aggression, cease to be neutral and become hostile, provided it still retains its own institutions and its own civil government. 2nd. That the most potent evidence in time of general war, as to the hostile or non-hostile character of any

that a neutral who resides or trades in a belligerent country will preserve his neutral character if he leave the country with his property *sine animo revertendi*. If on the outbreak of hostilities he promptly take steps to leave, he will not be considered an enemy, even when still in the belligerent state, provided that he carries on his preparations without delay. But a mere intention to leave, not accompanied by any overt act, is not sufficient: The President (1804), 5 C. Rob. 277, 280; The Baltica (1855), Spinks' Prize Cas. 264, 267; 1 Kent, Com. 78. See The Anglo-Mexican, [1918] A. C. 422, at p. 425. The same principle is, no doubt, applicable in the case of a British subject with a commercial domicil in an enemy country. In Nigel Gold Mining Co. *v.* Hoade, [1901] 2 K. B. 849, 853, the plaintiffs were a metal company registered in Natal, who owned a mine in the Transvaal. A few days after war was declared by the South African Republic against this country some gold, the product of their mine, was seized therein by the agents of the Republic. The plaintiffs shut down their mine when war was declared, and there was nothing to show that they intended to continue their business or mining operations in the Transvaal during the war. Mathew, J., held that they could recover on a policy on the gold. "The sounder opinion," said the learned judge, "would seem to be that the subject of one country, surprised by a declaration of war in the country where he has a commercial domicil, ought to have time allowed him to free himself from his commercial engagements and effect a removal of his property."

(*a*) Bromley *v.* Hesseltine (1807), 1 Camp. 75.

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port, is the declaration of our own government regarding it; if our own government, either directly or indirectly, recognizes any of the ports of a hostile state, or of its colonial possessions, as neutral, or non-hostile ports, that is binding on our Courts of Justice (*b*).

Property connected with trading establishment in hostile country.

97. Domicil, however, is not always the test of national character for commercial purposes. Thus, the act of trading or keeping on foot a mercantile establishment in the enemy's country, even without residence there, impresses a hostile character on all the property connected with such establishment (*c*).

This principle, however, only applies to property or transactions connected with the hostile firm. Thus if a neutral have two houses of business, one in the neutral and the other in the belligerent country, his property connected with the neutral house will be protected from seizure, while his property connected with the hostile establishment will be liable

(*b*) The Dart and The Happy Couple (1808), cited in The Manilla, Edwards' Adm. R. 1, 2; The Pelican (1809), Edwards' Adm. R. App. D.; Bromley *v.* Hesseltine (1807), 1 Camp. 75; Donaldson *v.* Thompson (1808), *ibid.* 429; Johnson *v.* Greaves (1810), 2 Taunt. 344; Atkinson *v.* Abbott (1809), 11 East, 135; Hagedorn *v.* Bell (1813), 1 M. & S. 450; see also Blackburn *v.* Thompson (1811), 3 Camp. 61. See *post*, §§ 757, 758. By Proclamation of the 16th February, 1915, the Trading with the Enemy Proclamations were applied to territory of allied or neutral States in the effective military occupation of an enemy. As to Belgium, see Société Anonyme Belge, &c. *v.* Anglo-Belgian Agency, Ltd., [1915] 2 Ch. 409 (C. A.). For a case as to the status of a Russian corporation having its head office at Petrograd, which was occupied at the time of the action by the Bolshevists against whom British forces had been engaged in hostilities, see Eastern Carrying Ins. Co. *v.* National Benefit Life and Property Ass. Co. (1919), 35 T. L. R. 292.

(*c*) The Vigilantia (1798), 1 C. Rob. 1; The Portland (1800), 3 C. Rob. 41; The Dree Gebroeders (1802), 4 C. Rob. 232; The Anglo-Mexican, [1918] A. C. 422, at p. 425. The converse of this rule is not applied in the case of a resident in a hostile country who is interested in a neutral house of business or adventure. All his property, whatever be the nature of the trade in which it is engaged, is considered enemy's property. The Clan Grant (1915), 1 Brit. & Col. Prize Cases, 272; The Roland (1915), *ibid.* 188; The Hypatia, [1917] P. 36; 1 Duer, Ins. 524. Similarly, the interest of a British merchant in the goods of a neutral firm has been held to be British property. The Franklin (1805), 6 C. Rob. 127, 132.

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to it (*d*). Moreover, either a British subject or a neutral who is interested in a house of trade in an enemy country must be allowed a reasonable time in which to dissociate himself from the business; and if in such time he takes steps towards that end, his interest in the property of the house will not be subject to confiscation (*e*). On the same principle, there may be a partnership between two persons, one residing in a neutral and the other in a belligerent country, and the trade of one of them with the enemy will be held lawful, and that of the other unlawful, and consequently the share of one partner in the joint traffic will be condemned, and that of the other restored (*f*).

Produce of enemy's soil.

The possession of an estate in the enemy's dominions impresses on the owner a hostile character in respect of the produce of his estate, during its transportation to another country, although he reside in a neutral State (*g*). The reason is that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil (*h*).

Neutral engaging in privileged colonial or coasting trade of the enemy.

98. A neutral, on the breaking out of hostilities, has the same rights of carrying on trade with either of the belligerents as he had before the war commenced, and therefore his property engaged in trade with the enemy is in general insurable in this country (*i*); but if instead of carrying on his trade on the ordinary footing of a foreign merchant in

(*d*) The Portland (1800), 3 C. Rob. 41.

(*e*) The Eumæus (1915), 4 Lloyd's Prize Cases, 270; 85 L. J. P. 130; The Manningtry, [1916] P. 329; The Anglo-Mexican, [1916] P. 112; [1918] A. C. 422.

(*f*) The Portland (1800), 3 C. Rob. 41; The Herman (1801), 4 C. Rob. 228; The Jonge Klassina (1804), 5 C. Rob. 297.

(*g*) The Phœnix (1803), 5 C. Rob. 20; The Vrow Anna Catharina (1804), 5 C. Rob. 161, 167. The Supreme Court of the United States assented to this rule in Bentzon *v.* Boyle (1815), 9 Cranch, 191. In Nigel Gold Mining Co. *v.* Hoade, [1901] 2 K. B. 849, Mathew, J., expressed the view that these decisions would not be followed now; but the rule was applied in the late war in The Asturian, [1916] P. 150.

(*h*) Per Lord Stowell, 5 C. Rob. at p. 167.

(*i*) See Bell *v.* Reid (1813), 1 M. & S. 726.

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time of peace, he do so as a privileged trader of the enemy; or if the trade itself consist of a colonial carrying trade between the hostile mother country and any one of her foreign settlements to which neutral nations had not been admitted previous to the war, the neutral, in respect of such privileged or unusual trade, is regarded as an alien enemy, and cannot maintain an action here on a policy effected to protect it (*k*).

Consuls carrying on such trade.

The consul of a neutral nation in this country, if engaged in such privileged colonial or coasting trade of the enemy, loses his neutral character (*l*); and his consular residence does not protect his goods concerned in such trade from seizure and condemnation as enemy's property (*m*).

National character of a corporation.

99. The question what is the national character of a company incorporated under the law of an enemy has become one of great practical importance. A corporation is an entity having an independent legal existence (*n*), and there is authority for the rule that it derives its national character from the State under whose laws it is incorporated, whatever be the nationality of its members. Thus a ship owned by a British company, some of whose shareholders are aliens, can be registered as a British ship under the Merchant Shipping Act, although aliens are not qualified to own British ships, or shares in British ships (*o*). In Driefontein Consolidated Mines *v.* Janson (*p*), the plaintiffs were a Transvaal mining company, incorporated and registered according to the laws of the South African Republic, and carrying on in the territory of the latter the business of extracting gold from their mines. The company had a London office and committee of

(*k*) See the judgments of Sir W. Scott in The Immanuel (1799), 2 C. Rob. 186; The Anna Catherina (1802), 4 C. Rob. 107; The Dree Gebroeders (1802), *ibid.* 232; and see Berens *v.* Rucker (1761), 1 W. Bl. 313; Brymer *v.* Atkins (1789), 1 H. Bl. 165, 191. See *post*, §§ 664, 665, 771.

(*l*) The Dree Gebroeders (1802), 4 C. Rob. 232.

(*m*) The Indian Chief (1800), 3 C. Rob. 22.

(*n*) See Myers *v.* Perigal (1852), 2 De G. M. & G. 599; Salomon *v.* Salomon & Co., [1897] A. C. 22.

(*o*) R. *v.* Arnaud (1846), 9 Q. B. 806; 16 L. J. Q. B. 50.

(*p*) [1900] 2 Q. B. 339; [1901] 2 K. B. 419, C. A.; [1902] A. C. 484.

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management, and its shareholders were nearly all resident outside the Transvaal, and not subjects of the Republic. The question was raised whether the company was an enemy during the war between the Republic and this country, and although, except for the purposes of the judgment of Vaughan Williams, L. J., it was unnecessary to determine this question, as it was held that the loss took place before the commencement of hostilities, there was a large consensus of judicial opinion that the company was a subject of the Republic, and, therefore, during the continuance of the war, an enemy (*q*). But where a company registered in Natal, whose only property was a gold mine in the Transvaal, had received a supplementary incorporation in the Transvaal (the object of which was to enable the company to sue and be sued there in its corporate name), Mathew, J., held that it was a British company and could therefore recover under a policy of insurance for a loss which occurred after the war had commenced (*r*).

Daimler Co. *v.* Continental Tyre and Rubber Co.

The question of the national character of a corporation arose again during the late European war with reference to a company incorporated in England, which had been formed for the purpose of selling goods manufactured in Germany by a German company. The bulk of the shares were held by the German company, and the remainder (with the exception of one share) by German subjects resident in Germany. There were four directors, all German subjects, of whom three were resident in Germany and the fourth, who had previously resided in this country, left for Germany on the outbreak of war. The Court of Appeal held that the company, being incorporated under the laws of this country, must be regarded as a British corporation, and was entitled to sue during the war for the payment of a trade debt (*s*).

(*q*) See per Mathew, J., [1900] 2 Q. B. at p. 346; per Romer, L. J., [1901] 2 K. B. at p. 437; per Lords Davey, Brampton and Lindley, [1902] A. C. at pp. 498, 501, 505. *Contra*, A. L. Smith, M. R., [1901] 2 K. B. at pp. 426, 427; Vaughan Williams, L. J., *ibid.* at p. 433.

(*r*) Nigel Gold Mining Co. *v.* Hoade, [1901] 2 K. B. 849.

(*s*) Continental Tyre and Rubber Co. (Great Britain), Ltd. *v.* Daimler Co., Ltd., [1915] 1 K. B. 893.

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This decision was unanimously reversed by the House of Lords (*t*), on the ground that the action was commenced by the Secretary without authority and ought to be struck out; but only two of the eight Law Lords before whom the appeal was heard, Lord Shaw and Lord Parmoor, agreed with the view that the British registration of the company was conclusive as to its national character. Lord Halsbury considered that the company was in substance a partnership of German traders (*u*), Lord Atkinson was of opinion that the national character of the company depended on its "place of residence," *i.e.*, on whether the business centre from which the affairs of the company were directed and controlled was in England or in Germany (*x*). This view was elaborated by Lord Parker, in whose judgment Lords Mersey, Kinnear and Sumner concurred. He formulated the following propositions:—

(1) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers.

(2) Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country it is *primâ facie* to be regarded as a friend.

(3) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are adhering to the enemy or taking instructions from or acting under the control of enemies.

(4) The character of individual shareholders cannot of itself affect the character of a company. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in *de facto* control of its affairs, are

(*t*) Daimler Co., Ltd. *v.* Continental Tyre and Rubber Co. (Great Britain), Ltd., [1916] 2 A. C. 307.
(*u*) [1916] 2 A. C. at p. 316.
(*x*) *Ibid.* at p. 319.

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in fact adhering to, taking instructions from, or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings.

(5) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is *primâ facie* to be regarded as a friend, but may, through its agents or persons in *de facto* control of its affairs, assume an enemy character.

(6) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

The test of control has been applied in prize cases in determining the national character of the property of a corporation. Thus goods owned by a British company, of which all the shares except six were held by a parent German company and four of these six by the German directors of the parent company, were condemned as enemy property (*y*). Again, the fact that a ship was owned by a company registered under the laws of this country or of a neutral State and sailed under the British or the neutral flag has been held not to be conclusive. In either case, where the control of the company was in the hands of enemies, the vessel was condemned or detained as enemy property (*z*).

In conclusion, it is submitted that the commercial domicil of a company registered under the laws of this country or of a neutral country will be deemed to be hostile (1) if the company is *de facto* controlled by enemies, or (2) if it is carrying on its business in an enemy country (*a*).

(*y*) The Michigan (1916), 5 Lloyd's Prize Reports, 421. The Poona (1915), 84 L. J. P. 150, *contra*, was decided before the decision of the House of Lords in Daimler Co., Ltd. *v.* Continental Tyre, &c. Co., Ltd., *supra*.
(*z*) The St. Tudno (ship under British flag), [1916] P. 291; The Hamborn (ship under Dutch flag), [1919] A. C. 993.
(*a*) See, in addition to the authorities cited above, De Beers Consolidated Mines, Ltd. *v.* Howe, [1906] A. C. 455, in which the House of

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Europeans residing and trading in Asiatic or African countries, with extra-territorial privileges.

100. Europeans, residing and trading under the protection of factories or colonial establishments in Asia or Africa were held to have the national character of the European mother State to which the establishment belonged, and under whose protection they lived and traded; the reason being that Europeans, so circumstanced, did not become the subjects of the Asiatic or African power in whose dominions such trading establishment was situated (*b*).

The factory system is now obsolete; but the principle was applied in the late war in the case of Europeans residing in Eastern ports, where they enjoy the privileges of extra-territoriality. A firm in Shanghai consisted of four partners, of whom two were British, and the other two German subjects. The British partners were registered at the British Consulate, but the firm was registered in the German Consulate as a German firm, and Sir Samuel Evans held that the firm must be regarded as an enemy house of trade (*c*); but the interest of the British partners in property of the firm seized as prize was released, on proof that on the outbreak of war they had taken reasonable steps to dissociate themselves from their German partners (*d*).

Such are some of the more important points in the jurisprudence of this country and the United States on the subject of national character, as affected by domicil or course of trade. It has not been deemed desirable further to encumber a work devoted to a special subject, by references to authorities which more properly range themselves under other heads of legal inquiry.

Lords decided that a foreign corporation may "reside" in this country within the meaning of the Income Tax Act, 1853.

(*b*) The Indian Chief (1800), 3 C. Rob. 22; The Etrusco (1798), cited *ibid.* 31; The Twee Frienden (1784), cited *ibid.* 29.

(*c*) The Eumæus (1915), 4 Lloyd's Prize Cases, 270; 85 L. J. P. 130.

(*d*) 4 Lloyd's Prize Cases, at p. 288.

CHAPTER VI.

COURSE OF BUSINESS IN SEA INSURANCE—RELATIONS BETWEEN ASSURED, BROKER, AND UNDERWRITER.

SECT.
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Employment of insurance brokers.

101. In this country almost all policies are effected by insurance brokers, whose business it is to act as middlemen between those merchants and shipowners who wish to insure their property, on the one hand, and the private underwriters or public insurance companies, on the other. The broker is the agent of the assured, not of the underwriter, and therefore he owes no duty in the transaction to the latter, on which an action for negligence can be founded (*a*). *Primâ facie*, the business of an insurance broker would seem to be limited to receiving instructions from his principal as to the nature of the risk, and the rate of premium at which he wishes to insure; communicating these facts to the underwriters; effecting the policy with them on the best possible terms for his employer; paying them the premium; and receiving from them whatever may be due in case of loss.

The usage, however, of our great commercial metropolis

(*a*) Empress Ass. Corp. *v.* C. T. Bowring & Co., Ltd. (1905), 11 Com. Cas. 107. See also Glasgow Ass. Corpn. *v.* Symondson (1911), 16 Com. Cas. 109. Sometimes, however, the broker may be the agent of both parties with regard to returns of premium. See *post*, § 116.

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has introduced modes of transacting business between insurance brokers and underwriters in London, apparently intended to facilitate the transaction of insurance business on an extensive scale, by substituting, as far as possible, credits for payments, in all dealings between broker and underwriter; but one effect of the system has been to introduce a considerable degree of complexity into the relations subsisting between the assured, the broker, and the underwriter.

Provisions of the Act as to the course of business.

The provisions of the Marine Insurance Act, 1906, which concern these relations are contained in sects. 52, 53 and 54, and are as follows:—

When premium payable.

> Sect. 52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

Policy effected through broker.

> Sect. 53.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.
>
> (2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent (*b*).

Effect of receipt on policy.

> Sect. 54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

(*b*) An insurance is not a necessary for a ship, and therefore neither the broker nor the underwriter can proceed *in rem* under s. 6 of the Admiralty Court Act, 1840, against a foreign ship for premiums: The André Théodore (1904), 10 Asp. M. C. 94.

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Further, as the course of business in marine insurance is to a large extent regulated by usage, sect. 87 of the Act (*c*) must be considered in connection with these provisions. For, as we have already seen in the chapter on the Construction of Sea-Policies, the usages of trade are often part of the contract. Indeed the rules contained in sect. 53 of the Act are themselves derived from mercantile usage (*d*).

Outline of course of business between assured, broker, and underwriter.

102. The actual course of the business of marine insurance, as carried on in London and elsewhere in this country, is as follows:—A broker on receiving orders from his principal to effect an insurance prepares what is commonly known as a "slip." This is merely a slip of paper containing rough notes relating to the intended insurance. It is, however, sufficiently precise to enable anyone conversant with the business to draw up, without difficulty and without going beyond its four corners, the policy which it is proposed to effect. The broker then takes the slip round to the various underwriters to whom he may be disposed to offer the business; these may be private Lloyd's underwriters, or they may be underwriters on behalf of companies, or some of one class and some of another. Those underwriters who are willing to accept the risk, whether private or representing companies, signify their willingness by initialing the slip for the amounts for which they are willing to become insurers. When the broker has succeeded in getting the slip initialed for the full amount required, it is then his duty to procure the execution of policies in accordance therewith. The old practice was, in so far as the initials on the slip were those of Lloyd's underwriters, for the broker after preparing the policy to take it round to the different underwriters in succession for their signature; owing, however, to the pressure of business and the shortage of staff during the recent war, a signing bureau was established under the authority of Lloyd's, but in a separate building; the broker takes the policy and slip to this bureau, where, after the policy has been examined

The slip.

(*c*) See *ante*, § 55. (*d*) *Ante*, § 66.

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and compared with the slip, the signatures of all those underwriters who have initialed the slip are affixed by clerks. This system though very largely adopted has not yet become universal, and when policies are not signed in the bureau the old practice subsists under which the broker submits the policy to the individual underwriters. The insurance companies always prepare their own policies, and in order to enable them to do so, the broker fills up a form which is also called a slip, and sends one to each company. This slip is an entirely distinct document from the slip which we have already explained, and is merely a memorandum of the engagement which the particular company has already entered into by initialing the "slip" proper (*e*).

As soon as the policy is completed, the underwriters enter the risk in their books, and debit the broker with the premium.

Possession of policy.

103. The broker, having effected the policy, usually retains it in his possession (*f*). He may do so either as of right, in exercise of his lien for premiums, or as a matter of convenience; for insurance brokers are now very generally employed not merely to effect insurances, but to attend to all business relating thereto that may subsequently arise, which the possession of the policy enables them to do.

When a loss occurs in respect of which the assured desires to make a claim on the policy, he instructs the broker to do so, sending him the policy if it is not already in the broker's possession (*g*). The broker then ascertains (*h*) the percentage

(*e*) The term "slip" is used, in Liverpool at least, in yet a third sense, to denote the covering or insurance note, by way of provisional insurance, issued by a company in order to signify its acceptance of a risk, and its undertaking for the subsequent issue of a stamped policy. See Gow, Mar. Ins. App. Ca. and Cb.

(*f*) This is so more particularly as regards policies on ship. Those on goods are often handed over forthwith to the assured who then may pass them on to bankers or other parties, together with bills of lading, as security for advances or otherwise.

(*g*) In a recent case it was contended that an action cannot be maintained for a loss, unless the plaintiff has the policy in his possession; but

(*h*) See note (*h*), next page.

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of the loss which ought to fall upon the policy—100 per cent. if it be a total loss, or a smaller percentage in case of an average loss—employing average adjusters if necessary, and endorses the ascertained percentage upon the policy, with the word "settled" prefixed. He then takes the policy, so endorsed, round to the several underwriters (*i*), who, unless they see reason for resisting the claim, sanction it with their initials and enter the amount to the broker's credit. This process is called "settling the claim." Any underwriter who is not satisfied as to the claim, or who proposes to resist it, simply refuses to attach his initials. Disputed claims are dealt with in the ordinary course of law. Of course, if the claim is one which it is known will be generally disputed, the process of ascertainment of the percentage and the attempt to settle will be postponed until after the question of liability has been determined (*k*).

"Settling the claim."

Payment of premium.

104. Sect. 52 of the Marine Insurance Act, as we have seen, provides that, unless otherwise agreed, the insurer is not bound to issue the policy until payment or tender of the premium (*l*). When, however, the insurance is made through a broker, the recognized course of business, as will appear

Channell, J., did not agree with this contention, although he admitted that non-production of the policy may be a ground for suspecting that some one other than the person putting forward the claim has an interest in the policy: Swan *v.* Maritime Ins. Co., [1907] 1 K. B. 117.

(*h*) In a great majority of cases this work has been already done by an average adjuster employed by the assured. As to the position and functions of an average adjuster, see Wavertree Sailing Ship Co. *v.* Love, [1897] A. C. 373.

(*i*) A system analogous to that explained in § 102 in regard to signing has been adopted by a large number of underwriters for the settlement of claims, but the bureau is not yet so largely used for settling as it is for signing.

(*k*) Such is the present practice. In order, however, to understand expressions which occur in some of the earlier cases, it should be noted that what is now called "settling the claim" used to be called "adjusting the policy." "Striking off the loss" was where the underwriter, on passing the loss to the credit of the broker, struck through his subscription to the policy with his pen. See 6th ed. p. 198, present ed. § 1241. These expressions and formalities are not now used.

(*l*) *Ante*, § 101.

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presently, is such that the insurer may have no right to an immediate payment (*m*).

Accounts as between broker and underwriter.

The custom of the marine insurance companies is that the premium on all policies issued during the month falls due upon the 8th of the following month. Premiums are subject to a deduction of 5 per cent. brokerage and 10 per cent. discount (*n*). The 5 per cent. brokerage is of course retained by the broker; the 10 per cent. discount is allowed by the broker to his principal (*o*). Where, as is sometimes done in insuring with companies, the insurance is effected direct, without the intervention of a broker, both percentages are allowed by the company to the assured.

Losses and averages are paid by cheque in each case—the cheque being signed at the board meeting at which the claim is passed, and delivered to the broker on his calling for it. It is not the practice for brokers and the insurance companies to have cross accounts for premiums and for losses, and to settle balances. Separate cheques for each are written out and handed over (*p*).

In the case of Lloyd's underwriters, the premiums on insurances effected during the month likewise become due on the 8th of the following month. Claims fall due seven

(*m*) See Mar. Ins. Act, 1906, s. 87, *ante*, § 55.

(*n*) This 10 per cent. discount is calculated on the premiums after deduction of the 5 per cent. brokerage—the total deductions thus amounting to 14½ per cent.

(*o*) This custom, as a whole, was recognized by Scrutton, J., in Glasgow Ass. Corp. *v.* Symondson (1911), 16 Com. Cas. at p. 114, and was proved in Green *v.* Tughan (1913), 30 Times L. R. 64, Pickford, J. In an earlier case, when the right of the principal to the discount seems not to have been so well established, the Court of Appeal allowed the agents to retain the 10 per cent. discount which they had received for many years, during which the principal made no enquiry as to their remuneration: Baring *v.* Stanton (1876), 3 Ch. D. 502; see also Great Western Ins. Co. *v.* Cunliffe (1874), L. R. 9 Ch. 525.

(*p*) For a running contract of re-insurance, under which monthly losses were to be deducted from monthly premiums, and the balance paid to the brokers, and by them to trustees to secure the re-insurers against further losses, and for the position after the re-insuring company was ordered to be wound up, see In re Law Car and General Ins. Corp. (1911), W. N. 91, 101.

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days after settlement. It is customary, however, to carry on current accounts, settling claims against premiums, and passing cheques for the balance due at the end of each quarter. When a total loss, or a heavy average loss occurs, the broker may, if he please, claim payment seven days after settlement; but he will in this case be expected to pay the underwriter all premiums due on the 8th of the current month. Lloyd's underwriters allow the same brokerage and discount as those allowed by the companies.

Accounts between broker and assured.

105. The broker usually keeps his account with the assured in a manner similar to that which governs his own relations with the companies. Thus, premiums for the month are due on the 8th of the succeeding month; and losses are payable as soon as the amounts are actually received from the underwriter, or if the amount of a loss is not actually so received, but merely placed by the underwriter to the broker's credit in current account, then seven days after settlement of such loss. The broker deducts from the claim a commission of 1 per cent. and remits the balance to the assured.

This practice, however, merely illustrates what is usual. There is no recognized or binding custom as to these matters, and in fact special arrangements are often made. For example, if a large steamer is insured for twelve months, or if a floating policy is taken out on a series of cargoes, the premiums payable by the broker to the underwriter may amount to several thousands of pounds, which it may be inconvenient to the assured to provide all at once at the inception of the risk. In such a case special arrangements are sometimes made between the broker and the assured for the premiums to be paid by instalments. When this is done, the assured usually gives the broker written authority to cancel the policy in the event of any instalment not being duly paid. The broker is thus enabled to protect himself by cancelling the policy and receiving from the underwriter the monthly return of premium, which its terms provide for.

Commissions *del credere*.

For greater security to their customers, insurance brokers

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frequently guarantee the solvency of the underwriters. This exposes them to greater hazard, and of course entitles them to a higher, or as usually it is, an additional, commission upon the business they perform. In such cases the brokers are said to act *del credere*, and the percentage which they are entitled to receive is called a commission *del credere*. This commission they are legally considered to be entitled to immediately upon entering into the contract, without waiting to see whether such guaranty do in the event subject them to loss (*q*). "The commission," said Lord Ellenborough in such a case, "was earned and to be paid to the party for entering into the contract of guaranty, and not in respect of the event, which was perfectly collateral" (*r*).

The above sketch is only intended to explain generally the course of business actually adopted in our commercial world. We do not say that in all points such practice tallies with the law. In what follows we propose to indicate the extent to which the practice is consistent with the law, either by being in original accord therewith, or by having become engrafted thereon by constant usage.

Broker alone liable to underwriter for premiums.

106. By virtue of a custom which had existed for more than a hundred years, it became established law that the assured could not be sued by the underwriter for premiums (*s*), nor could the latter set off unpaid premiums in an action brought by the assured on the policy for losses. Accordingly, sect. 53 (1) of the Marine Insurance Act,

(*q*) Caruthers *v.* Graham (1811), 14 East, 578.

(*r*) *Ibid.* As to the general law relating to the liability of *del credere* agents, the reader is referred to a masterly exposition of the subject by Judge Duer, who, as usual, collects and exhausts all the authorities. 2 Duer, 331—339, especially 337, *in notis*. Since the publication of Duer's work, it has been settled, in accordance with his view, that the *del credere* contract between the agent and his principal is not within the Statute of Frauds: Couturier *v.* Hastie (1852), 8 Exch. 40. See Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778.

(*s*) In the United States it was held in Mannheim Ins. Co. *v.* Hollander (1901), 111 Fed. R. 549, that, no usage similar to the English one having been proved, the assured was liable to the underwriter for the premium on a policy effected by the broker.

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1906, declares that "unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium."

Legal relation of the parties and their broker.

The position is briefly but comprehensively described by Bayley, J., in these words: "According to the ordinary course of trade between the assured, the broker and the underwriter, the assured does not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, who is a middleman between the assured and the underwriter. But he is not merely an agent: he is a principal to receive the money from the assured, and to pay it to the underwriters" (*t*).

Effect of acknowledgment in policy of payment of premium.

By sect. 54 of the Marine Insurance Act, 1906, "where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker."

Origin of rule that broker alone liable for premiums.

The earlier editions of this work appear to have confined the rule that, as regards premiums, the broker is the debtor of the underwriter to policies which, such as Lloyd's, contain an express acknowledgment by the underwriter of the receipt of premium from the assured. There is undoubtedly some judicial sanction for this view of the origin of the present state of the law. But a few years ago it was held that the rule

(*t*) In Power *v.* Butcher (1829), 10 B. & Cr. 340; see also per Parke, J., at p. 347. The course of dealing between the parties may be such that the liability of a third party to the broker for premiums is substituted for that of the assured, *e.g.*, the liability of the managing owner of a ship. See Lamont, Nisbet & Co. *v.* Hamilton (1907), Sess. Cas. 628.

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under discussion was based, not upon the receipt clause, but upon a general custom, and that it applied accordingly to all policies of marine insurance, whether containing such receipt clause or not. The action was brought by an insurance company against the assured for premiums on a policy which, so far from containing the receipt clause, embraced an express promise by the assured to pay the premiums to the company, and for the latter it was argued that the custom, which admittedly obtained in the case of Lloyd's policies, to treat the broker and not the assured as liable for the premiums had no application to, and was in fact inconsistent with, the present policy. But Collins, J., after explaining the origin of the custom, rejected this contention. "It is a well-recognised practice in marine insurance," said the learned judge, "for the broker to treat himself as responsible to the underwriter for the premiums; by a fiction he is deemed to have paid the underwriter, and to have borrowed from him the money with which he pays. If that is a correct explanation of the origin of the custom, it is as applicable to this form of policy as to a Lloyd's policy. No doubt there is here a contract to pay by the assured, but by custom the broker is treated as personally liable, the same fiction being applicable, namely, that the broker has paid the premium, and has so absolved the assured from his liability, having first borrowed the money from the underwriter to make the payment." This decision was confirmed by the Court of Appeal (*u*).

Broker alone liable, even where policy contains express promise by assured to pay the insurer.

(*u*) Universo Ins. Co. of Milan *v.* Merchants' Marine Ins. Co., [1897] 2 Q. B. 93; see also Power *v.* Butcher, *ubi supra*, especially at p. 347, per Parke, J.; and Dalzell *v.* Mair (1808), 1 Camp. 533; De Gaminde *v.* Pigou (1812), 4 Taunt. 246. In Dalzell *v.* Mair, which was an action by the assured against the underwriter to recover back a premium where the risk had never attached, Lord Ellenborough said: "I should completely knock up the insurance business if I were to allow this acknowledgment [in the policy] to be impeached." In the last-mentioned case, which was an attempt by an underwriter, in an action by the assured, to set off premiums, Heath, J., said: "When the assured is admitted to have paid the premium, it is as between the assured and the underwriter actually paid." We have already suggested that the decision in Universo Ins. Co. *v.* Merchants' Mar. Ins. Co. is difficult to reconcile with established rules of construction (see *ante*, § 56), and the

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107. It further follows from what has been above stated that, as a general rule, the assured is liable to the broker for premiums as for money paid, whether they have been in fact paid over by the broker to the underwriter or not. This is because, in accordance with the system which we have just explained, the premiums are, as between the broker and the underwriter, considered as paid. The broker, being thus deemed to have paid the underwriter, can at once recover the amount from the assured as money paid to his use (*x*). Similarly, in case the assured becomes entitled to claim a return of premiums, inasmuch as these are deemed to have been paid by the broker to the underwriter on account of the assured, they can at once be recovered from the underwriter by the assured as money had and received "without any reference as to whether or not the year during which the broker generally has credit has run out, so as to make them payable in cash by the broker to the underwriter" (*y*).

Assured at once liable to broker for premiums.

Of course, if there be fraud or collusion on the part of the assured, or of the assured and broker jointly, in their dealings with the underwriter, the acknowledgment in the policy will not be held binding (*z*).

108. As we have seen, the general rule is, that the broker, and not the assured, is the debtor of the underwriter for the premiums. "By the course of dealing," says Parke, J., "the broker gives the underwriter credit for the premium

The broker is the debtor of the underwriter for premuims.

qualifying words, "unless otherwise agreed," in sect. 53 (1) of the Mar. Ins. Act, 1906, leave that decision still open to review by the House of Lords.

(*x*) Power *v.* Butcher (1829), 10 B. & Cr. 347. See also Airy *v.* Bland (1774), 2 Park, Ins. 811. In the case of policies which are gaming or wagering contracts within the Gaming Act, 1845 (see *post*, § 315), it seems that the Gaming Act, 1892, would bar the right of the broker to recover the premiums from the assured even though he was not aware of the true nature of the transaction: see Tatam *v.* Reeve, [1893] 1 Q. B. 44.

(*y*) Per Blackburn, J., in Xenos *v.* Wickham (1863), 33 L. J. C. P. 18; 14 C. B. N. S. 452; Dalzell *v.* Mair (1808), 1 Camp. 532.

(*z*) Foy *v.* Bell (1811), 3 Taunt. 491; Mavor *v.* Simeon (1810), *ibid.* 497.

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when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor" (*a*).

I.e. generally the broker immediately concerned in effecting the policy.

Generally speaking, however, it is only the broker immediately concerned in effecting the policy to whom the underwriter can resort for premiums, on the plain principle that it is to him alone he has given credit for them (*b*).

Broker, to action by underwriter, has the same grounds of defence as the assured.

Being thus substituted for the assured, the broker generally has the same grounds of defence against the claim for the premium as the assured would have had if he had effected the policy without the intervention of a broker (*c*).

Premiums for an illegal insurance.

109. Hence a broker is only legally liable to the underwriter for premiums due on legal insurances. Therefore, in the case of premiums for re-insurance, which was then known by all to be illegal, where no money had passed, and the assured had ordered the brokers not to pay the underwriters on the ground of illegality, Lord Ellenborough held that no action could be maintained by the assignees of the underwriters against the brokers for the recovery of the premiums as money had and received to the use of the bankrupt. "The money," said his Lordship, "does not appear to have been actually paid into the defendants' (brokers') hands. In case of illegal transactions, it may always be stopped while it is *in transitu* to the person who is entitled to receive it. If, indeed, this had been a legal transaction, the money might perhaps have been considered as paid; but we will not assist an illegal transaction in any respect. We leave the matter

(*a*) Per Parke, J., Power *v.* Butcher (1829), 10 B. & Cr. 347; and per Blackburn, J., Xenos *v.* Wickham (1863), 33 L. J. C. P. 13, 17; 14 C. B. N. S. 452.

(*b*) In a case of Robson *v.* Wilson (1797), cited 1 Marsh. Ins. 301, where the assured had employed broker A., who in his turn employed broker B., to effect a policy, the Court allowed the underwriter to recover against broker A. when broker B. had become bankrupt; but this case is of doubtful authority.

(*c*) Per Lord Ellenborough, in Jenkins *v.* Power (1817), 6 M. & S. 282, 287.

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as we find it: and then the maxim applies *melior est conditio possidentis*. We cannot consider this as money paid for the use of the bankrupt; no money has, in fact, been paid, but only an account stated" (*d*).

If the premiums had actually been paid to the brokers by their employers, in such case it seems that the action would be maintainable (*e*); and where the insurance is void under the Gaming Act, 1845, as being a gaming or wagering transaction, the Gaming Act, 1892, does not seem to bar the right to recover (*f*).

Losses paid to broker by mistake and not actually paid over by broker to his principal.

If an underwriter have, by mistake, paid a loss to the broker to which the assured is not entitled, he may recover it back as money had and received to his use, if the broker have not in fact paid it over to his principal. Merely passing it in account with his principal is not equivalent to paying it over, and no answer to such an action; *secus*, retaining a portion of the money in payment of an adjusted balance due to him from his principal (*g*).

Right of set-off.

110. In considering the right of set-off, it is as well to remember that the contract of marine insurance is still a

(*d*) Edgar *v.* Fowler (1803), 3 East, 222. So, where the language of the policy was large enough to comprise an illegal adventure, and the assured contemplated it, the underwriter was held not entitled to sue for the premium which had not been paid by the assured to the broker. Jenkins *v.* Power, *supra*.

(*e*) In Tenant *v.* Elliott (1797), 1 B. & P. 3, it was held in an action by the assured against the broker, that the defendant had no right to retain as against the plaintiff moneys paid to him by the underwriter as the amount of loss on an illegal insurance on the ground, as Judge Duer remarks, "that the person to whom moneys have been actually paid to the use of another has no right to inquire into the legality of the transaction out of which the payment arose." See 2 Duer, 366—371. See also per Lord Campbell, C. J., and Crompton, J., in Nicholson *v.* Good (1856), 5 E. & B. 999, 1015, 1017.

(*f*) See De Mattos *v.* Benjamin (1894), 63 L. J. Q. B. 248; and § 121, *infra*.

(*g*) Buller *v.* Harrison (1777), 2 Cowp. 565; *i.e.*, as Judge Duer observes, supposing the circumstances to be such that the broker had a right to revoke the credit he had given to the assured; 2 Duer, 269, n. (*a*); Holland *v.* Russell (1861), 1 B. & S. 424; 30 L. J. Q. B. 308; 4 B. & S. 14; 32 L. J. Q. B. 297.

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contract sounding in unliquidated damages, even after an adjustment of a loss under the policy (*h*), and notwithstanding it be a valued policy (*i*). It consequently follows that any claim for such a loss cannot give a right of set-off, in the strict sense in which that term was used in the old statutes of set-off. This point is, however, not of so much importance as it used to be, inasmuch as by modern practice a defendant can by counterclaiming usually secure most, if not all, the advantages which he formerly could only obtain in cases where he was entitled to set-off (*k*).

In bankruptcy.

It is nevertheless still important, in the event of the bankruptcy of one of the parties, say of the underwriter or of the broker, to consider the question of the right of set-off in the wider sense (*l*) in which the expression is used in the Bankruptcy Act, 1914. The right depends on whether there have been, in relation to the policy, "mutual credits, mutual debts or other mutual dealings" between the parties within the meaning of sect. 31 of that Act, at the time of the receiving order (*m*).

Principle of the mutual credit clause.

The principle is this, that "where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. . . . From the earliest practice to the latest provision by statute, the object seems to have been that the account should be stated as between merchant and merchant, and that whatever would be in

(*h*) Castelli *v.* Boddington (1852), 1 E. & B. 66; 22 L. J. Q. B. 5; Luckie *v.* Bushby (1853), 13 C. B. 864; Thompson *v.* Redman (1843), 11 M. & W. 487; Pellas *v.* Neptune Marine Ins. Co. (1879), 5 C. P. D. 34. See, however, Swan *v.* Marit. Ins. Co., [1907] 1 K. B. 117, 123.

(*i*) King *v.* Walker (1863), 2 H. & C. 384; 3 *ibid.* 209; 33 L. J. Ex. 167, 325.

(*k*) Similarly, Young *v.* Kitchin (1878), 3 Ex. D. 127 (approved in Government of Newfoundland *v.* Newfoundland Ry. Co. (1887), 13 App. Cas. 199), shows that in an action by the assignee of a debt a defendant with cross-claims is, as against the plaintiff, in as good a position whether his cross-claims are liquidated or unliquidated.

(*l*) See Parke, B., in Forster *v.* Wilson (1843), 12 M. & W. 203; see also Isberg *v.* Bowden (1853), 22 L. J. Ex. 322.

(*m*) In re Daintrey, Ex parte Mant, [1900] 1 Q. B. 546, C. A.

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ordinary practice a pecuniary item in such account, should be the subject of set-off" (*n*).

Primâ facie no mutuality as regards claims for premiums and losses.

111. We have seen that the ordinary relations between the three parties to the contract result in this, that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured for losses. *Primâ facie*, therefore, there is no such mutuality between the claim of the underwriter against the broker for the premium (as a claim of principal against principal) and the claim of the broker against the underwriter for losses and returns (a claim of agent against principal) as to entitle the broker (whether in cases of solvency or bankruptcy) to set off the latter claim against the former (*o*). Hence, in many of the cases, we shall observe the endeavour has been to show that this *primâ facie* objection did not apply, but that the broker, from his course of dealing, either generally or in the particular transaction, must be taken as standing in the place of the assured, and entitled, as principal, to claim losses and returns from the underwriter.

One of the earliest reported cases in which the effect of this clause (*p*) on claims arising out of policies of assurance, as between the assignees of the bankrupt underwriter and the broker, came before the Courts, was Wilson *v.* Creighton, decided in 1782. It was an action by the assignees of a bankrupt underwriter against an insurance agent for premiums passed in account in the usual way. The defendant claimed to set off losses and returns of premium due to him

Wilson *v.* Creighton.

(*n*) Per Tindal, C. J., in Gibson *v.* Bell (1835), 1 Bing. N. C. at pp. 753, 754; see also Rose *v.* Hart, 2 Smith's Leading Cases; Palmer *v.* Day, [1895] 2 Q. B. 618; In re Taylor, [1910] 1 K. B. 562. It is immaterial whether a debt is liquidated or not (Peat *v.* Jones (1881), 8 Q. B. D. 147); and even if the amount of a liability be not ascertainable until after the date of the receiving order, it may nevertheless be the subject of set-off: In re Daintrey, Ex parte Mant, *supra*.

(*o*) It is, however, a common practice for the broker, on receiving credit for a claim from the underwriter, to pay the assured forthwith. The reasoning in the text would not apply to such a case.

(*p*) Or the corresponding clause in the Act then in force. On the point of "mutuality" the old decisions are still of effect.

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from the bankrupt on the same risks. He had not acted *del credere*, but simply as agent in this country for various foreign correspondents, effecting the policies on goods consigned by him to his principals abroad, to all of whom, except one, he was, at the time of action brought, in advance, more or less, on the insurance account between them. The Court (Lord Mansfield, Willes, Ashurst and Buller, JJ.) unanimously held that the losses and returns of premium were not the subject of set-off under the mutual credit clause, because there was no mutuality—the debts were in different rights and due to different parties (*q*).

Grove *v.* Dubois.

The next case in which the question arose was the often-cited one of Grove *v.* Dubois, 1786, also an action by the assignees of a bankrupt underwriter for premiums. The defendant had effected the policies in his own name with the bankrupt for foreign correspondents, unknown to the bankrupt, under a commission *del credere*, being debited in his underwriter's accounts for premiums, and always retained the policies in his own hands. Under these circumstances the Court of King's Bench held, that the defendant had a right, under the mutual credit clause, to the set-off he claimed (*r*).

Remarks on Grove *v.* Dubois.

112. In this case three points must be particularly noticed:—1st, the insurance agent had effected the policies in his own name, on account of whom it might concern, so that his employers were unknown to the underwriter; 2nd, he always retained the policies in his own hands; 3rd, he acted for his employers on a commission *del credere*. The ground of the decision, therefore, might well have been that the insurance agent appeared, from all these circumstances, to have been the only party of whom the underwriters knew anything in the transaction; in fact, as Lord Ellenborough says, in Cumming *v.* Forrester, "the dealing was with the

(*q*) Wilson *v.* Creighton (1782), cited in 1 T. R. 113, and reported in 3 Dougl. 132.

(*r*) Grove *v.* Dubois (1786), 1 T. R. 112.

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defendant as a principal" (*s*), and therefore it might be inferred that, as he gave them credit for premiums, so they gave him credit for losses.

Lord Mansfield on the effect of a commission *del credere*.

Lord Mansfield, however, certainly put the decision of the Court entirely on the last of the above-mentioned circumstances. "The whole turns," says his Lordship, "on the nature of a commission *del credere*. Then what is it? It is an absolute engagement to the principal from the broker that makes him liable in the first instance" (*t*).

Opinions of Lord Ellenborough and Sir V. Gibbs.

Lord Ellenborough and Sir Vicary Gibbs, especially the latter, frequently professed their inability to understand the ground of the decision as thus stated by Lord Mansfield (*u*); they refused, however, to disturb the case, which, as it had been long acted upon, might have been attended with inconvenience; but, on the other hand, they carefully avoided applying it by analogy to other cases, as will sufficiently appear by the following decisions:—

Koster *v.* Eason, as to right of *del credere* broker to set off losses in an action by the assignees

113. The assignees of a bankrupt underwriter sued defendants, insurance brokers, for premiums due from them before the bankruptcy on the balance of their underwriting account with the bankrupt, upon nineteen policies of insurance which they had effected with the bankrupt. The defendants acted

(*s*) In Cumming *v.* Forrester (1813), 1 M. & S. 499. Again, in Parker *v.* Smith (1812), 16 East, 386, Lord Ellenborough speaks of Grove *v.* Dubois as having been determined on the special ground that the dealings with the broker in respect of his commission *del credere* were considered as virtually had with the assured themselves.

(*t*) 1 T. R. 115.

(*u*) Lord Ellenborough says: "I cannot conceive how a contract between A. and B. can vary the rights between B. and a third person, who is a stranger to it, and empower B. to set up a claim against him as derived out of that contract": 1 M. & S. 498. See also in Koster *v.* Eason (1813), 2 M. & S. 117; and Morris *v.* Cleasby (1816), 4 M. & S. 566; Hornby *v.* Lacy (1817), 6 M. & S. 166. Gibbs, C. J., declared that he had often endeavoured, but in vain, to discover the principle on which Grove and Dubois was founded. See Baker *v.* Langhorn (1816), 2 Marshall's R. at p. 216, *S. C.*, 6 Taunt. 519; see also Peele *v.* Northcote (1817), 7 Taunt. 478. The American jurists treat the case of Grove *v.* Dubois as clearly overruled on this point by the subsequent authorities. See 2 Duer, 375, who collects them all.

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under a *del credere* commission for their employers; but this fact was not known to the bankrupt. The defendants claimed to be allowed to set off, as mutual credits, unadjusted losses due from the bankrupt, before his bankruptcy, on the account current between them, and for which they, the defendants, had given credit in account with their respective principals. It appeared that five out of the nineteen policies were effected by defendants in their own name and on their own account: as to these, the Court allowed the claim of set-off on the authority of Grove *v.* Dubois: four out of the nineteen policies were in the name, but not on the account, of the defendants; as to these also the Court held that the right of set-off might be claimed, because upon these policies the defendants could sue in their own names and on their own account, provided they had a lien on the policies, or had paid the losses over to their employers; and the bankrupt, by subscribing to a policy so effected, had consented that they should stand as principals, and be considered as giving him credit on the policy at their own risk and on their own account. The remaining ten out of the nineteen policies were neither in the name nor on the account of the defendants, and as to these the Court held, on the ground of want of mutuality of credit, that the claim of set-off could not be allowed; because upon these policies the defendants, even though they had a lien, or had paid over losses, could never sue in their own names, but only in the names of their principals, nor had the bankrupt consented that as to these policies they should ever stand as principals, so as to be considered as giving him credit on their own risk and on their own account: the guaranty of the bankrupt's solvency, given by defendants to their employers under the commission *del credere*, being a transaction to which the bankrupt was not privy, could not affect the rights of the parties (*x*). With regard to these ten policies also, the Court considered that the right of the defendants to set off losses was precluded by the fact that

(*x*) Koster *v.* Eason (1813), 2 M. & S. 112.

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they had not actually paid over such losses to their principals, but only allowed them in account (*y*).

Parker *v.* Beasley, as to right of broker who has a lien on a policy to set off losses in an action for premiums by the trustee of a bankrupt underwriter.

114. An agent who has a lien upon a policy which he has effected in his own name, though not on his own account, may set off losses, as mutual credits, in an action brought against him by the trustee of a bankrupt underwriter for premiums, due before the bankruptcy, even though he has not a *del credere* commission; *e.g.*, the consignees of a cargo, having a lien thereon in respect of bills drawn on them on account of such cargo (*z*). "Here," said Lord Ellenborough, "if the parties had not had a lien, their names would have stood on the policy as mere naked names, not coupled with an interest; but they may have an interest not only by a *del credere* commission, but also by a lien" (*a*).

Davies *v.* Wilkinson.

Accordingly, in a similar action against a broker who had effected a policy in his own name at the request of a principal, who was indebted to him at the time in a greater sum than that which the broker claimed to set off in the action, the Court of Common Pleas held, on the authority of the case just cited, that, as the broker himself might have sued on the policy, and had a lien on it for more than the amount of his set-off, he might be allowed to reduce the claim of the assignees by availing himself of such defence, though he did not act under a *del credere* commission (*b*).

Lee *v.* Bullen.

In 1858 the principle underlying these decisions was again brought into question in the case of Lee *v.* Bullen. That was an action for premiums by assignees of a bankrupt underwriter against brokers, who pleaded a set-off for return of premiums and for losses. The policies had been effected by the defendants in their own names, "$\frac{\text{and}}{\text{or}}$ as agents," they had given the assured a *del credere* guaranty, and continued to hold the policies. Lord Campbell, C. J., said: "Both on principle and according to decided cases, I am

(*y*) *Ibid.* 119.
(*z*) Parker *v.* Beasley (1814), 2 M. & S. 423.
(*a*) *Ibid.* 426.
(*b*) Davies *v.* Wilkinson (1828), 4 Bing. 573.

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quite clear that the facts raised a good defence. There was mutual credit between the parties; the underwriter trusts the brokers for the premiums, and they on the policy trust him that he will fulfil his engagement. The policy being effected in the names of the defendants, and they guaranteeing the solvency of the underwriters, the defendants are not merely nominal contractors, but had a real interest in the contract. This, therefore, is a case of mutual credit, both on principle and the decided cases. Koster *v.* Eason and Parker *v.* Beasley are expressly in point as to the construction to be put on the mutual credit clauses as between an underwriter and the person thus effecting the policy" (*c*).

Baker *v.* Langhorn.

115. Where, however, brokers, not having a *del credere* commission, effected the policy in their own names, but expressly on the face of the policy "as agents," Gibbs, C. J., held, that although they had always retained the policy in their own hands, they could not set off losses in an action by the assignees for premiums (*d*). "If," said the Chief Justice, "I underwrite for A. B. in his own name without proof that he is acting for another, I must take him to be the principal; but if he be acting expressly as agent, I know that he is not the principal, and that any contract I may enter into with him is not a contract of insurance" (*e*). The result was the same in a case where a broker effected a policy, not in his own name or account, but in the name and on the account of his principals, under a commission *del credere* (*f*), and it was proved that the policy had throughout remained in the hands of the assured. The underwriter having become bankrupt, his assignees sued the broker for premiums due before the bankruptcy: the broker claimed to set off losses which had not only accrued before the bankruptcy, but which had

Peele *v.* Northcote.

(*c*) Lee *v.* Bullen (1858), 27 L. J. Q. B. 161; 8 E. & B. 692, n.

(*d*) Baker *v.* Langhorn (1816), 2 Marshall's R. 215; 6 Taunt. 519, *S. C.*; 4 Camp. 396.

(*e*) 2 Marshall's R. 216.

(*f*) A declaration was written on the policy that it was agreed that the broker should guarantee the underwriters thereon.

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actually been paid over by the broker to his employers before that event.

Sir Vicary Gibbs, however, disallowed his claim on the grounds,—

1. That the policy was not effected in the name of the broker at all.

2. That it was not left in his hands.

3. That the mere fact of its having been effected *del credere* could not alter the relations of the broker and the underwriter, nor let in the claim to set off; for the guarantee of the underwriter's solvency interested no one but the assured, who paid the broker accordingly his commission *del credere* (*g*).

Right of broker to make deductions in respect of returns of premium.

116. The cases hitherto considered have turned upon the right of the broker to deduct losses from premiums; those which follow relate to the broker's right to make a similar deduction in respect of returns of premium, and depend upon different principles.

Principles on which it rests.

The amount of premium ultimately payable to the underwriter may very frequently depend on contingencies which cannot for some time be ascertained; as, for instance, where goods coming from abroad are insured at a premium of ten guineas per cent., to be reduced to five if the ship sail with convoy, and to be further reduced in case of short interest; the amount of premium, in fact, payable cannot in such case be ascertained until it be known whether the ship, in fact, sailed with convoy or not, and whether the interest really falls below the amount insured (*h*).

Usage as to the allowance in account for

Accordingly, the general custom as between insurance brokers and underwriters was (*i*), that if on the settlement of

(*g*) Peele *v.* Northcote (1817), 7 Taunt. 478. See, too, Ex parte White (1871), L. R. 6 Ch. at p. 403, per Mellish, L. J.

(*h*) A more modern illustration would be the case of a steamer insured for twelve months with broad liberties of trading, say, at eight guineas per cent., with a return of one guinea per cent. should she be engaged solely in Eastern voyages.

(*i*) This custom is now quite extinct. Returns of premium are now dealt with as losses or averages. The underwriter is credited with the

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their mutual account there were any returns of premium then pending, the balance of the account, instead of being paid over, became the first item of account for the ensuing year and the pending returns of premium, as they successively became due, were carried to the debit of the underwriter in such subsequent account, and the adjusted balance was not paid over to the underwriter until all returns of premium were actually ascertained and deducted (*k*).

Legal position.

Until the sum to be deducted for returns of premium is ascertained—that is, in other words, until the events are determined upon which the amount of premium, actually payable to the underwriter, depends—the broker is the mutual agent of the assured and the underwriters, for the one to pay and for the other to receive (*l*).

Either party may, indeed, determine this agency when he pleases: the assured by taking the policy out of the hands of the broker who has effected it (*m*), paying him, of course, what he owes him at the time, and placing it in the hands of another broker to get it adjusted (*n*); and the underwriter by at once calling on the broker for the full premium, leaving nothing in reserve in the broker's hands to answer any returns of premium that the underwriter, at a subsequent time, may be bound to pay the assured (*o*).

If, however, the underwriter do not determine the broker's agency before the event arises on which the return of premium depends, the broker still continues his agent for the deduction of such return from the full amount of premium; and, consequently, when the underwriter brings his action against

agreed initial premium, and if a return is afterwards found to be due, it is adjusted on the policy and credited to the broker, just as a loss would be adjusted or credited. It has nevertheless been thought necessary to retain in the text the passages and decisions relating to the old practice, for the sake of the principles which they illustrate.

(*k*) See Goldschmidt *v.* Lyon (1812), 4 Taunt. 534.

(*l*) Per Lord Ellenborough in Shee *v.* Clarkson (1810), 12 East, 510.

(*m*) See Mar. Ins. Act, 1906, s. 53 (1), *ante*, § 101, that the underwriter is directly responsible to the assured for losses.

(*n*) Per Mansfield, C. J., in Minett *v.* Forrester (1811), 4 Taunt. 543.

(*o*) *Ibid.* 544.

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the broker for such full amount of premium, the broker is entitled in his defence to set off the amount of returns which, as his agent, he was authorized to deduct.

The single question, then, as to the broker's right to set off returns in an action for premiums was considered, under the old practice, to resolve itself into this: Was or was not his agency determined before the right to returns of premium accrued?

Hence, where the underwriter himself sued the broker for premiums, the Court held, that the broker, although not acting under a *del credere* commission, might deduct, by way of set-off, sums due for returns of premium, though it did not appear that the broker had either received the premiums from his principals or credited them with returns of premium; and although the returns of premium claimed to be deducted had never been adjusted as between the broker and the underwriter (*p*).

Death or bankruptcy of underwriter terminates broker's agency.

117. As, however, the authority thus given by the underwriter ceases *ipso facto* by his bankruptcy or his death, the broker cannot avail himself of this defence when the action is brought by the trustee of a bankrupt or the executors of a deceased underwriter, unless, indeed, the sums payable by way of returns of premium have been actually adjusted in account between the broker and the underwriter before the bankruptcy or the death.

Minett *v.* Forrester.

Thus, where the assignees of a bankrupt underwriter brought their action against a broker for premiums due on two policies of insurance, in respect of which he claimed to deduct, by way of set-off, certain sums for returns of premium, and it appeared that the events which entitled the broker to make this deduction had occurred and become known to him—on the one policy before the bankruptcy; on the other policy not till after that event; but that no adjustment had been made on either policy: the Court held, that, as the agency of the broker had been determined by the

(*p*) Shee *v.* Clarkson (1810), 12 East, 507.

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bankruptcy of the underwriter, he was not entitled to this set-off either on the one policy or on the other (*q*). Upon the same principles the Court of King's Bench subsequently decided in a similar action the three following points:—

Parker *v.* Smith.

1. That no such returns of premium can be set off against a claim by the assignees (or now the trustee) of a bankrupt underwriter for premiums, even though forming part of an adjusted account, where the events entitling to such returns were not known to have happened until after the adjustment.

2. That no such set-off can be allowed where the events entitling to the return happened before the bankruptcy, but the amount of return claimed was never adjusted with the bankrupt.

3. That such set-off cannot be allowed in any case where the events entitling to the return are not known till after the bankruptcy (*r*).

Houston *v.* Robertson.

The Court of Common Pleas extended the same principles to actions brought by the executors of a deceased underwriter, and decided that no set-off could be allowed in respect of returns of premium, the events entitling to which were not known till after the underwriter's death (*s*). In a subsequent case they also explicitly decided that all these rules applied exactly in the same way, whether the broker acted under a *del credere* commission or not (*t*). And the same principles have been held to apply to a case where a broker was sued by the underwriter's trustee for sums which, subsequently to the bankruptcy, he had received on the underwriter's account for certain salvages on losses which, prior to his bankruptcy, the underwriter had paid. It was held by Collins, J., that he was not entitled to deduct from the amount so received by him payments to the assured for losses

Whether the broker be acting *del credere* or not makes no difference: Houston *v.* Bordenave.

(*q*) Minett *v.* Forrester (1811), 4 Taunt. 541; Goldschmidt *v.* Lyon (1812), 4 Taunt. 534.

(*r*) Parker *v.* Smith (1812), 16 East, 382.

(*s*) Houston *v.* Robertson (1816), 6 Taunt. 448.

(*t*) Houston *v.* Bordenave (1816), 6 Taunt. 451.

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which he had made in pursuance of his *del credere* obligation (*u*).

Such, then, are the principal decisions that have taken place on the right of the broker to set off losses and returns of premium in actions brought against him by the underwriter for his premiums—decisions complicated from the variety of circumstances involved in them, and from the difficulty of reconciling the relations arising out of the actual course of dealing between the broker and the underwriter with those which flow from the general principle that the underwriter is debtor, not to the broker, but to the assured.

Summary of the positions established by the cases in respect, 1st, to setting off losses; 2nd, to setting off returns of premium.

118. The cases above discussed seem to support the following positions (*x*):—

1. In respect of setting off losses—

a. Where bankruptcy has intervened, and the action is brought on behalf of the creditors of the bankrupt underwriter, the broker who has effected the policy in his own name and on his own account, or in his own name, but on the account of his principals (provided in this last case he has also a lien on the policy to the extent of his set-off), may set off losses allowed to him on account by the underwriter before his bankruptcy, though unadjusted, because losses so allowed in account are mutual credits within the meaning of those words in the Statutes of Bankruptcy (*y*).

(*u*) Elgood *v.* Harris, [1896] 2 Q. B. 491.

(*x*) The summary which here follows is taken from the 2nd edition of this work, pp. 139, 140. It is conceived, however, that the modern tendency is rather to treat these and similar questions as questions of fact, each to be determined according to circumstances, the question in each case being, Did the broker contemplate having an interest in the policy, or was he acting merely as agent for the assured? In the former case he will be entitled to set off; in the latter he will not. The fact of the broker's receiving a *del credere* commission, the fact of the policy being expressed to be in his name, and of his retaining the policy in his own hands, are none of them conclusive, though each of them important pieces of evidence in his favour. Apart from other circumstances which might lead to a contrary conclusion, a modern tribunal would probably, upon proof of the several facts and circumstances detailed in the text, arrive at the several positions indicated—rather, however, as questions of fact than of law.

(*y*) Grove *v.* Dubois (1786), 1 T. R. 112; Koster *v.* Eason (1813),

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b. But where he effects the policy both in the name and on account of his principals; or where, when effected in his own name, but on their account, he has no lien on it; or where he effects it in his own name, but expressly on the face of the policy as agent, he has no such right of set-off, even though he acts under a *del credere* commission (*z*).

c. For a *del credere* commission, being a contract wholly between the broker and the assured, cannot affect the mutual rights and liabilities of the broker and the underwriter; and therefore does not, *per se*, and without other requisites, entitle the broker to his right of set-off (*a*).

2. As to returns of premium (*b*)—

a. The broker, being the agent of the underwriter for deducting returns of premium in the account between them, may, in an action by the underwriter himself for premiums, set off sums due for returns of premium (*c*).

b. But the death or bankruptcy of the underwriter operates as a revocation of this agency, and the broker, therefore, cannot, in an action by the trustee in bankruptcy, or by the executors, set off unadjusted returns of premium, whether the events entitling to those returns were known before or after the death or bankruptcy (*d*).

Effect of leaving policy in the hands

119. In the usual course of business, the assured leaves the policy in the hands of the broker until the settlement of

2 M. & S. 112; Parker *v.* Beasley, *ibid.* 423; Davies *v.* Wilkinson (1828), 4 Bing. 573; Lee *v.* Bullen (1858), 27 L. J. Q. B. 161; 8 E. & B. 692, n.

(*z*) Koster *v.* Eason (1813), 2 M. & S. 112; Baker *v.* Langhorn (1816), 6 Taunt. 519; Peele *v.* Northcote (1817), 7 Taunt. 478.

(*a*) Peele *v.* Northcote (1817), 7 Taunt. 478; Houston *v.* Bordenave (1816), 6 Taunt. 451; Elgood *v.* Harris, [1896] 2 Q. B. 491.

(*b*) As has been already pointed out, the alteration in the course of business, by which returns of premium are now regarded and treated as losses on the policy, has rendered obsolete the distinction which was properly drawn by Arnould.

(*c*) Shee *v.* Clarkson (1810), 12 East, 507.

(*d*) Minett *v.* Forrester (1812), 4 Taunt. 541; Goldschmidt *v.* Lyon (1812), *ibid.* 534; Parker *v.* Smith (1812), 16 East, 382; Houston *v.* Robertson (1816), 6 Taunt. 448; Houston *v.* Bordenave (1816), 6 Taunt. 451.

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claims. By doing so the assured probably holds the broker out as having authority, or in other words gives him ostensible authority, to act as his agent in all matters arising on the policy—to claim and receive returns of premium, to settle losses, and to receive the amount of them in cash, or, if the assured is cognizant of the usage at Lloyd's, to pass them in account—probably to do all that is incidentally necessary for carrying out the contract contained in the policy thus left in his hands (*e*). If, however, the insurer pays a loss to an agent of the assured without the production of the policy, he no doubt does so at his peril, and will be liable to pay it a second time if the agent had not in fact authority to receive the money (*f*).

of the broker.

Duty of broker thus entrusted with the policy.

Whenever the assured leaves the policy in the hands of the insurance broker for the purpose just explained, the broker is, in law, presumed to promise, in consideration of his commission, that he will use all reasonable diligence to procure from the underwriter a speedy settlement of the claim, and, without delay, collect and pay over to the assured the sums due. If he fail to do so, an action for damages at the suit of the assured will lie against him in respect of such failure (*g*).

May be sued for money received.

The broker, therefore, after thus allowing the loss in account, and so depriving the assured, when cognizant of the usage, of all legal remedy against the underwriter, will be liable to the assured for the amount, as money had and received to his use; and this although no proof be given that he has actually received any money from the underwriter, for in such action he will be estopped from saying that he has not such money in his hands for the plaintiff's use (*h*).

(*e*) See the cautiously expressed opinion of Blackburn, J., in Xenos *v.* Wickham (1863), 14 C. B. N. S. 452; 33 L. J. C. P. 13, 21; Richardson *v.* Anderson (1807), 1 Camp. 43, n.; Goodson *v.* Brooke (1815), 4 Camp. 163; per Lord Esher, M. R., Hine *v.* Steamship Ins. Syndicate (1895), 72 L. T. 79, 81; see *infra*, §§ 124—129.

(*f*) See Swan *v.* Marit. Ins. Co., [1907] 1 K. B. 117.

(*g*) Bousfield *v.* Cresswell (1810), 2 Camp. 545.

(*h*) Andrew *v.* Robinson (1812), 3 Camp. 199; Wilkinson *v.* Clay (1814), 4 Camp. 171; *S. C.* in banc, 6 Taunt. 110.

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Unless assured has waived his right.

120. The assured, however, may be found, by his subsequent course of dealing, to have waived his right to resort to the broker. The following is a case of the kind:—The brokers, after a loss had occurred, allowed the underwriter's name to be struck off the policy, and he gave them credit in his books for the amount. They did not, however, take credit for it on their side of the account; and, on the underwriter's bankruptcy, which took place soon after, gave notice thereof to the assured, telling him he must prove for his loss under the commission. Six months after this the assured settled an account with the brokers, including the very policy in question, without making any complaint of the erasure of the underwriter's name, or any claim in respect of the loss. Lord Ellenborough ruled, that, under these circumstances, the assured must be considered to have waived his right against the broker, and to have elected to seek his remedy under the bankrupt's commission (*i*).

Broker who has paid a loss, or allowed it in account, cannot recover it back.

If an insurance broker, in case of a loss, pays the assured the full amount of the money subscribed, he cannot afterwards recover back any part of it on the ground that, before the loss happened, one of the underwriters became insolvent, and that he, the broker, was not aware of that fact when he paid the money (*k*). The same rule applies where the broker, instead of paying the loss over to his principal in money, has allowed it to him in account, especially if a considerable period has been suffered to elapse between such allowance and the claim to recover back the money (*l*).

When can broker set up defence of illegality.

121. An agent, to whom monies have actually been paid to the use of the principal, has no right to inquire into the legality of the transactions out of which the payment arose.

(*i*) Ovington *v.* Bell (1812), 3 Camp. 237.

(*k*) Edgar *v.* Bumstead (1808), 1 Camp. 411.

(*l*) Jameson *v.* Swainstone (1810), 2 Camp. 546, *in notis*. In this case two years had elapsed between the allowance of the loss in account and the attempt to recover it back by action. Mansfield, C. J., held, that after such a lapse of time the brokers, as between themselves and their principal, must be held to have received actual payment from the underwriters.

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Hence, where a loss has actually been paid over by the underwriter to the broker, the latter cannot, to an action for money had and received by the assured, set up the illegality of the insurance (*m*). But where the money is not paid, but only allowed in account, as the course of dealing is not suffered to operate in illegal transactions, the money may always be stopped by the principal whilst in transitu to the person for whom it is intended; *e.g.*, premiums on illegal insurances may be stopped by the assured whilst in the hands of the broker (*n*).

Broker cannot dispute the title of his employer.

An agent cannot dispute the title of his principal; nor shall he, after accounting with his principal, and receiving money for him in that capacity, afterwards say that he did not so receive it, but for the benefit of some other person.

Roberts *v.* Ogilby.

An action was brought for money had and received, to recover from a policy broker the amount of a loss he had received from the underwriters on a policy effected on ship on behalf of the plaintiff, a part-owner and ship's husband. The other part-owners had never given the plaintiff any directions to insure for them, and the defendant, in effecting the policy, looked to the plaintiff alone as his employer. A loss having occurred, the defendant collected the amount thereof from the underwriters, but did not pay it over to the plaintiff, in consequence of having received notice not to do so from the other part-owners. On this evidence, a verdict having passed for the plaintiff, the Court refused to set it aside, on the plain ground that the plaintiff alone employed the defendant, and that the defendant, as his agent, having since received the money from the underwriters, must be held to have received it for his use (*o*).

(*m*) Tenant *v.* Elliott (1797), 1 B. & P. 3; Farmer *v.* Russell, *ibid.* 298. As regards policies which are gaming and wagering contracts within the Gaming Act, 1845 (see *infra*, § 315), the position does not appear to be affected by the Gaming Act, 1892. See De Mattos *v.* Benjamin (1894), 63 L. J. Q. B. 248; Burge *v.* Ashley, [1900] 1 Q. B. 744, approving O'Sullivan *v.* Thomas, [1895] 1 Q. B. 698.

(*n*) Edgar *v.* Fowler (1803), 3 East, 222; see *ante*, § 109.

(*o*) Roberts *v.* Ogilby (1821), 9 Price, 269.

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Dixon *v.* Hamond.

Flowerden and Davidson were partners: Flowerden having mortgaged a ship which belonged to him in his separate right, Hamond, the defendant, paid off the debt, 900*l.*, and got his own name substituted for that of the former mortgagee as registered owner. Some time subsequently defendant effected an insurance for 2,800*l.* on the ship and freight, as agent for and by the direction of Flowerden and Davidson, and charged the partnership with the premiums. The ship having been lost, the underwriters paid the whole amount insured to defendant, as agent for Flowerden and Davidson, who refused to pay over the difference between the 900*l.* and the 2,800*l.* to the assignees of Davidson, the surviving partner, on the ground that, 1st, the defendant, being the sole registered owner of the ship, was not liable at all; 2nd, if he was, as the ship never belonged to the partnership, he was only liable to the executors of Flowerden, and not to the assignees of the surviving partner. The Court overruled both objections on the single ground, that as the defendant had received the money as the agent for the partnership, he could not, when claimed of him, be permitted to say that he had received it for the benefit of Flowerden alone (*p*).

Bell *v.* Jutting.

122. The case of Bell *v.* Jutting has been frequently cited (*q*) in support of the proposition that brokers will, generally speaking, be safe in paying over a loss to the party for whom they have effected a policy as for a principal, and whom alone they knew as such, even after notice—unless, indeed, satisfactory proof can be given that he only effected the policy as agent. The facts were that the defendants, as brokers, by directions of Brown, the charterer of the "Lady Hood," effected an insurance for 2,000*l.* on her freight. A total loss having ensued, the defendants collected the 2,000*l.*, and although they received notice, whilst part of the money was still in their hands, that the plaintiffs, as owners of the vessel, claimed the benefit of the insurance, they nevertheless

(*p*) Dixon *v.* Hamond (1819), 2 B. & Ald. 310.
(*q*) 2nd ed. of this work, p. 145; 6th ed. p. 209.

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paid the balance over to Brown. The plaintiffs failed in an action to recover this sum, not, however, on the ground that the defendants were justified in paying the money to an agent, but because the Court held, on the facts, that Brown had effected the policy on his own account, and had never intended to act as the plaintiff's agent at all. The case, therefore, decides nothing with respect to the duties or liabilities of the broker towards an agent and his undisclosed principal (*r*).

123. We have already seen that the rule is that the assured is liable to the broker for premiums as for money paid, whether they have been paid over by the broker to the underwriter or not (*s*).

Where a policy by deed, instead of acknowledging receipt of the premium, contained a covenant from the brokers to pay it, and was expressed to be effected in consideration of that covenant, the Court held, that the premiums not paid by the broker before his bankruptcy to the underwriters could be recovered by his assignees from the assured, not, indeed, as money paid, but as "money due for premiums for policies caused and procured to be underwritten by the bankrupt" (*t*).

Assured cannot object to policy after voyage ended.

If a broker engages to effect an insurance with such names as should be to the satisfaction of the assured, it is no defence for the assured, after lying by till the voyage is completed, to set up against an action for premiums that the names of the underwriters had never been submitted to him for approval (*u*).

124. We now proceed to discuss the right of the assured to maintain an action on the policy for a loss.

Whether the usage of Lloyd's binds the assured.

We have already detailed the course of practice as to the settlement of claims in case of loss. Such a mode of settle-

(*r*) Bell *v.* Jutting (1817), 1 J. B. Moore, 155. The true effect of this case is pointed out by Duer, vol. ii. pp. 176, 361—363.
(*s*) See *ante*, § 107.
(*t*) Power *v.* Butcher (1829), 10 B. & Cr. 329.
(*u*) Dixon *v.* Hovill (1828), 4 Bing. 665.

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ment is binding by the usage of business upon the broker and the underwriter as between themselves. But whether it be of any binding effect upon the assured is a question of fact as to his assent to this kind of settlement.

We have seen that it is a usual thing for the assured to leave the policy in the hands of the broker. The effect is, probably, that he has ostensible authority to settle the loss and to receive the money (*x*). But it is of no effect whatever to bind the assured by the peculiar usages of Lloyd's (*y*).

What discharges the underwriter as to the assured.

125. Thus, if the underwriter pays the loss in money (*z*) to the broker who has been allowed to retain possession of the policy, and *à fortiori* to a broker to whom the policy has been expressly sent for the purpose of settling for the loss, the underwriter is thereby discharged at common law from any claim by the assured for the same loss (*a*). So he is, if the assured can be shown to have actually assented to the usage at Lloyd's in settling the claim, by allowing the amount to be credited by the underwriter to the broker in

(*x*) *Ante*, § 119. See per Blackburn, J., in Xenos *v.* Wickham (1863), 33 L. J. C. P. 13, 21; 14 C. B. N. S. 452. There is no clear judicial decision on the point. It arose in Sweeting *v.* Pearce, *infra*, §§ 126, 127, but in the event did not need to be decided. In the Court of Common Pleas, Cockburn, C. J., expressed the opinion that when the assured leaves the policy with the broker he is estopped from saying that the latter has no authority to receive payment for a loss (see 29 L. J. C. P. at p. 270); and Byles, J., agreed with this opinion (*ibid.* p. 272); but the judges in the Court of Exchequer Chamber carefully refrained from giving any opinion. Phillips (vol. i. s. 1882), Duer (vol. i. Lect. XI. ss. 8, 42), and apparently Arnould (§ 129, *infra*) agree with the view of Cockburn, C. J., and Byles and Blackburn, JJ. (*ubi supra*), which is also to some extent supported by the decisions that a broker who retains possession of the policy owes a duty to the assured to collect losses from the underwriters with diligence. See *post*, §§ 163, 164. It is apprehended that the legal position is the same whether the assured voluntarily leaves the policy in the hands of the broker, or the latter retains it in the exercise of his lien.

(*y*) As to this, see *post*, §§ 126—128.

(*z*) As to payment by bill, see Hine *v.* Steamship Ins. Syndicate (1895), 72 L. T. 79.

(*a*) Scott *v.* Irving (1830), 1 B. & Ad. 605; see also Legge *v.* Byas (1901), 7 Com. Cas. 16, per Walton, J.

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account (*b*); or if, from all the circumstances of the case, he must reasonably be presumed to have acquiesced in it (*c*).

The question involved in this is not appreciated in all its importance until the bankruptcy of the broker threatens one of the two other parties to the insurance with serious loss. Very strict views of the broker's authority, under any circumstances whatever, were at one time entertained by the judges, much to the prejudice of the underwriter (*d*). The leaning of the Courts, however, speedily altered. The right of the assured in such cases to recover from the underwriter is now a pure question of evidence, and depends solely upon the point whether the assured, upon a view of all the facts, must not be taken to have been cognizant of the usage, and an assenting party, therefore, to its observance (*e*). For the usage of Lloyd's as to settling losses in account, being "the usage of a particular place, or of a particular set of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage and adopt it" (*f*).

Common law and Lloyd's usage contrasted.

126. The law applicable to this question is strikingly expounded by Bramwell, B., in the following passage, in delivering his opinion in the case of Sweeting *v.* Pearce (*g*):—

"This is a question," says the learned judge, "of authority. . . . . The legal presumption of authority given to a person who is to receive satisfaction for another for a money

(*b*) See Bartlett *v.* Pentland (1830), 10 B. & Cr. 760. This usage does not extend to dealings between the brokers and insurance companies: Hine *v.* Steamship Ins. Syndicate, *supra*.

(*c*) Andrew *v.* Robinson (1812), 3 Camp. 199.

(*d*) See the case before Lord Ellenborough of Jell *v.* Pratt (1817), 2 Stark. N. P. 67; and the cases before Lord Tenterden of Todd *v.* Reid (1821), 4 B. & Ald. 210; and Russell *v.* Bangley (1821), *ibid.* 395.

(*e*) Bartlett *v.* Pentland (1830), 10 B. & Cr. 760; Scott *v.* Irving (1830), 1 B. & Ad. 605; Stewart *v.* Aberdein (1838), 4 M. & W. 211; Sweeting *v.* Pearce (1861), 9 C. B. N. S. 534; 30 L. J. C. P. 109.

(*f*) Per Lord Tenterden in Bartlett *v.* Pentland (1830), 10 B. & Cr. 770.

(*g*) Sweeting *v.* Pearce (1861) (in error), 9 C. B. N. S. 534, 540; 30 L. J. C. P. 109, 112.

Sect. 126. demand is, that he is to receive it by payment of money only. It is also a rule of good sense. . . . . The custom [*i.e.*, of Lloyd's] set up is, that the persons who are by legal presumption to receive in money, and in money only, are not to receive in money. The custom therefore is in contradiction to the authority given to the agents by their principal. It is a custom not to do the thing which the law implies they are to do; that shows it to be unreasonable" [*i.e.*, if it were to be supposed to be binding on a person ignorant of it and consequently not assenting to it].

"There is a great distinction between this and the cases which have been relied upon for the defendant. If I set a man generally to do a thing, a custom may well apply to regulate the mode of doing it. Thus, with regard to usages of the Stock Exchange which have been referred to, if I tell a broker to purchase such and such stock, I impliedly engage him to deal upon terms upon which he can deal, that is, according to the usages of the place. If the tenor of my authority is to exclude the operation of any custom, I give him no authority to act according to the custom; but if the authority I give is consistent with the custom, then the custom comes into operation. Thus, in the case before us, when the plaintiff says to the broker 'Receive payment in money'; that means 'Receive it in money and not otherwise.'

"Mr. Arnould, in his work on Marine Insurance, 2nd edit. p. 81, says:—'It might have been considered not a very violent presumption that all parties resident in this country employing brokers to effect policies for them, in the common course of business, should be considered to have done so with reference to the usages established at Lloyd's.' I beg leave to say that I think it would have been an unreasonable presumption. I can well understand, if a man who knows of this usage of Lloyd's gives his policy to the broker, with instructions to do the needful, a jury might well find that he authorizes the broker to do the needful according to the custom. Probably Mr. Arnould meant no

more than that. But it would be a question for the jury in each case whether the presumption that the authority [was] to receive payment in money was rebutted by the principal's knowledge of the custom. . . . . This custom, in truth, goes not to say how the presumed authority to receive payment in cash is to be exercised; but that it should not be exercised at all." Sect. 126.

127. The case in which these observations were made was singularly suitable to bring out the antagonism between Lloyd's usage and the general law of the country. The London brokers had become bankrupt after debiting the underwriter with the loss as against a large sum due to him from them on account of premiums. This was in accordance with the usage, which the jury found to be generally known amongst merchants and shipowners effecting insurances, and would have been a bar to the action of the assured against the underwriter, if the usage were binding on the plaintiff. It was admitted, however, by the defendant, in accordance with the plaintiff's evidence, that, the policy being in the hands of the brokers for safe custody only, the ship's papers were delivered to them after the loss for no other purpose than to obtain an adjustment. The plaintiff was ignorant of Lloyd's usage, and had not intended his brokers should ever receive the money in payment for the loss. Under these circumstances it was determined in the Court below, and affirmed by the Exchequer Chamber, that the general law, and not the usage at Lloyd's, governed the case and entitled the plaintiff, notwithstanding the settlement with the broker, to recover against the underwriter (*h*). Sweeting *v.* Pearce.

In Bartlett *v.* Pentland (*i*), the plaintiffs, corn merchants in Plymouth, had a policy effected for them by a London broker with the St. Patrick's Insurance Company at their office in Lombard Street, London; a total loss having taken Bartlett *v.* Pentland.

(*h*) Sweeting *v.* Pearce (1861), 7 C. B. N. S. 449; 29 L. J. C. P. 265; (in error), 9 C. B. N. S. 534; 30 L. J. C. P. 109.

(*i*) Bartlett *v.* Pentland (1830), 10 B. & Cr. 760.

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place, a pen was struck through the company's subscription to the policy, and the loss passed in account, as between broker and underwriter, in the usual way, the company being at that time indebted to the broker on the general account between them. The plaintiffs, although in the habit for thirty years of procuring insurances, were yet unacquainted with the usage at Lloyd's, and were misled by a false request of the broker to draw on him instead of the underwriter (*k*) three months' bills, which he accepted but never paid, having failed before they became due. Previous to his bankruptcy, the insurance company, which had all along been indebted to him on the general account between them (including many transactions besides the policy in question), settled such general account with him by paying in money the balance due to him for losses, including the loss in question, after deducting the amount of the premiums due to them from the broker. It was held that there was nothing in the case to raise any presumption against the plaintiffs, that they had given an implied authority to the broker to settle according to Lloyd's usage; and consequently that the money paid to the broker, being not a specific payment on account of a specific loss, but merely a general payment on a general account, was not to be deemed in law payment as against the assured. And it was further held that, notwithstanding the plaintiffs had been induced to give credit to the broker, and had not applied to the company until after the broker's failure, when the company had already settled their general account with him, yet, as the company had not been damnified by the laches of the plaintiffs, they could not be discharged by it (*l*).

When payment not a discharge.

When *laches* is a discharge.

Scott *v.* Irving.

128. In the next case of the same kind, the plaintiff, a merchant in Glasgow, had employed a London broker to procure an insurance for him at Lloyd's. A total loss having

(*k*) The practice of drawing bills, whether on brokers or underwriters, for the settlement of claims is now obsolete.

(*l*) Per Lord Tenterden, C. J., 10 B. & Cr. 770; accord. *per curiam*, Macfarlane *v.* Giaunocopulo (1858), 3 H. & N. 860; 28 L. J. Ex. 72.

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occurred on the policy, the plaintiff wrote to the broker, enclosing a bill drawn on the broker, payable ten days after sight, and stating that he did not know at what date it was proper to draw for the balance, this being the first total loss he had ever had in London. The Court upon these facts held that the plaintiff was not cognizant of the usage of Lloyd's so as to be precluded from suing the underwriter even two years after the broker's insolvency; but that to the extent of a payment made in cash by the underwriter to the broker within the month on account of this loss the underwriter was discharged as against the assured, since the payment made was in strict accordance with his general authority to the broker (*m*).

Stewart *v.* Aberdein.

In the next case the plaintiffs were merchants at Liverpool, who, for a long course of years, had employed the same firm of London brokers to effect their insurance business in London, which was of a very extensive character. The London brokers kept both a general and also an insurance account with the plaintiffs, in the latter of which they debited them with all premiums, and credited them with all losses allowed in account by the different underwriters; and the balance, after deducting the premiums, was then carried into the general account with the plaintiffs. Some evidence was given that Lloyd's usage was well known in Liverpool. A loss on a policy effected with the defendant, who was an underwriter at Lloyd's, was settled and passed in account as between the brokers and the defendant in the usual way, and the defendant's name was struck off the policy. An adjustment of this and other losses having been obtained by the brokers, they advised the plaintiffs (to whom they were then considerably indebted on the general account) of the fact; and the plaintiffs then drew upon them for the amount (*n*). Shortly after this the London brokers, who were still greatly indebted to the plaintiffs, became bankrupt, and the plaintiffs thereupon immediately sued the defendant

(*m*) Scott *v.* Irving (1830), 1 B. & Ad. 605.

(*n*) This practice is now obsolete. See *ante*, § 127, note (*k*).

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for the loss already mentioned as passed in account with the brokers. But the Court held that, under the circumstances, the plaintiffs' claim could not be supported, on the ground stated by Lord Abinger, "that there was sufficient evidence in the case of the knowledge of the plaintiffs of the custom, and of their authorizing the brokers to settle with the underwriters, and to give them credit on account for the loss, and to permit them to draw on the brokers for the amount" (*o*).

Opinion of Lord Abinger upon the general question.

Upon the general question, the Court were of opinion, that "where an insurance broker, or other mercantile agent, has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he (the agent or broker) may have received by credits in account with the debtors (the underwriters, &c.), with whom he also keeps running accounts, and not merely with monies actually received, ... it must be understood, that where an account is *bonâ fide* settled according to that known usage, the original debtor (*i.e.*, the underwriter) is discharged; and the agent (*i.e.*, the insurance broker) becomes the debtor, according to the meaning and intention, and with the authority, of the principal" (*p*).

Recent cases.

Unsuccessful attempts were made in two recent cases to bind the assured by a settlement in account between the broker and underwriter (*q*). In Matvieff *v.* Crosfield it was contended that Sweeting *v.* Pearce has been overruled by

(*o*) Stewart *v.* Aberdein (1838), 4 M. & W. 211.

(*p*) Per Lord Abinger, delivering the judgment of the Court in Stewart *v.* Aberdein (1838), 4 M. & W. 228. Duer is in many respects very dissatisfied with the report of this case (see remarks on it, 2 Duer, 260, 261); but although some of the reported expressions of Lord Abinger at N. P. and in Banc may be difficult to defend, yet the case, as Duer himself admits, is unexceptionable if only used as an authority for the position, that where the assured is fairly shown to be cognizant of the usage, he is bound by it.

(*q*) Legge *v.* Byas (1901), 7 Com. Cas. 16; Matvieff *v.* Crosfield (1903), 8 Com. Cas. 120.

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Robinson *v.* Mollett (*r*), a case in which the House of Lords affirmed (though without applying) the rule that "if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contract, and do not change their intrinsic character" (*s*). The judgments in Sweeting *v.* Pearce, however, expressly negative the application of this rule in the case of a Lloyd's usage which conflicts with the duty of an agent to receive payment in money; and Kennedy, J., held that Sweeting *v.* Pearce was not affected by Robinson *v.* Mollett.

Summary of the law on this point.

129. The following propositions seem to embrace the law on this subject:—

1. Unless the assured by evidence reasonably sufficient can be shown to be cognizant of this usage of settling claims in account and to have assented to it, he is not bound by it; but may recover against the underwriter, although the claim has, as between broker and underwriter, been settled, and passed in account.

2. Payment in cash by the underwriter to the broker of the balance of a general account is not payment as against the assured, if ignorant of Lloyd's usage. But a specific money payment by the underwriter to the broker in respect of the specific loss claimed by the assured in the action, and within the time appointed for cash payments, is, as against the assured, payment *pro tanto*.

3. If upon the facts of the case it is to be inferred that the assured was cognizant of this usage and assenting to it, he is bound by it, and cannot recover against the underwriter claims settled and passed in account as between underwriter and broker.

But the assured may lose his right to recover against the

(*r*) (1875), L. R. 7 H. L. 802.

(*s*) Per Lord Chelmsford, L. R. 7 H. L. at p. 836.

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underwriter by suing in the name of the broker, since every defence which is good against the actual plaintiff is open to the defendant. Consequently, a settlement by passing the claim in account with the broker is a bar to the action when it is brought in the broker's name (*t*). But the assured has the right of action in his own name.

The broker's lien on the policy.

130. The policy, when effected, becomes in law the property of the assured, who may maintain trover for it, subject to any lien which the broker may have for premiums and commission, or for the general balance of his insurance account. In practice the policy, after being effected, is sometimes handed over by the broker to the assured, and afterwards remitted by the assured to him for the settlement of claims on the occurrence of a loss; or the broker himself, as is very generally the case, keeps it throughout in his own possession.

If the broker represents to the assured that he has effected a policy according to their orders, they may maintain an action of trover against him although such policy has never in fact been effected at all; and in such action the plaintiff shall prove his loss, as in an action against the underwriter, and the defendant shall not be permitted to say that no such policy exists (*u*).

Particular lien.

As regards the broker's lien for the premium and commission due in respect of a particular policy which he has himself effected, the law is thus stated by Phillips (*x*):—"The agent who effects a policy for his principal and advances the premium or becomes responsible for it, and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him or he is supplied

(*t*) Gibson *v.* Winter (1833), 5 B. & Ad. 96. This is so wherever the action is brought in the name of one in trust for another (see the observations of Parke, B., in Wilkinson *v.* Lindo (1840), 7 M. & W. 87). So, the Judicature Act, 1873, s. 25, sub-s. 6.

(*u*) Harding *v.* Carter, before Lord Mansfield (1781), Park, Ins. 5; 1 Marshall, 309.

(*x*) 2 Phillips, s. 1909, quoted with approval in Fisher *v.* Smith (1878), 4 App. Cas. at p. 12.

with funds for the payment, whether his immediate employer is the assured himself or an intermediate agent, and in the latter case whether the intermediate agency was known or not known to the sub-agent claiming the lien." And this is so, even where the assured has paid the intermediary, in a case where the latter has not paid the broker (*y*). Sect. 130.

General lien.

131. His lien, however, for the balance of his general account depends on circumstances. Where he has been employed immediately by the assured himself, he has a lien on the policy, not only for the premium and commission due on the particular transaction, but for the amount of the general balance of his insurance account (*z*).

But where he is employed not immediately by the assured himself but by some intermediate agent, and he knows that to be the case, he has no lien on the policy in respect of his general balance against such his immediate employer. Where, however, he is ignorant that the policy is not really effected for the party by whom he is immediately employed, he may refuse to give it up to the assured until he is paid the amount of the general balance of his insurance account against his immediate employer. "The only question," says Gibbs, C. J., "is whether he knew or had reason to believe that the person by whom he was employed was merely an agent" (*a*).

(*y*) Fisher *v.* Smith, *ubi supra*.

(*z*) Whitehead *v.* Vaughan, and Parker *v.* Carter, cited in Cook's Bankrupt Laws, 547, 7th ed.; see also Olive *v.* Smith (1813), 5 Taunt. 56, where Gibbs, J., says: "I came to London in 1775. I was pretty early conversant with some business of that sort, and never remember any doubt to have existed in the profession whether a policy broker had a lien for his general balance on the insurance accounts."

(*a*) See the general rule as laid down by Gibbs, C. J., in Westwood *v.* Bell (1814), 4 Camp. 352, 353; and cf. Maspons *v.* Mildred (1882), 9 Q. B. D. 530, affd. (1883), 8 App. Cas. 874; and Cahill *v.* Dawson (1857), 3 C. B. N. S. 106; 26 L. J. C. P. 253. Duer, vol. ii. pp. 353—371, reviews all the cases and agrees with the rule as stated above. It is, however, forcibly contended by Phillips, vol. ii. s. 1916, that the sub-agent, even if ignorant of the true position of his immediate employer, cannot maintain a general lien. The rule, however, seems to be now well established.

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The broker may, however, be precluded by his conduct from enforcing a general lien, though he was not aware when he made the assurance that his employer was only an agent. Thus, where a firm of brokers who had effected policies on the instructions of an intermediate party, were requested by the latter to hold the policies to the order of the plaintiffs, and wrote to them to say they would do so subject to their lien for unpaid premium, Scrutton, J., held that the brokers were estopped from asserting against the plaintiffs a general lien for the premiums of other insurances effected for the intermediaries (*b*).

132. It is not necessary, in order to deprive the broker of his general lien against his immediate employer, to show that he had express notice that the party so employing him was only an agent: it is enough if he was reasonably bound to infer this from the circumstances proved (*c*). The party, however, who seeks to deprive the broker of his lien, on the ground of his knowledge of agency, must make out the affirmative, for, in the absence of reasonable proof to the contrary, it will be presumed that the broker believed his immediate employer to be the principal (*d*).

Cahill *v.* Dawson.

D., at Liverpool, received orders from his principal abroad to effect an insurance on a cargo of fruit, but thinking to effect it more economically in London, wrote to L. there, who employed N. to procure the policy. A loss was afterwards paid on it to N., who retained the whole for his general balance against L., and D. was sued by his principal for negligence. It was held that, assuming D. to have been guilty of negligence in insuring at London instead of at Liverpool, the plaintiff's right to recover substantial damages from D. depended on whether L. had or had not shown to N. his letter of instructions, as, if he had, N. would not be

(*b*) Fairfield Shipbuilding Co. *v.* Gardner, Mountain & Co. (1911), 104 L. T. 288.

(*c*) Maanss *v.* Henderson (1801), 1 East, 334.

(*d*) Per Gibbs, C. J., in Westwood *v.* Bell (1814), 4 Camp. 353.

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entitled to retain the money for his general balance of account (*e*).

Maanss *v.* Henderson.

An English merchant effected a policy for a neutral foreigner in his own name, but informed the broker at the time that the property was neutral, and the policy was effected with a warranty of neutrality. This was held a sufficient indication to the broker, at a time when this country was at war, that the English merchant was acting as agent, and not on his own account, so as to deprive the broker of any lien except for the premiums due on the particular policy (*f*).

Snook *v.* Davidson.

Trover for a policy: The plaintiffs had told Carter, an insurance broker, to effect several policies for them; instead of effecting them himself he employed the defendants, who were also insurance brokers, to do so, telling them at the time that they were for correspondents in the country: it also appeared from the policies themselves that they were in fact for the plaintiffs, as they were all filled up in their names: the defendants claimed to retain for the general balance of their insurance account with Carter; but Lord Ellenborough held that they could not do so, and the plaintiffs had a verdict on paying the amount due for premium and commissions on the policy for which the action was brought (*g*).

Lanyon *v.* Blanchard.

Action to recover a loss received by the defendant from the underwriters, on a policy effected by him as broker: The plaintiff, then abroad, had instructed one Crowgy to effect an insurance here, on goods which he, the plaintiff, had shipped and consigned to Crowgy for sale, together with the bill of lading unindorsed. Crowgy employed the defendant, as his

(*e*) Cahill *v.* Dawson (1857), 3 C. B. N. S. 106; 26 L. J. C. P. 253; Man *v.* Shiffner (1802), 2 East, 523.

(*f*) Maanss *v.* Henderson (1801), 1 East, 334.

(*g*) Snook *v.* Davidson (1809), 2 Camp. 218. Lord Ellenborough puts the case on the want of privity between Carter and the defendants, and says: "A sub-agent, employed as the defendants were, cannot acquire the broker's general lien." It is clear, from the observations of Gibbs, C. J., in Westwood *v.* Bell, that the real ground of decision was the same as in Maanss *v.* Henderson, viz., that defendants must have known Carter to be only an agent. See 2 Duer, pp. 354, 355. Phillips, however, vol. ii. s. 1916, declines to accept this view of the case, which he cites as an authority for the position that a sub-agent, whether ignorant or not of the true position of his immediate employer, can have no general lien.

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broker, to effect the policy, representing to him at the time that he (Crowgy) had authority to indorse the bill of lading, which he accordingly did, to a person named by the defendant. Under these circumstances, the defendant claimed to retain for the general balance on his insurance account with Crowgy. Lord Ellenborough, however, ruled that he could not do so, and the plaintiff had a verdict, subject only to a deduction for the premium and other charges on the particular policy (*h*).

Westwood *v.* Bell.

133. Where, on the other hand, in an action of trover for a policy, it appeared that the plaintiff (through several intermediate agencies) had employed one Clarkson to effect the policy, and Clarkson, instead of doing so himself, had instructed the defendants, who were regular insurance brokers, to effect it, as for him, leading the defendants to believe that he was principal in the transaction, and the defendants accordingly effected the policy in their own names, "as agents," and debited Clarkson with the premiums; it was held that the defendants, as against the plaintiff, had a right of lien on the policy so effected for the amount of their general balance of their insurance account with Clarkson (*i*).

Mann *v.* Forrester.

In such a case the broker may still satisfy his lien, notwithstanding that before receiving the money he have notice that his immediate employer is only an agent. But if after

(*h*) Lanyon *v.* Blanchard (1811), 2 Camp. 597. Per Gibbs, C. J.: "In Lanyon *v.* Blanchard, the defendant must be taken to have had notice that the person who employed him was not the principal. The representation made by Crowgy that he had authority to indorse the bill of lading was abundantly sufficient to show that he was only an agent": in Westwood *v.* Bell (1815), 4 Camp. 353. As Duer ably puts it: "The unindorsed bill of lading was conclusive to show that the ownership of the goods was still vested in the plaintiff, the shipper, and that it could only be divested by an indorsement made by him, or by his authorized agent. It was this authority that Crowgy represented himself as possessing, and the representation was, in its very terms, an admission of agency": 2 Duer, p. 357. Note that the truth or falsehood of the representation was not the material point, but whether or not the representation, as believed and acted upon by the defendant, necessarily and in its very terms conveyed to his mind the notion that Crowgy, in procuring the insurance to be effected, was acting as agent, and not as principal.

(*i*) Westwood *v.* Bell (1815), 4 Camp. 349.

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such notice he pay over the surplus to his immediate employer, the principal will nevertheless be entitled to recover the amount from him in an action for money had and received (*k*).

A mercantile agent in this country of a merchant abroad has a lien on the policy that he is authorized to effect, for the general balance due to him, or becoming due on his accounts with his principal, while the policy remains in his hands (*l*). If he has procured the policy to be effected through an insurance broker, this lien of his attaches on the policy while in the possession of the broker, for the possession of the broker in such case is regarded as that of his employer. The assignee, therefore, of such policy, who becomes so by the indorsement to him of the bill of lading, takes it subject to the correspondent's lien: if the amount of such lien exceeds that of the loss, the assignee of the policy, as against the broker, can recover nothing (*m*).

No general lien on policy left merely for safe custody.

If a policy be left in the hands of an agent merely as a depositary and for safe custody, he acquires no general lien thereon, although he may have advanced money to the assured without any other security than the policy (*n*).

General lien is only for the balance of the insurance account: demands, not the subjects of lien, may be items of mutual credit. Olive *v.* Smith.

134. It must be clearly understood that the general lien of an insurance broker is only for the balance of his insurance account: it does not comprehend transactions between the broker and his employer on a distinct account having no relation to insurance. In cases, indeed, where bankruptcy has intervened, demands which cannot be made the subject of lien may frequently be embraced as items of mutual credits, so as to enable the broker to avail himself of a substantial benefit although no lien attaches (*o*).

Such appears to have been the principle of decision in the case of Olive *v.* Smith: in the subsequent case of Rose *v.*

(*k*) Mann *v.* Forrester (1814), 4 Camp. 60.

(*l*) Godin *v.* London Ass. Co. (1758), 1 Burr. 493.

(*m*) Man *v.* Shiffner (1802), 2 East, 523.

(*n*) Muir *v.* Fleming (1822), 1 Dowl. & Ryl. N. P. C. 29. This was a case on a life policy, which had been left with defendant, he paying the premiums as they became due. So 2 Phillips, s. 1909.

(*o*) Olive *v.* Smith (1813), 5 Taunt. 56.

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Hart the doctrine of mutual credit was limited to cases where the credits given must in their nature terminate in debts; but Gibbs, C. J., as the organ of the Court, was careful to state expressly that the principle so laid down would support Olive *v.* Smith, on the ground that in that case "the bankrupts were indebted to the defendants, and, being so indebted, delivered policies of insurance to them to collect losses under them, which, when so collected, would make the defendants their debtors for the amount" (*p*).

When lien of broker is lost,

The lien of an insurance agent, as of every other agent, depends at common law on the continuance of possession: when he voluntarily delivers up the policy to his principal, or to his order, his lien is extinguished; so it is if he parts with the policy wrongfully, as by pledging it as his own; but not so where it is taken from him by force, or fraud, or parted with by mistake (*q*).

and revives.

As a general rule, the lien of the broker revives where the policy comes again into his possession (*r*); but there are excepted cases. If, for instance, when the policy comes again into the broker's hands he knows, or has reasonable grounds to believe, that his immediate employer was a mere agent (he having been ignorant of the fact when he before held the policy), it seems that his general lien for the balance of his insurance account with his immediate employer will not revive with the re-possession of the policy, as against the claims of the party really assured (*s*). So, if during the time

(*p*) Rose *v.* Hart (1818), 8 Taunt. 499; 2 Smith's L. C.; and see, as to Olive *v.* Smith, the observations of Lord Brougham in Young *v.* Bank of Bengal (1836), 1 Moore's Ind. App. Cas. 87; and of Maule, J., in Dixon *v.* Stanfield (1850), 10 C. B. 413. It must be remembered that the words of the statute at present in force (s. 31 of the Bankruptcy Act, 1914) are wider than they were under the statute in force when many of the older cases were decided. Modern decisions have extended the applicability of the "mutual credits" clause: see, for example, In re Daintrey, [1900] 1 Q. B. 546; In re Taylor, [1910] 1 K. B. 562; Tilley *v.* Bowman, [1910] 1 K. B. 745.

(*q*) 2 Duer, 289. The learned jurist, as usual, supports these positions by incontestable authorities.

(*r*) Whitehead *v.* Vaughan, Cook's Bankrupt Laws, 547, 7th ed.; Levy *v.* Barnard (1818), 8 Taunt. 149; 2 J. B. Moore, 34.

(*s*) Levy *v.* Barnard (1818), 8 Taunt. 149; *S. C.*, 2 J. B. Moore, 34.

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the policy has been out of the broker's possession, it has been assigned over by his employer in good faith and for a valuable consideration to a third party, the broker's general lien on the insurance account with his employer would not, it has been held in the United States, revive as against the claim of such assignee (*t*).

Broker under a *sub. duc. tec.* must produce policy, but his lien will be satisfied.

If an insurance broker, having a lien on a policy, be summoned as a witness to produce it under a *subpœna duces tecum*, in an action by his employer against the underwriter, he is compellable to produce the policy; but the Court will, if the plaintiff in such action obtain a verdict, prevent the money from being paid over to him until the broker's lien is satisfied (*u*).

This was probably the point decided in this case; but it is better, with Judge Duer, to speak doubtfully on the matter: 2 Duer, 290, 359, 360.

(*t*) Spring *v.* S. Carolina Ins. Co. (1823), 8 Wheat. 268, cited 2 Duer, 290.

(*u*) Hunter *v.* Leathley (1830), 10 B. & Cr. 858; *S. C.*, at N. P., Lloyd & Welsby, 125. It appears, by the Nisi Prius report, that the broker, after objection made, produced the policy "on an assurance from Lord Tenterden that if the plaintiffs recovered a verdict, the Court would prevent the money from being paid over to them till the witness's lien was discharged": Lloyd & Welsby, 125. This explains the meaning of what Lord Tenterden is reported to have said in banc: "We do not by this decision" (*i.e.*, that the broker was compellable to produce the policy) "deprive the party of his lien; he still has the policy in his possession, and has the same right of lien as before." His lordship obviously means that the Court would take care that the broker's lien should be satisfied out of the fruits of the judgment, if it passed for the plaintiffs; if it did not, he would, of course, be in the same position as before. See 2 Duer, 294, 297.

In Fairfield Shipbuilding Co. *v.* Gardner, Mountain & Co. (1911), 104 L. T. 288, Scrutton, J., expressed a doubt whether a lien on a policy gives a lien on the proceeds collected under it, though the plaintiffs had declined to take this point. There may be a possessory lien on a document, which is merely a right to hold it until a claim is satisfied, giving no right to obtain payment of any debt of which the document is evidence: see Rummens *v.* Hare (1876), 1 Ex. D. 169; West of England Bank *v.* Batchelor (1882), 51 L. J. Ch. 199. When, however, a broker, being in possession of a policy, is authorized to collect losses or returns of premiums, his right to retain the sum for which he has a lien out of moneys received by him under the policy has been expressly recognized in Mann *v.* Forrester, *ante*, § 133, and impliedly in Cahill *v.* Dawson, *ante*, § 132. See also Man *v.* Shiffner (1802), 2 East, 523, at p. 530, *ante*, § 133.

CHAPTER VII.

INSURANCE AGENTS GENERALLY—THEIR RIGHTS, DUTIES AND LIABILITIES.

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Insurance agents acting for the assured.

135. In the last chapter we considered the actual course of sea insurance business as carried on in London and elsewhere in Great Britain, and the relative rights, duties and liabilities of insurance agents and their principals as affected thereby. In the present chapter an endeavour will be made to discuss the relations of insurance agents to their employers, first, as governed by the general principles of the law of agency; and, secondly, as affected by the general course of business in sea insurance, in so far as that has grown to be a custom.

Insurance agents may be employed either for the assured to effect, or for the underwriters to subscribe, policies. We will for the present confine our attention to insurance agents acting on behalf of the assured, and consider, in the first place, the nature of the authority under which they act. Insurance agents may procure policies to be effected either, first, in consequence of orders expressly given them by their employers; or, secondly, by virtue of an implied authority arising out of the relation in which they stand to the persons for whom, or the property on which, they procure the insurance to be effected; or, thirdly, insurance made by them

without the prior authority, may be ratified by the subsequent adoption, of the assured.

Their express authority.

First, with regard to persons procuring sea insurances to be effected at the express request, instance or direction of the assured. In these cases no difficulty can arise as to the authority to insure: every person who is specially requested or directed so to do by the party interested may effect a policy to protect the interests of his employer; if, indeed, he himself puts the policy in suit or founds any legal claim upon it, he must, of course, be prepared, in the first instance, to prove the express authority, as given, whether verbally or in writing. The questions that have arisen in these cases of express authority turn mainly on the point: Under what circumstances does the express order to insure impose on the agent the positive duty of causing the insurance to be effected? and this will be more properly considered when we are discussing the duties and liabilities of insurance agents.

Their implied authority.

136. As to the implied authority to insure arising out of the relation of the agent to the parties for whom, or the property on which, the insurance is effected, the following are some of the principal points that have been decided.

A partner has an implied authority to bind his co-partners by insurance;

A partner may, without express authority from the other members of the firm, procure an insurance to be effected for him and them on partnership property; and if, by his directions, such an insurance is effected "on account of the firm," all the members of such firm are liable to the broker, by whom the policy was so effected, for premiums and commissions (*a*).

but a part owner, as such, has not.

But the same rule does not apply to part owners, who cannot bind the other part owners by any policy originally effected without their authority, and not subsequently

(*a*) Hooper *v.* Lusby (1814), 4 Camp. 66. The vessels in this case, however, were not partnership property, though the defendants carried on business in partnership. It should seem that, in order to constitute a joint liability, a general partnership is not necessary; it will be sufficient if the defendants were special partners in the particular adventure intended to be protected by the insurance. See the *dicta* of the judges in Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156.

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adopted by their ratification. The reason of this difference is thus stated by Lord Ellenborough: "Each separate share in the ship is the distinct property of each individual part owner, whose business it is to protect it by insurance; so that the insurance of another cannot be binding on such proprietors without some evidence importing an authority by them" (*b*).

Not even where the part owner is ship's husband.

This is so even where the part owner, who has given orders for the insurance, is ship's husband, or managing owner, appointed by deed in the usual form to act discretionally for all the other owners. Nothing will make his insurance binding on the others, except either a particular direction from them to insure, or satisfactory proof that they approved and ratified the insurance after it came to their knowledge (*c*). Otherwise, the brokers can only look to him for premiums, and are liable to him alone for the amount received by them from the underwriters on account of losses (*d*).

Aliter, where the part owners are jointly interested in the adventure insured.

Where, indeed, all the part owners are jointly interested in the particular adventure insured, and the insurance is made by one of them, who is managing owner, for their joint account and benefit, they having full opportunity of learning what has been done, and never objecting to it, this is sufficient to warrant a jury in inferring a joint authority to insure, and will render all the part owners liable to the broker for premiums, notwithstanding the broker may have debited the managing owner only, and divided with him the profits of commission on effecting the insurance (*e*). Moreover, in the present day, there is no doubt that managing owners have, apart from express instructions, wider powers with respect to insurance, than formerly (*f*).

(*b*) Per Lord Ellenborough in Bell *v.* Humphries (1818), 2 Stark. 345. See French *v.* Backhouse (1771), 5 Burr. 2727.

(*c*) French *v.* Backhouse (1771), 5 Burr. 2727; Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156.

(*d*) Roberts *v.* Ogilby (1821), 9 Price, 269.

(*e*) Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156. Several of the judges put this decision on the ground, that though the defendants were not general partners, yet they were special partners in the adventure in which the ships insured were engaged.

(*f*) See Calafatis *v.* Olivier (1919), 36 T. L. R. 18. In that case Roche, J., held that where the managing owner has authority to insure, he owes a duty to a part-owner, who is a co-adventurer, to insure to a reasonable amount. In the C. A. (*ibid.* 223) the judges gave no opinion on this point.

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137. Has a consignor or commission agent, to whom funds are remitted to purchase and ship goods for his employer, an implied authority, as such, in the absence of express orders, to insure such goods on behalf of his principal? No doubt such insurances are not unfrequently made in reliance on their being subsequently adopted by the principal. In the absence of any established course of dealing, prior authority or subsequent adoption, would such insurances be upheld, so as to give the agent who has effected them a right to charge the premium to his principal, or to demand a loss from the underwriter? As a general rule, and in accordance with ordinary mercantile practice, it seems that the answer to this question must be in the negative. Where orders are given to consign, and no orders given to insure, the practical inference generally would be, either that the principal meant to effect the insurance himself, or intended to remain uninsured. Exceptions to the general rule may, of course, be created by circumstances. An established course of dealing between the principal and agent, or the usage of a particular port or trade (*g*), may be reasonably held to confer an implied authority in the consignor to effect an insurance on behalf of his principal (*h*).

Implied authority of consignor to insure.

Duty of vendor to give notice of shipment.

137a. The same rule no doubt applies to a vendor of goods. It is, however, provided by the Sale of Goods Act, 1893 (*i*), that unless otherwise agreed, where goods are sent by the

(*g*) Duer adds (vol. ii. p. 103): "An authority to insure may probably arise by implication in all cases where, from special or unforeseen circumstances, the agent is justified in believing that the property, unless insured by himself, will be unprotected, and that his principal, if on the spot, would himself direct the insurance." Arnould (2nd ed. p. 167) adopted this on the high authority of Judge Duer; but it may be doubted whether authority could be implied from such a state of things, however reasonable it would be in the agent to insure, relying on the ratification of his principal.

(*h*) 2 Duer, 101—104.

(*i*) Sect. 32 (3).

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seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit. It has, however, been held that this provision does not apply to f.o.b. contracts (*k*), and also it does not usually apply to c.i.f. contracts (*l*). It is not quite easy, therefore, to see to what kind of business contract it is intended to apply.

Duty of vendor under c.i.f. contract to insure.

A seller of goods under a c.i.f. contract is bound to effect a valid policy on the particular goods sold. If the policy turns out to be invalid, he will be liable for the amount the purchaser would have recovered under a valid policy (*m*). An actual policy must be tendered. It is not sufficient for the seller merely to guarantee to hold the purchaser covered under a policy in the seller's possession. Moreover, the policy should cover only the goods sold and not include others (*n*). In the absence of a proper policy the purchaser may reject the goods, even after their safe arrival (*o*).

Implied authority of consignee to insure.

138. The same question may be put with regard to the implied authority of the consignee, as such, to insure. The answer to this question depends on the sense in which the word consignee is used. A consignee who has made advances has, it is clear, not only the right to effect an insurance on his own behalf, and to recover thereon to the extent of those advances, but he has also an implied authority to insure on

(*k*) Wimble *v.* Rosenberg, [1913] 1 K. B. 279; 3 K. B. 743 (C.A., Vaughan Williams, L. J., dissenting).

(*l*) Law & Bonar, Ltd. *v.* British American Tobacco Co., Ltd., [1916] 2 K. B. 605.

(*m*) Cantiere Meccanico Brindisino *v.* Constant (1912), 17 Com. Cas. 192; *S.C.* in C. A., *id.* 346.

(*n*) Manbre Saccharine Co., Ltd. *v.* Corn Products Co., Ltd., [1919] 1 K. B. 198.

(*o*) Orient Co., Ltd. *v.* Brekke, [1913] 1 K. B. 531; Biddell *v.* E. Clemens Horst Co., [1911] 1 K. B. 214, 934; [1912] A. C. 18; Groom, Ltd. *v.* Barber, [1915] 1 K. B. 316.

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behalf of his consignor (*p*). But a mere naked consignee—one, that is, who has no personal interest in the property consigned to him, but is the mere transmittee of the bill of lading, with directions to sell or otherwise dispose of the goods to which it relates—has no implied authority (in the absence of any established course of dealing) to effect insurances on behalf of his consignor, at all events while the goods are in course of transit, and before they have reached his hands (*q*).

Implied authority of general agents of foreign merchants to insure.

Has the general agent of a foreign merchant an implied authority to insure on his behalf? Here, again, the answer to the question must depend on the extent of trust and authority embraced by the term general agency. Where the general agency consists in this, that a merchant in one country consigns all his goods intended for sale in another country to a particular merchant there resident, and effects through him all his purchases, this alone, without some evidence of a special course of dealing in regard to insurances, would not show that either correspondent had implied authority to insure on behalf of the other. But where the trust reposed is more extensive, as, for instance, where a foreign merchant employs a general agent to procure consignments, and make advances and shipments on his account, leaving the whole conduct and management of the business entirely in the agent's uncontrolled and unassisted discretion, no doubt an authority to insure on the foreign merchant's behalf would be implied as a necessary means of conducting the business of such an agency (*r*).

Implied authority to

139. An implied authority to insure may arise from the

(*p*) Wolft *v.* Horncastle (1798), 1 B. & P. 316; Carruthers *v.* Shedden (1815), 6 Taunt. 14; Smith *v.* Lascelles (1788), 2 T. R. 188; Craufurd *v.* Hunter (1798), 8 T. R. 23.

(*q*) 2 Duer, 104—111; see 2 Phillips, s. 1858.

(*r*) 2 Duer, 111—113. Judge Duer says: "Such agents as those last mentioned are to be found in all our principal cities; and their universal practice is either to insure themselves the shipments made to their principals, or to take an assignment of the policies that, for the security of their principals, they require to be effected": p. 113.

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insure, arising from the peculiar situation of the property; as of master and supercargo in case of wreck, &c., or prize agents and the like.

peculiar situation of the property with which the agent effecting the insurance is entrusted. Thus, although the master, as such, has not in general an implied authority to effect insurance either on ship, freight, or cargo (*s*), yet there seems little doubt that cases may arise which would confer that authority on him. Where the ship is lost, but the cargo, or part of it, saved, under such circumstances as to make it impossible either to sell it at the place of disaster or to forward it to the port of destination, the master, if he had the chance of so doing, would be justified, as agent for all parties concerned, in sending it on to some other port for sale. In such a case, if there were no means of speedy communication with the owners, the law that confers the agency would seem also to confer upon the agent authority to insure (*t*). It has been intimated by a learned judge in the United States, that in a similar case a like authority would be implied in the supercargo (*u*). A merchant who has ordered goods from a foreign correspondent may refuse to receive them, if in excess of or not according to order; in such case, if he elect to re-ship them, he has, in the opinion of Lord Hardwicke, an implied authority to insure them on behalf of the consignor (*x*). Generally speaking, as we have seen, a mere order to consign or forward goods will not carry with it an implied authority to insure on behalf of the party giving the order. In a case, however, where an agent was empowered by the owners of a ship and cargo, captured as prize, to prosecute their claims in the foreign

(*s*) Craufurd *v.* Hunter (1798), 8 T. R. 23.

(*t*) 2 Duer, 101.

(*u*) Per Jones, J., in De Forest *v.* Fulton Ins. Co. (1828), 1 Hall, 84, cited in 2 Phillips, s. 1856.

(*x*) Cornwall *v.* Wilson (1750), 1 Ves. sen. 214. A buyer who rejects the goods owes no duty to the seller to return them (Sale of Goods Act, 1893, s. 36); and it may be doubted whether, in general, he is entitled, without instructions, to send them back at the seller's expense. See as to his duty, Couston *v.* Chapman (1872), L. R. 2 H. L. Sc. 250; Grimoldby *v.* Wells (1875), L. R. 10 C. P. 391. Mr. Arthur Cohen questions Lord Hardwicke's dictum: Laws of England, vol. xvii. § 699, note (*b*).

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prize court, to make such compromise as he might deem advisable, and, in case of restitution, "to forward the ship to London:" it having been objected that these circumstances raised no implied authority in the agent to direct an insurance on the property after restitution, Lord Ellenborough held that the order to forward the ship to London was an authority to insure her (*y*).

Ratification equivalent to a prior authority.

140. The cases hitherto considered have been those in which a prior authority to insure has either been expressly given, or has been implied from the relation of the parties effecting the policy, either to those for whose benefit the insurance is intended, or to the property designed to be protected. It is not, however, essential to prove any prior authority, either expressed or implied. By sect. 86 of the Marine Insurance Act, 1906, "where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of the loss" (*z*). Such subsequent ratification is equivalent to a prior authority (*omnis ratihabitio retrotrahitur et mandato æquiparatur*) (*a*).

(*y*) Robertson *v.* Hamilton (1811), 14 East, 522. See the case stated and commented on, 2 Duer, 101, 102.

(*z*) The leading authorities are: Wolff *v.* Horncastle (1798), 1 B. & P. 316; Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 269; Stirling *v.* Vaughan (1809), 11 East, 623; Routh *v.* Thompson (1811), 13 East, 274; Hagedorn *v.* Oliverson (1814), 2 M. & S. 485; Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156; Watson *v.* Swann (1862), 11 C. B. N. S. 756; 31 L. J. C. P. 210; Boston Fruit Co. *v.* British & Foreign Mar. Ins. Co., [1906] A. C. 336.

(*a*) In Keighley, Maxted & Co. *v.* Durant, [1901] A. C. 240, the House of Lords held that the doctrine of ratification has no application where the person who made the contract did not profess at the time of making it to be acting on behalf of any principal. In Boston Fruit Co. *v.* British & Foreign Mar. Ins. Co., [1906] A. C. at p. 343, Lord Atkinson doubted whether since this decision the doctrine can survive that an insurance, if ratified, protects those whom the person dealing with the underwriter intended to be insured, when such intention was not communicated to the underwriter. As, however, the ordinary English policy professes in terms to be effected on behalf of other persons interested in the subject-matter insured, the editors submit that the decision in Keighley, Maxted & Co. *v.* Durant does not affect the right of the intended principal to ratify the contract. See *post*, §§ 172, 173.

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Thus, although one part owner has no original implied authority from the rest to insure on their account, yet, if he does so, and they subsequently adopt the insurance, they are bound by it (*b*). So, although the captors of a prize have no original implied authority to insure, yet, if they do insure, for whom it may concern, and the Crown, in whom the legal interest vests, subsequently adopts the insurance, it is thereby rendered valid (*c*). Whether the clerk of a foreign consignee has, as such, a prior implied authority to direct an insurance to be effected by English correspondents of his master on a consignment made by them on account, and to the orders, of his employer, may be doubtful; but subsequent adoption by the foreign principal of the insurance so effected will amply warrant a jury in finding that such insurance was made with his authority (*d*).

Ratification of insurance may be implied from conduct.

141. With regard to the nature of the evidence required to establish the fact of ratification, positive proof of an express ratification is not needful. The adoption of the policy may be inferred from the conduct of him for whose benefit it was originally intended. If he means to reject it, he should express his dissent as soon as he is informed of the fact; if he fail in so doing, his adoption of the contract will, generally speaking, be inferred from his silence (*e*). At all events, this will be so in cases where those who have effected the insurance, instead of being mere strangers or volunteers, stand in such relations of business or correspondence as would give them, not indeed an implied authority to insure, but a

(*b*) French *v.* Backhouse (1771), 5 Burr. 2727; Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156.

(*c*) Routh *v.* Thompson (1811), 13 East, 274. So of the Dutch Prize Commissioners, Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 269.

(*d*) Barlow *v.* Leckie (1819), 4 J. B. Moore, 8.

(*e*) So Phillips (vol. i. s. 390). In view of the now-established doctrine in this country, that a principal may ratify even after knowledge of a loss (Mar. Ins. Act, 1906, s. 86, *ante*, § 140), this would probably be held to be law here; otherwise a party interested would be able to lie by for an indefinite time, and eventually elect to take the benefit of the insurance in case of a loss, or to repudiate liability for premiums in case of safe arrival.

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reasonable ground for anticipating that the policy, when made, would be adopted by him for whom it was designed (*f*).

Evidence of ratification.

Thus, in the case of part owners: where no proof could be adduced of an express authority to insure, but evidence was given that the part owner insuring had "told all his co-partners that he had insured, and that they did not object to it" (*g*); or where it appeared that the part owner insuring had entered the premium in his books, which were open to the inspection of the other owners, and that they had actually inspected an extract made from these books relating to the insurance transaction without objecting to it; juries were held to be justified in finding that the part owner insuring had done so with the authority of his co-owners (*h*).

Conditional ratification.

142. A ratification, conditional in its terms, has been held in the United States to be equivalent to a prior authority as soon as the contingency on which it was to depend has happened. The general agent, at New York, of a merchant resident at Carthagena, having effected an insurance for him without instructions, gave him notice of what he had done. The Carthagena merchant wrote in answer, that, if other insurances which he had ordered should not have been made, and if the ship should not have arrived safe, he wished the policy to stand, otherwise to be cancelled. When this answer was received in New York the other insurance referred to had not been made, and the ship (which was then out of time) had not arrived; in fact, was totally lost. An action

(*f*) This distinction is suggested by Judge Duer, vol. ii. pp. 151—154. See also note (*v*) to sect. x. pp. 178—182, in which he discusses the question "whether the mere omission of the principal to reply to a letter of advice from a self-constituted agent is to be regarded as evidence of an adoption of the agent's act." The learned jurist takes the negative view.

(*g*) French *v.* Backhouse (1771), 5 Burr. 2727. The action here was by the ship's husband against his co-part-owners to recover back premiums on a policy effected by him on the owners' behalf.

(*h*) Robinson *v.* Gleadow (1835), 2 Bing. N. C. 156. The action was by the assignees of the broker against all the part owners for premiums. Park, J., however, seems to have considered the case as one of subsequent ratification rather than of original authority.

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having been brought in the Superior Court of New York on the policy, Oakley, J., before whom the case was tried, held the ratification sufficient, and a judgment was recovered for the loss (*i*).

When the adoption must be made.

The adoption, as we have seen, may be made not only after a loss has taken place, but even after it has become known to the principal (*k*); and in one case the only evidence of adoption was a letter written by the principal two years after the making of the insurance, and nearly as long after he had become aware of the loss, expressing a hope that the party who had effected the policy had procured a final settlement from the underwriters (*l*). Accordingly, the Court of Appeal, when asked to review these cases in order to limit more narrowly the time for valid ratification, recognized the rule as one that had been long established, and no doubt found convenient in the case of marine insurance, and therefore refused to disturb it (*m*).

That, however, which is relied upon as a ratification must be done, said, or written by the principal after he is cognizant of the insurance. A general order to insure, given by the principal before knowledge of the particular insurance, though not received by the party insuring till after the policy was effected, cannot, it seems, be construed into an adoption of such policy (*n*).

(*i*) Bridge *v.* Niagara Ins. Co. (1828), 1 Hall, 247, cited 2 Phillips on Ins. s. 1868. In point of fact, a conditional order ceases to be so, and becomes positive, when, before receipt by the party who is to execute it, its conditions have been fulfilled.

(*k*) Mar. Ins. Act, 1906, s. 86, *ante*, § 140. Lucena *v.* Craufurd; Routh *v.* Thompson; Barlow *v.* Leckie, *ubi supra*, are all cases in which the principal ratified the insurance with knowledge of the loss. This rule is peculiar to marine insurances: Grover *v.* Mathews, [1910] 2 K. B. 401.

(*l*) Hagedorn *v.* Oliverson (1814), 2 M. & S. 485.

(*m*) Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757. In view of this decision, it is probably the law now, as stated by Phillips, vol. i. s. 390, that ratification, and consequent liability for premiums, is presumed in the absence of express repudiation within a reasonable time after notice. See *ante*, § 141, note (*e*).

(*n*) Bell *v.* Janson (1813), 1 M. & S. 201.

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Ratification of an insurance effected by a voluntary agent.

143. It is, however, necessary, in order to justify an adoption or ratification of such a contract, that the "voluntary agent"—or, in other words, the party who has without authority effected the contract—should have intended to be acting on behalf of the person claiming to adopt or ratify it. He must also have intended to look to such person for the reimbursement of his necessary expenses in the transaction (*o*). "It is clear law," said Erle, C. J., "that no one can sue on a contract but the person who made it, or the person who ratified what purported (*p*) to be a contract made by his agent. . . . A very wide extension has been given to this principle . . . in respect of a policy of assurance, and persons who could not be named at the time, if intended to come within it, and so capable of being ascertained, have been allowed to be entitled to the benefit of the same: but they must have been such as were contemplated at the time when the policy was made" (*q*).

In Byas *v.* Miller, an insurance broker at Lloyd's was instructed by principals at Liverpool to reinsure goods for a voyage at a certain premium. He was unable to execute the order at the rate mentioned, but obtained from the defendant, an underwriter, a slip at a higher premium, and

(*o*) See 2 Duer, 135. The whole subject of voluntary agency and ratification is learnedly discussed in pp. 132—155.

(*p*) As to the meaning of this word, the Lords Justices in Durant *v.* Roberts, [1900] 1 Q. B. 629, took different views. The dissenting opinion of A. L. Smith, L. J., was approved by the House of Lords, Keighley, Maxted & Co. *v.* Durant, [1901] A. C. 240. The fact that a person who effects a policy in his own name is an insurance broker may, it is suggested, be enough to show that he professes to be acting for a principal.

(*q*) In Watson *v.* Swann (1862), 11 C. B. N. S. 756; 31 L. J. C. P. 210. Willes, J., in the same case, considered that the intended principal must be a person who is capable of being ascertained at the time the contract is made. Mathew, J., seems to have been of the same opinion. "It is imperatively necessary," he said in Byas *v.* Miller (1897), 3 Com. Cas. 39, "that the insurance should be intended to be effected by the agent on behalf of some person capable of identification, and responsible to the broker for the premiums that the broker undertakes to pay to the underwriter." See further on this point, *post*, §§ 171—173, and see also Keighley, Maxted & Co. *v.* Durant, *ubi supra*.

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sent to the Liverpool firm a cover-note stating that he had reinsured provisionally for their account at the higher rate: this insurance, however, the Liverpool firm refused to accept. The broker shortly afterwards issued to the plaintiffs a fresh cover-note in respect of an interest which they had in the same goods, the defendant's name being inserted therein as underwriter; and within two or three weeks the goods were totally lost. A few days later a policy in the ordinary form was tendered to, and signed by, the defendant in accordance with the slip. The defendant never knew the names of the original principals of the broker, nor did he ever know, until after the loss, that the broker had appropriated the slip to clients for whom he was not acting at the time when the slip was signed. It was held, in accordance with the principles above stated, that there was no contract between the plaintiffs and the defendant (*r*).

When an express authority to insure may be revoked.

144. With regard to the revocation of an express authority to insure given to an agent, the time within which it may be made depends, of course, upon this: whether the agent, acting in pursuance of the authority, has conclusively bound himself to third parties before receiving notice of the revocation. If he have not, the revocation will be operative; if he have, it will be ineffectual. In this country no contract for sea insurance is valid unless it be expressed in a policy containing the particulars required by the Stamp Act, 1891 (*s*). Hence, the authority given to an insurance agent may be revoked, notwithstanding the initialing of the slip by the underwriters, at any time before the formal policy is subscribed; and if a broker, having procured a slip to be written on

(*r*) Byas *v.* Miller, *ubi supra*. The facts and the decision in Watson *v.* Swann were very similar. In Byas *v.* Miller, Mathew, J., seems to have considered that a purely speculative insurance cannot be ratified. Such a limitation of the rule is not unreasonable, and it is possible that the words "in good faith" in s. 86 of the Mar. Ins. Act, 1906, *ante*, § 140, may be construed as implying that the voluntary agent must have an honest belief that the intended principal expects, or would, if aware of the facts, expect that he will effect the insurance.

(*s*) See also Mar. Ins. Act, ss. 22—24.

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terms within the scope of his original authority, afterwards receive an intimation from his principals that they will not consent to such terms, and, notwithstanding such notice, effect a policy on those terms, and pay the premiums to the underwriters, he cannot recover against his employers for the premiums so paid (*t*), nor for his commission (*u*).

Duties and liabilities of agents for the assured.

Agents paid and unpaid, skilled and unskilled.

145. The liability of insurance agents to their employers for negligence is determined by the general principles of the law of agency (*x*). All such agents, whether paid or unpaid, skilled or unskilled, are bound to exercise due care in the performance of the duties which they have undertaken. A greater degree of care, however, is required from a paid than from an unpaid, from a skilled than from an unskilled, agent. In other words, conduct which amounts to actionable negligence in a paid or in a skilled agent may not amount to such in one who is unpaid or unskilled. In view of recent authorities, this seems to be a better way of stating the law than to say that the one is liable for ordinary, but the other only liable for gross negligence (*y*).

Application of these principles.

The great majority of persons employed in the business of sea insurances are both paid and skilled agents, or, at all events, either the one or the other. Generally speaking,

(*t*) So held by Lord Ellenborough in Warwick *v.* Slade (1811), 3 Camp. 127. We have, however, elsewhere advanced the view that the slip may itself be a valid policy: if this view be correct, the revocation by the principals would be too late. See *ante*, §§ 37, 38.

(*u*) So Arnould, 2nd ed. p. 174. But no question of commission appears to have been raised in Warwick *v.* Slade, and the editors suggest that under the circumstances the principals might have been liable to pay, if not commission, at least damages for preventing the broker from earning it. The editors are, however, informed that it is not the practice to claim brokerage when the insurance is cancelled before the policy has been issued. Whether such practice amounts to a binding usage, they are unable to say.

(*x*) See Coggs *v.* Bernard and notes, in Smith's Leading Cases; Story on Agency, 149, 150. A broker who effects a contract of insurance with an underwriter is not his agent, and owes no duty of care or skill to him: Empress Ass. Corporation *v.* Bowring (1906), 11 Com. Cas. 107; Glasgow Ass. Corpn. *v.* Symondson (1911), 16 Com. Cas. 109.

(*y*) Cf. 2nd ed. of this work, pp. 174, 175.

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therefore, the question of their liability for negligence turns on the point, whether they exerted such an amount of reasonable skill in effecting the policy as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment. From a policy broker, whose main occupation it is to manage sea insurance transactions, a higher degree of skill may fairly be claimed than from a merchant or commission agent, who may be expected, indeed, to possess a general knowledge of maritime and mercantile affairs, but no special knowledge of the business of sea insurance.

A person who accepts instructions to procure an insurance for another is bound to use reasonable care and skill to effect the policy. If he is unable to procure the policy, he must at once inform his principal of his inability to do so. Sometimes, however, the contract is not merely to use care and skill to effect a policy, but amounts to an undertaking to procure a policy at a named figure. It is a question of fact, which will generally depend upon a construction of documents, whether the contract is of the former or the latter description (*z*).

Liability of a party voluntarily undertaking to procure an insurance for another.

146. Notwithstanding doubts which at one time prevailed, it may now be considered as settled law, that a person who voluntarily and without consideration undertakes to effect insurances for another is liable for negligence in doing so, if he takes any steps towards performance of his undertaking (*a*). But if the person who voluntarily promises, without any kind of consideration, to procure an insurance never takes any steps whatever towards the performance

(*z*) See Hood *v.* West End Motor Car Packing Co., [1917] 2 K.B. at p. 47 (Scrutton, L.J.).

(*a*) Wallace *v.* Tellfair (1788), 2 T.R. 188, n., before Buller, J., at N.P., cited in Wilkinson *v.* Coverdale (1793), 1 Esp. 75. In the latter case Lord Kenyon held, that where the seller of a house had voluntarily undertaken to get a fire policy renewed for the plaintiff, and had in fact renewed it, but without procuring a proper indorsement, whereby plaintiff was deprived of the benefit of the insurance, this was actionable negligence.

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of his promise, he is not liable to an action for the nonfeasance (*b*).

Three cases in which agents requested to procure insurance must do so.

Generally speaking, a person to whom an order to insure has been transmitted is under no obligation to accept the trust; but there are certain cases in which an express order to insure, not only may, but must be complied with.

1. Where a merchant abroad has effects in the hands of his agent or correspondent here, he has a right to expect that the agent will comply with an order to insure; because he is entitled to call his money out of the other's hands when, and in what manner, he pleases.

2. Where the merchant abroad has no effects in the hands of his correspondent here, but the course of dealing between them has been such that the one has been used to send orders for insurance, and the other to execute them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing.

3. Where the merchant abroad sends bills of lading to his correspondent here, with an order to insure as the implied condition on which he is to accept the bills of lading, and the correspondent accepts the bills of lading, he must obey the order; for it is one entire transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition (*c*).

The rules thus stated are believed to be as universal in their observance as they are unquestionably well founded in justice and equity.

Where the obligation to insure arises from a previous

147. Where the obligation to insure arises from a previous course of dealing, and the agent has no funds in hand, Duer suggests that he would be excused from compliance if, when

(*b*) Thorne *v.* Deas (1809), 4 Johns. N.Y.R. 84—a decision of Chief Justice (afterwards Chancellor) Kent. Duer approves of this decision as a correct exposition of the law, though he remarks forcibly on the hardship which may thus be inflicted on the party who trusts to the promise of the volunteer. 2 Duer, 128—130; see the Carpenters' Case, Year Books, xi. H. iv. p. 33, ed. 1679.

(*c*) Per Buller, J., in Smith *v.* Lascelles (1788), 2 T.R. 189, 190.

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course of dealing, and the agent has no funds in hand.

he receives the order, he has just grounds for believing that his correspondent is insolvent (*d*). This may be so; but in practice it will be the safer course for the agent to obey the order, unless his information of his correspondent's insolvency be of such a nature as to leave him no ground for doubt.

Where the insurances are out of the usual course.

Duer also thinks that "the obligation to insure that arises from a previous course of dealing can only apply to insurances similar to those that the agent had been in the habit of effecting. If the past assurances had all been effected in a time of peace, at a low rate of premium, and requiring in each case only a moderate advance, they would give the principal no right to expect that an order to insure in a time of war, not accompanied by a remittance of the necessary funds, would be obeyed" (*e*). It may be a question, however, how far this would be so held in this country, where an immediate advance in respect of the premium is hardly ever required in practice at the time of effecting the policy.

Where funds are remitted.

There can be no doubt as to another position of the very learned American jurist, "that where the necessary funds for procuring the insurance are remitted to a commission merchant or insurance broker, he is under an equal obligation to apply them to the purpose directed as where the funds are in his hands when the order is received" (*f*).

It also seems free from doubt that the duty of insuring may be imposed on an agent, even in the absence of express directions to insure, by the usage of the particular trade to which his agency and the insurance relate (*g*).

Agent instructed to insure will be liable for neglect to do so.

148. If an agent is employed by a foreign correspondent to procure an insurance under circumstances which, according to the rules laid down by Buller, J., in Smith *v.* Lascelles, give the correspondent a right to expect such orders will be complied with, a total failure to comply with such orders, without notice, will subject such agent to an action for all the loss which his correspondent may have sustained from the

(*d*) 2 Duer, 124.
(*e*) 2 Duer, 125.
(*f*) *Ibid.*
(*g*) *Ibid.* 127, 128.

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Unless he give prompt notice of dissent.

non-insurance (*h*). It is his duty to give prompt notice of his refusal to act upon such orders, in order that his employer may not be deprived of the opportunity of effecting the insurance elsewhere. If, in consequence of his failure to give such notice, no insurance be made, the agent will be answerable to his employer for the loss arising from his neglect (*i*).

Hence, where a merchant in this country received from a merchant abroad, with whom he had no previous connection, a bill of lading, with a request to insure the goods, and the merchant, not wishing to take to the consignment, but without giving any notice to the consignor that he rejected it, handed over the bill of lading and the order to insure to a creditor of the consignor, who effected the insurance and received the goods, and afterwards became insolvent with the proceeds in his hands; it was held, that the merchant, who had his election either to accept or reject the bill of lading, was yet bound, if he accepted it, to comply with the terms of the consignment, and was liable for the consequences of not having done so (*k*). So also, in the event of any difficulties in procuring the insurance on the terms prescribed by the principal, it is the duty of the parties employed to give notice of such difficulties to their employer within a reasonable time.

Or of difficulties.

Callander *v.* Oelrichs.

149. The plaintiff, a merchant in this country, had instructed the defendants, who were his correspondents in America, to effect an insurance for him, on certain prescribed

(*h*) Smith *v.* Lascelles (1788), 2 T. R. 187; Smith *v.* Price, *coram* Erle, C. J. (1862), 2 F. & F. 748. See 2 Duer, 120.

(*i*) *Ibid.* Observations of Ashurst, J., 2 T. R. 188. See the general principle in Prince *v.* Clark (1823), 1 B. & Cr. 186. As to duty of seller of goods to give notice to buyer, so as to enable the latter to insure, see § 137A, *ante*.

(*k*) Corlett *v.* Gordon (1813), 3 Camp. 472. The action, however, was in trover and conversion, for allowing the creditor to obtain possession of the goods. It does not necessarily follow from this case that if the defendants had done nothing they would have been liable. The case might be different where there have been previous dealings between the parties. See the cases above cited.

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terms (viz., that the insurers should be liable for every average loss above 10*l.* per cent.), upon a cargo of wheat shipped by him from London to Baltimore, and consigned to the defendants, to be sold on commission. The defendants attempted in vain to procure an insurance on the terms prescribed, but gave no notice to the plaintiff of their failure to do so, and instead thereof effected an insurance on the usual terms, by which the insurers were exempted from all liability for average. The Court of Common Pleas held, that the giving of such notice was part of the duty of the defendants, and that the plaintiff, therefore, was entitled to recover in an action brought against them for the breach of such duty (*l*). In this case the damage alleged was, that by reason of the defendants' failure in giving notice, the plaintiff had been prevented from effecting an insurance on the wheat on the terms proposed, and recovering for an average loss. As Judge Duer remarks, no proof appears to have been given that an insurance could have been effected on the terms proposed; as, however, by agreeing to refer the amount of damages, it was conceded that some *damnum* had been incurred, it must be taken to have been admitted that the protection which the plaintiff wished might, with due diligence and a proper exercise of discretion, have been procured (*m*).

A correspondent for a foreign house must show the skill and diligence of a prudent man of business.

150. A foreign principal has a right to expect the same amount of ordinary care, skill and diligence in procuring an insurance that the principal himself, as a man of common prudence and knowledge of business, might reasonably have been expected to exercise, had he been upon the spot and himself engaged in endeavouring to effect it. Hence, where the foreign correspondent of a mercantile firm in this country directed them to procure an insurance for him, without prescribing any limit of premium, and they limited the broker to so low a rate of premium that it was impossible to effect

(*l*) Callander *v.* Oelrichs (1838), 5 Bing. N. C. 58; 6 Scott, 761.
(*m*) 2 Duer, 222—225.

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an insurance on such terms, they were held liable to their foreign employer for the loss arising from the failure to insure (*n*). On the same principle, where a policy had been effected, but the agents neglected to ascertain the solvency of the underwriters, and to communicate the names of the brokers, by whom it was effected in their own names, so that, when a loss on the property occurred, the assured were unable to obtain payment of the whole insurance money, the agent was held liable for the deficiency caused by the insolvency of the brokers and of one of the underwriters (*o*).

If, however, the agent does all that the foreign principal, on the spot and acting with due care, skill and diligence as a man of business, could reasonably be expected to do, he will not be liable for the consequences of a failure to procure insurance. Thus, where the correspondents in London of a foreign merchant, being directed by him to procure an insurance, and, having failed to do so at Lloyd's because the ship was not in Lloyd's register, ultimately caused it to be effected with a Newcastle company through the medium of the shipowners, who afterwards refused to deliver up the policy, or pay over a loss they had received on it from the underwriters, it was intimated to the jury by Buller, J., before whom the case was tried, that this afforded no ground of action against the agents for negligence in effecting the policy (*p*). "If," said the learned Judge, "the defendants had made a blunder in effecting the insurance, which would have avoided the policy, that would have been negligence; but the policy is a good one, and it was only owing to the knavery and insolvency of the shipowners that the plaintiffs have lost the benefit of it" (*p*).

How far must agent go in quest of insurance?

At the present day, Buller, J., would hardly be justified in the doubt, which he expressed in this case, whether the

(*n*) Wallace *v.* Tellfair (1788), 2 T. R. 188, *in notis*.
(*o*) Hurrell *v.* Bullard, *coram* Cockburn, C. J. (1863), 3 F. & F. 445.
(*p*) Smith *v.* Cologan (1788), at N. P., 2 T. R. 188, *in notis*. The verdict was given partly, if not principally, on the ground that the foreign correspondents had adopted the agents' acts.

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defendants, who lived in London, were bound to seek insurance elsewhere than at Lloyd's, as, for instance, at the public metropolitan insurance offices. They would perhaps, however, not be bound to extend their endeavours beyond the limits of the metropolis. In the case of correspondents resident in provincial towns the obligation might be different.

151. In the United States the extent of the obligation to procure insurance has been well illustrated in the following case:—The correspondents in Boston of shippers at Surinam received orders to effect insurance on a valuable cargo. The ship was already out of time, and the insurance was declined, on that ground, by the insurers at Boston. The agents subsequently tried in vain to effect the insurance at several other places in the neighbourhood, and then wrote to New York for the same purpose, fixing a limit (but a very high one) to the rate of premium; part of the amount was eventually insured there at high premiums; the rest could not be done at the limit. An action having been brought against them for not having insured the whole amount, a verdict was found for the defendants under the direction of the Judge, on the ground that in their prompt endeavours to procure insurance at Boston and the other neighbouring ports, they had extended their efforts as far as their duty required, and that they were not liable for having failed in procuring a full insurance at New York, though such failure might possibly have been ascribed to their having set a limit on the premium (*q*).

A reasonable and average degree of skill is all that is required.

152. In none of these cases does the law require an extraordinary degree of skill on the part of the agent, but only such a reasonable and ordinary proportion of it as persons of average capacity in his situation and profession might fairly be expected to exert. In inquiries, therefore, as to his

(*q*) Sanches *v.* Davenport (1810), 6 Mass. R. 258; cited 2 Duer, 242—244; 2 Phillips, s. 1890. It might, however, now be considered reasonable to take steps which a hundred years ago would not have been required.

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liability in case of loss, the question is, whether the act or omission complained of is inconsistent with that reasonable and proper degree of care, skill and judgment which persons of common prudence or ordinary ability might be expected to show in the situation and profession of the defendant (*r*).

Duty of broker to communicate material information.

Every policy broker of average capacity must know that there are matters on which all material information must be submitted to the underwriter. Hence, where a policy broker, who was supplied by his principal with the requisite information as to the time of sailing, omitted, through inadvertence, to forward it to a second broker, who at the wish of the principal was employed to effect the policy, it was held that the first broker was liable to his principal for the failure of insurance arising out of this neglect; for although he personally was to receive no remuneration, he had yet undertaken to employ the other (*s*).

Effect of withholding information, the materiality of which is a doubtful point.

Where, however, the materiality of the information is doubtful, or may fairly be a matter of divided opinion amongst persons conversant with the trade, it may reasonably be urged that a broker, though acting in the ordinary way as a paid agent, may be ignorant of the point without such a degree of negligence as to make him responsible for the failure of a policy he was directed to effect, owing to the withholding by him of such information (*t*).

153. Every policy broker is bound to know all the ordinary and formal details necessary to be complied with in order to make a sea-policy a legally valid instrument.

(*r*) Per Tindal, C. J., in Chapman *v.* Walton (1833), 10 Bing. 63.

(*s*) Seller *v.* Work (1801), 1 Marshall on Ins. 306. See Duer's remarks on this case, vol. ii. pp. 202, 203; see also Maydew *v.* Forrester (1814), 5 Taunt. 615, as to the point that, whenever the informa- concealed is unquestionably material, the broker will be liable; see also, as to what constitutes negligence, Wake *v.* Atty (1812), 4 Taunt. 493.

(*t*) See the observations of Lord Denman in Campbell *v.* Rickards (1833), 5 B. & Ad. 844, 845; see also Rickards *v.* Murdock (1830), 10 B. & Cr. 527.

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Duty of broker to procure the delivery of a stamped policy.

Hence, a policy broker employed to effect a policy on a ship, having negotiated an insurance with the Newcastle Commercial Insurance Company on the terms directed, was held liable for not procuring a stamped policy, in consequence of which neglect the shipowner was unable to recover from the company in respect of a loss that subsequently took place (*u*).

Duty of broker to insert all usual and ordinary clauses.

Every policy broker, or other insurance agent, is bound, without any express directions, to insert in the policy all the ordinary risks and customary clauses, which are usual and proper in respect of the contemplated voyage. Thus, as it was shown to be the invariable practice in all voyages from Teneriffe to London to insert a clause giving liberty "to touch and stay at all or any of the Canary Islands," it was held that a London policy broker was guilty of actionable negligence in omitting this clause, and thereby causing the failure of the insurance (*x*).

Commencement of risk on goods must be properly described.

It has been repeatedly and notoriously decided, that a policy on goods, "beginning the adventure from the loading thereof on board," without any addition, only attaches on goods loaded at the port which is the terminus *a quo* of the voyage insured (*y*). So completely is this settled law, that all insurance brokers are bound to know and act on it. Hence, a London policy broker, being directed to effect a policy for a voyage "from Gibraltar to Dublin" upon goods which, by his instructions, clearly appeared to have been loaded on board at Malaga, was held liable for negligence in having effected the policy on such goods in the common printed form, "at and from Gibraltar to Dublin, beginning

(*u*) Turpin *v.* Bilton (1843), 5 M. & G. 455. By s. 97 of the Stamp Act, 1891, a broker writing any policy of sea insurance upon material not duly stamped, or otherwise offending against the true intent of the Act, forfeits all claim for brokerage and expenses, and is also liable to penalties.

(*x*) Mallough *v.* Barber (1814), 4 Camp. 150.

(*y*) Robertson *v.* French (1803), 4 East, 130; Spitta *v.* Woodman (1810), 2 Taunt. 416; Horneyer *v.* Lushington (1812), 15 East, 46; Mellish *v.* Allnutt (1813), 2 M. & S. 106.

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the adventure upon the said goods and merchandise from the loading thereof aboard the said ship" (*z*).

Assured not always bound to read his policy to see whether broker has followed his instructions.

Moreover, when a broker of repute is employed to effect an insurance against certain risks, the client is entitled to rely upon his instructions being properly carried out. It is no answer for the broker to say, "I handed you the policy and you should have examined it and seen whether it gave you the protection you required." A broker was instructed to insure goods per steamship "Suwa Maru" and/or steamers, but by a mistake insured them only while on the "Suwa Maru." The policy was sent to the client, who did not examine it, though if he had done so the mistake should have been discovered. The goods were shipped on another steamer and were lost: but as they were only covered while on the "Suwa Maru," the loss was not recoverable under the policy. It was held that the broker was liable for the value of the goods as damages for breach of his contract to insure them as directed. "Business could not be carried on," said the learned Judge, "if, when a person has been employed to use care and skill with regard to a matter, the employer is bound to use his own care and skill to see whether the person employed has done what he was employed to do" (*a*).

Broker not liable where mistake due to uncertainty of law or practice.

154. The rule which we have been discussing regards what is ordinary, usual, and settled; when we leave the common beaten track it ceases to be applicable. As Judge Duer well expresses it, "The mistake of the agent, where the practice is unsettled, or the law uncertain, affords no evidence of that want of reasonable skill and ordinary diligence for which alone he is responsible" (*b*).

(*z*) Park *v.* Hammond (1814), Holt, N. P. 80; *S. C.*, 4 Camp. 344; 2 Marshall's R. 189; 6 Taunt. 495. This last report, as Duer points out, commits the absurd mistake of stating the risk under the policy to have been on the goods "from the loading thereof on board at Gibraltar": 2 Duer, 209, n. (*b*).

(*a*) Dickson & Co. *v.* Devitt (1916), 21 Com. Cas. 291 (Atkin, J.).

(*b*) 2 Duer, 214.

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Unless the directions of his principal are clear and precise.

If the directions given be clear, precise and intelligible, the failure of the insurance agent to comply therewith is actionable, where it has caused damage to the principal, although the directions may embrace a partially illegal insurance. Thus, where clear directions were given by the plaintiffs (foreign merchants) to the defendants, (their London mercantile agents) to insure goods and also the premium, and the defendants insured the goods but not the premium; it was held that they were liable to the plaintiffs for not complying with this order to insure, and that they could not avail themselves of the defence that the order also directed them to insure against British capture, for although on that ground they might have renounced the order altogether, yet, having adopted it, they were bound to execute it as far as by law they might *secundum formam jubentis* (*c*).

All prior verbal communications are superseded by subsequent written instructions.

155. An agent who has faithfully followed express written instructions to insure will not be liable for having omitted to insert a provision in the policy which, according to the verbal communications of his principal, he might fairly have inferred to be necessary for the complete protection of the insured property. Thus, where the captain of a ship told a broker, in the course of conversation, that the ship was to carry simulated papers, but afterwards sent him written instructions for effecting a policy on the ship, in which nothing was said as to inserting a liberty to carry them, the broker was held not to be liable for negligence in not inserting the clause, though the ship was subsequently condemned for carrying such papers (*d*).

Where instructions are ambiguous

In case the orders of the principal are so ambiguous as to be susceptible of two distinct meanings, and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent

(*c*) Glaser *v.* Cowie (1813), 1 M. & S. 52.

(*d*) Fomin *v.* Oswell (1813), 3 Camp. 357. "The captain," Lord Ellenborough remarked, "notwithstanding his prior conversation, might have resolved not to carry any such papers, or if he still meant to carry them, might not have wished that a leave for that purpose should have been inserted in the policy."

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to the principal to complain of the act as unauthorized, because he meant the order to be read in the other sense, of which it is equally capable (*e*).

An agent acting under a general order to insure need only effect a policy in the general form.

156. An agent acting under a general order to insure is not bound to do more than effect an insurance in the form in general use at the place to which the order refers (*f*). If the principal wishes to have the insurance effected in a particular mode, or with a particular class of insurers, he should give specific instructions to that effect.

In the case, indeed, of a foreign principal, who is not proved to have, and cannot be presumed to have, a knowledge of the different usages of the various classes of insurers at the place to which the order refers, it might *à priori* have been fairly deemed part of the agent's duty, even though acting only under a general order to insure, to select that class of insurers with whom he might have secured the most complete protection on the most advantageous terms. If directed, for instance, under a general order, to insure a certain description of goods, which at some of the insurance offices of the place to which the order referred might be completely protected, and at others not, the premium in both cases being the same, and the solvency of the insurers equal, the agent would seem not to exercise the requisite amount of reasonable skill by insuring with the office which afforded the less complete protection.

Moore *v.* Mourgue.

The following case, however, is to the contrary:—The plaintiff (a merchant of Alicant) brought his action against

(*e*) Ireland *v.* Livingstone (1871), L. R. 5 H. L. 395.

(*f*) Cf. Yuill *v.* Scott-Robson, [1907] 1 K. B. 685; [1908] 1 K. B. 270, C. A., in which a seller of cattle who had contracted to insure them "against all risks" was held not to have satisfied the contract by procuring a Lloyd's policy in the usual form, containing the "free of capture" clause.

Where a sale contract contained a clause: "Insurance to be effected by (the sellers) all risks," Hamilton, J., held that they had satisfied the contract by effecting an insurance covering the entire quantum of damage, although it did not cover a loss of cargo improperly shipped on deck in breach of the contract of carriage: Vincentelli *v.* Rowlett (1911), 16 Com. Cas. 310.

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the defendant (his agent in London) for not insuring his goods agreeably to his directions. The goods were a cargo of fruit: the plaintiff had given the defendant no particular directions how or with whom to insure, but only a general order "to insure the cargo." The defendant effected the policy with the London Insurance Office, who only insured fruit "free from particular average"—an exception not to be found in the policies of Lloyd's, or the Royal Exchange, who, however, insured fruit at the same premium as the London. An average loss having happened on the fruit, the plaintiff was precluded from recovering, owing to the exception. For the plaintiff it was contended, that though the order to insure was general, yet the defendant was bound to execute it in such a manner as would effectually answer the end proposed; that the very nature of the commodity showed it was liable to an average loss, a danger against which the defendant ought accordingly to have guarded; that, as there were two offices in London (Lloyd's and the Royal Exchange) where this exception was never put in, it was gross negligence in the defendant not to have insured with them. Lord Mansfield left it generally to the jury, that if they thought there was gross negligence, or that the defendant had acted *malâ fide*, they should find for the plaintiff, otherwise for the defendant; the jury found for the defendant, on the ground that they thought he had acted *bonâ fide* and to the best of his judgment, and this verdict the Court in Banc refused to disturb. "The plaintiff," said Lord Mansfield, "if he pleased, might have given orders to the defendant not to insure at the London Insurance Office, but at some other office where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters" (*g*). Unless we suppose that proof was given (of which no trace appears in the report) that the plaintiff, a foreign merchant, was cognizant of the different usages of the London Insurance

Remarks on Moore v. Mourgue.

(*g*) Moore *v.* Mourgue (1776), Cowp. 480.

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Offices, this decision certainly seems unsatisfactory: the question is not only whether the agent acted *bonâ fide* in insuring as he did, but whether he exercised that reasonable amount of skill and diligence which could fairly be required of him: upon this point there is great weight in the following observations of Judge Duer: "A general order to insure implies a direction to make the insurance on the best terms that the agent, in the exercise of reasonable diligence, will be able to obtain, and binds the agent, at least, to that degree of diligence that a person of ordinary prudence is accustomed to employ in his own affairs. Certainly no person of ordinary prudence, about to determine on an insurance, would fail to ascertain the usual terms of the respective companies, or sets of underwriters, to whom he might apply; nor would fail, if the credit of the underwriters was equally solid, to effect his insurance at that office, whose terms, at an equal premium, secured to him the largest indemnity. Hence, an agent who, in acting for another, should omit to make the same inquiries, and pursue the same course, would be chargeable with such a want of reasonable and ordinary diligence as would render him justly liable for a resulting loss" (*h*).

Comber v. Anderson.

157. In the following case the plaintiff was a British merchant, and although the decision seems partly to have been based on acquiescence in the policy, yet Lord Ellenborough undoubtedly ruled that the plaintiff must be presumed cognizant of the tenor of the policies adopted by the different classes of insurers in London. The defendants, London insurance brokers, having received from the plaintiff, a merchant in Liverpool, general orders to insure a cargo of wheat, but no specific instructions as to how or with whom to insure, effected a policy with the Royal Exchange Assurance Company, who at that time left out of their memorandum the exception which makes them liable for an average loss on wheat in case of stranding. The ship having stranded, and the wheat having sustained an average loss, the plaintiff

(*h*) 2 Duer on Ins. 231; and see also pp. 229—232.

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was precluded from recovering anything under the policy. He lay by for some time after the loss had happened, without complaining of the form of the policy, and then brought his action against the defendants for not having effected such a policy as would have secured to him an indemnity for average loss in case of stranding. Lord Ellenborough, as to this part of the case, said: the plaintiff must be taken to have been cognizant of the existence of the chartered companies and the tenor of their policies. If he wished that the policy on this cargo should not be effected on the terms of the Royal Exchange Assurance Company, he ought to have given special directions to the defendants for this purpose; and, at any rate, having been so late in reproaching them with what they had done, he had acquiesced in and adopted the policy which they had actually effected (*i*).

Is evidence of experts admissible to prove what a broker of reasonable skill would have done under the circumstances?

158. A question of some importance in relation to the subject of a broker's duty is whether the evidence of experts is admissible to show what a broker of reasonable skill would have done under the circumstances. In Rickards *v.* Murdock (*k*), which was an action against underwriters, the defendants called expert witnesses who deposed that in their opinion the whole of a certain letter ought to have been communicated by the broker who effected the insurance, and that the part omitted was material. Lord Tenterden admitted the evidence and left the question of materiality to the jury, who found for the defendants. Subsequently, Lord Tenterden and the Court of King's Bench held that the evidence was properly admitted. The assured then brought an action (*l*) against the broker for negligence and called similar evidence on his own behalf. The same Court, however, presided over by Denman, C. J., considered the evidence inadmissible. In the same year, another action (*m*) was tried in which a broker was charged with want of skill in not procuring a

(*i*) Comber *v.* Anderson and another (1808), 1 Camp. 523.
(*k*) (1830), 10 B. & C. 541.
(*l*) Campell *v.* Rickards (1833), 5 B. & Ad. 840.
(*m*) Chapman *v.* Walton (1833), 10 Bing. 57.

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proper alteration to be made in a policy according to instructions which he had received. Similar evidence was called for the defendant at the trial and the jury found for the defendant. The Court of Common Pleas, presided over by Tindal, C. J., held that the evidence was admissible.

Tindal, C. J., said: "The point to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill and judgment. This is a question of fact, the decision of which appears to rest on this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion with the defendant" (*n*).

Although this question, as far as authority is concerned, must still be regarded as doubtful in English law, yet it must be confessed that the opinion of Tindal, C. J., for the reasons he has so forcibly urged, appears most consistent with sound principle; it seems also to have been adopted as the preferable rule on the other side of the Atlantic (*o*).

(*n*) 10 Bing. at p. 63. This admirable judgment deserves a very careful and attentive perusal throughout.

(*o*) 1 Smith's Leading Cases, notes to Carter *v.* Boehm. As to the American decisions, see M'Lanahan *v.* Univ. Ins. Co. (1828), 1 Peter's Supreme Court R. 188; 3 Kent, 285, n. (*b*). Duer, vol. ii. pp. 780—788, gives a very learned review of the whole question. Cf. also, 2 Phillips, s. 2112. A similar question is discussed, and these and other cases referred to, in the chapter on "Concealment," where the point is whether expert evidence is admissible to show what facts are material, and, as such, necessary to be communicated. See *post*, § 626.

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The agent is not liable where principal is not damnified.

161. In order to fix the liability of an insurance agent, it is not sufficient to show that the insurance directed has failed through his default; it must also be proved that his principal has been damnified by the failure. Hence, if an agent fails to procure an insurance directed by his principal, which, if made as directed, would not be binding on the insurer, the agent is not liable in damages (*p*) on the plain ground that his principal has not been damnified (*q*). If the neglect complained of be the non-communication of a material fact, the insurance agent may defend himself on the ground that, had the fact been communicated, it would have been impossible to procure an insurance at the premium limited in the instructions (*r*); but unless the policy, if made as directed, would have been wholly void or voidable, this defence, arising out of the absence of *damnum* to the principal, cannot be set up, as in the case of an agent directed to insure against British capture,—a direction which, if complied with, would only have avoided the policy *pro tanto* (*s*).

Insurance agent may avail himself of any defence open to the underwriters.

An insurance agent in this form of action may avail himself of any defence that would be open to the underwriters; as breach of warranty (*t*), unseaworthiness (*u*), deviations (*x*), and the like: the only exception to this rule is, that the agent cannot, of course, take advantage of any defence founded on his own act or default. So where a broker had been instructed to effect a p.p.i. policy, but omitted to give proper

(*p*) Except, perhaps, for nominal damages: see Cahill *v.* Dawson (1857), 26 L. J. C. P. 253. *Sed contra*, Cheshire *v.* Vaughan, *infra*.

(*q*) Webster *v.* De Tastet (1797), 7 T. R. 157. The assurance directed to be made in this case was on slaves, the privilege of transporting which was given to the mate of a slave ship in lieu of wages. This being an illegal subject of insurance, the policy, if made as directed, would have been void.

(*r*) Anonymous case before Chambre, J. (1808), cited in Paley's Principal and Agent, 20.

(*s*) Glaser *v.* Cowie (1813), 1 M. & S. 52.

(*t*) Alsop *v.* Coit (1815), 12 Mass. R. 40, cited 2 Duer, 325; 2 Phillips, s. 1904.

(*u*) Miner *v.* Tagert (1810), 3 Binn. 204, cited Duer and Phillips, *loc. cit.*

(*x*) Delaney *v.* Stoddart (1785), 1 T. R. 22.

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information to the underwriters so that the latter successfully resisted a claim for payment (*y*), it was held by McCardie, J., and by the Court of Appeal that inasmuch as p.p.i. policies are void under sect. 4 of the Marine Insurance Act, the broker was not liable for his breach of duty (*z*).

Extent of liability.

The insuring agent's liability in such actions is, as a general rule, co-extensive with that of the underwriters if sued on the policy; thus he is entitled, in such action, to deduct from the damages the premium, and any other items which might have been deducted by the underwriter, such as (under the old practice) the one-half per cent. on the amount of loss (*a*).

It may sometimes be greater.

162. It may happen that the agent, in an action for negligence, is liable beyond the amount for which the underwriters would have been liable on the policy.

This may be for the costs of a previous action on the policy when brought at his desire or with his concurrence; and so it seemingly may be when the action on the policy, though brought without his concurrence, is defeated by some misconduct of his in effecting the insurance not disclosed to his principal until action brought (*b*). Not so, however, where the principal knows of the invalidity of the insurance and the misconduct of the agent, before suing, unless the suit be at the agent's request. Thus, where the principal sued the underwriters, although he knew that they had refused to pay on the ground that the agent had concealed a material fact, Lord Eldon would not suffer him to charge the agent with the costs, as the action was not necessary to entitle the

(*y*) See Cheshire *v.* Thompson (1918), 24 Com. Cas. 114, 198.

(*z*) Cheshire *v.* Vaughan (1919), 25 Com. Cas. 51; affd. [1920] 3 K. B. 240.

(*a*) Harding *v.* Carter (1781), 1 Marshall, 309; Delaney *v.* Stoddart (1785), 1 T. R. 22; Wilkinson *v.* Coverdale (1793), 1 Esp. 75; Glaser *v.* Cowie (1813), 1 M. & S. 52.

(*b*) 2 Duer, 330. This may sometimes be the case where the underwriters' ground of defence is concealment or misrepresentation by the agent.

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principal to recover, and did not appear to have been brought at the desire or with the concurrence of the agent (*c*).

Insurance brokers were sued for negligence in not having communicated certain material letters to the underwriters, whereby the plaintiff, their principal, had failed in two actions on the policies, and incurred costs to a large amount in adition to very heavy losses. It appeared that the plaintiff had since offered the defendants permission to try on his behalf as many other actions as they liked on the policies, and that, on this offer being declined, he at once, without further communication with the defendants, paid back to certain of the underwriters the losses which they had paid over to him without suit. It was held that the plaintiff had a right so to do without waiting to resist an action at the suit of these underwriters, and that, having done so, he had a right to recover from the defendants the amount of the losses, so paid over, in addition to his other losses and costs of action (*d*).

Agent is entitled to the fruits of abandonment.

Judge Duer raises the question, whether, in cases of constructive total loss, it is necessary, in order to charge the agent, in an action for negligence, with the whole amount that would have been due under the policy, to vest the remains of the property in the agent by abandonment: he concludes that it is, on grounds in every way reasonable, seeing the principal is entitled in law against the defaulting agent to the extent and in form as if he were the underwriter on a valid policy, such as ought to have been effected (*e*).

Duties of insurance agent entrusted with the policy.

163. So much for the duties of the insurance agent as to effecting an insurance. If, after the insurance is effected, the agent, as is generally the case, keeps the policy in his own hands, another class of duties is imposed upon him, his negligence or unskilfulness in the discharge of which may also render him personally liable to the assured.

(*c*) Seller *v.* Work, 1 Marshall, Ins. 305, 306; *ubi supra*.
(*d*) Maydew *v.* Forrester (1814), 5 Taunt. 615.
(*e*) 2 Duer, 326, 327.

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Generally speaking, the agent so entrusted with the policy after its execution is the substitute for the assured in all the relations of the latter with the underwriters, and has cast upon him the duty of enforcing the rights and protecting the interests of his principal in all matters arising out of the contract of insurance (*f*). Thus, according as circumstances may arise, it may be his duty to demand a return of the premium; to prepare and submit the proof of a loss, settle and adjust the amount, and at the proper time collect the various sums from the underwriters, and pay them over to his principals; where an abandonment is requisite, he must take care to give notice thereof in due time and in proper form. In this country these duties are generally discharged by professed insurance brokers, who, as we have already seen, are the parties usually employed in actually effecting the insurance. They will, however, equally be expected of any mercantile commission agent, who chooses to place himself in the same responsible relations to his principal.

Neglect of broker, having policy in his hands, to collect and pay over losses with due promptness. Bousfield *v.* Cresswell.

164. One of the most important of these subsequent duties of the insurance agent is to collect and promptly pay over losses to his principal. In an action against a broker for not having duly called on certain underwriters to settle the loss and pay the sums insured, there was no other evidence offered of such obligation, except that the policy remained in his hands after the loss. Lord Ellenborough: "If an insurance broker keeps the policy in his hands he shall be presumed to promise that he will collect the sum due from the underwriters on a loss happening, in consideration of the commission he receives for effecting the insurance. Here the broker, if he chose to part with his lien, might have handed

(*f*) 2 Duer, 245. "Perhaps," says Blackburn, J., "it may be put as high as to say that he is clothed with authority to do all that is incidentally necessary for carrying out the contract in the policy thus left in his hands. I do not wish to be understood as giving a decided opinion that he has so much authority, but there are at least grounds for so contending." Xenos *v.* Wickham (1863), 33 L. J. C. P. at p. 21.

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over the policy to the assured, as soon as it was effected, and his responsibility would then have been at an end; but as he retained it he was bound to use all reasonable diligence to bring the underwriters to a settlement of the loss according to the usage of trade in this respect" (*g*).

Duty to give notice of abandonment.

165. The insurance agent is no doubt bound, as to giving notice of abandonment, by any express instructions received from his principal, and to carry them out with such reasonable skill as may fairly be expected of him. Where, however, he is left to his own discretion in the matter, the question whether he is liable in an action for not having given due notice of abandonment, must depend upon the circumstances of the case. In the case of principals living at too great a distance to be consulted on the matter, the agent having the policy in his hands would no doubt be held bound to act in their behalf by giving due notice of abandonment, where the circumstances are such as to require it. In such cases, if the agent have done all that his principal, as a prudent, careful and skilful man of business, if on the spot, could reasonably be expected to do, he will be free from liability; but if he have failed in this, he will be liable for the consequences of his negligence. In the case of principals living sufficiently near to be consulted, the agent, in a point of such difficult discretion as a question of abandonment frequently is, would always do wisely to refer to his employers for instructions. In Comber *v.* Anderson, the plaintiff, a merchant of Liverpool, had insured through the defendants, brokers in London, a cargo of wheat from Waterford to Liverpool. On going down the Waterford river on the 28th January, 1807, the ship struck and filled. The greater part of plaintiff's wheat was got out, but damaged 95 per cent. on its value. On the 2nd February the plaintiff

Comber *v.* Anderson.

(*g*) Bousfield *v.* Cresswell (1810), 2 Camp. 545. The usage of trade referred to by his Lordship is, that losses ought to be collected from the underwriters a month after the adjustment, and paid over forthwith to the assured.

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wrote to the defendants a letter, which they received on the 4th, directing them, if any steps could be taken for his interest with the underwriters, "to do the needful," adding, "I should wish to abandon, if it be admitted of." The defendants, by return of post, wrote back to say, "that it would be imprudent to say anything to the underwriters without learning further particulars." The plaintiff did not write again till the 9th, when he neither complained of the abandonment not being made, nor directed the defendants to abandon. On the 18th of the same month they sent in a notice of abandonment, which was held to be too late (*h*).

It was contended for the plaintiff, that the defendants, after receiving the letter of the 2nd of February, ought to have given immediate notice of abandonment.

Lord Ellenborough, however, held, that no negligence could be imputed to the defendants for not abandoning before the 18th. The letter of the 2nd left it to the defendants' discretion to act as they should think most expedient; and, if the plaintiff was dissatisfied with their conduct, he ought at once to have said so. Instead of that he lay by till the 9th, and did not even then complain or give them any fresh orders. Had he positively required them to abandon, they would have been answerable for not complying with his request as soon as possible; but he had referred them to their own judgment, and it seemed as if he himself at the time had thought that they acted judiciously (*i*).

The above case appears to afford a good illustration of the principles that in this matter regulate the insurance agent's liability: he will not, in cases of difficulty, as questions of abandonment generally are, be held liable for not having exerted the best possible judgment that could, under the circumstances, have been found; it is enough if he acted with reasonable skill and discretion, and as his principal would probably have done had he himself taken the management of the business.

(*h*) In Anderson *v.* Royal Exchange Ass. Co. (1805), 7 East, 38.
(*i*) Comber *v.* Anderson (1808), 1 Camp. 525.

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Broker has no authority to cancel a policy.

A broker has, in the absence of the express authority of his principal, no authority to cancel a policy, whether it be left in his hands or not (*k*).

Agents of the insurer.

166. Agents may be appointed for the purpose not only of effecting sea-policies for the assured, but also of subscribing them for the underwriters (*l*).

Evidence of authority.

As to what shall be satisfactory evidence of authority is a point on which there has been some little fluctuation in the decisions. Thus, where a broker called by the plaintiff proved that the defendant's name had been subscribed by one Hutchins, who was in the constant habit of subscribing policies in the defendant's name, and had done several for the witness and for others to his knowledge, Lord Kenyon ruled that this was sufficient evidence to charge the defendant without the production of the written authority under which he acted (*m*); but Lord Ellenborough, in a later case, held precisely similar evidence insufficient (*n*), unless it was also proved that the defendant had ratified such subscription, as, *e.g.*, by paying losses upon policies so subscribed (*o*).

A memorandum indorsed on a policy for change of voyage was signed by the agent of an insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it. This was held by Lord Tenterden to be sufficient proof of the agent's authority to sign such memorandums; and that the other policies on which the memorandums had been signed need not be produced (*p*).

(*k*) Xenos *v.* Wickham (in error) (1863), 14 C. B. N. S. 452; 33 L. J. C. P. 13; (1867), L. R. 2 H. L. 296.

(*l*) In Nicholson *v.* Croft (1761), 2 Burr. 1188, it was held that proof of subscription by an authorized agent will satisfy an allegation of signature by the principal. See also Cope *v.* Miller (1896), 1 Com. Cas. 296, and Mar. Ins. Act, 1906, s. 24, *ante*, § 26.

(*m*) Neal *v.* Erving (1793), 1 Esp. 61.

(*n*) Courteen *v.* Touse (1807), 1 Camp. 43, n.; and rightly, see 2 Duer, 341, n. (*a*).

(*o*) Haughton *v.* Ewbank (1814), 4 Camp. 88.

(*p*) Brockelbank *v.* Sugrue (1831), 5 C. & P. 21.

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After an agent's authority to underwrite policies has expired, the principal may, nevertheless, be estopped from denying the continuation of the authority as against parties who had previously effected insurances with the agent, if the principal has not given them notice of the termination of the authority (*q*).

What is a sufficient execution of a power to sign policies.

167. Where a power was given to fifteen persons, "jointly or separately, to sign policies on such ships as they or any of them should think proper," after four of the original fifteen had died, a policy was executed, in the name of the principal, by four of the survivors, and this was held to be a sufficient pursuance of the authority (*r*).

Where the power of attorney was to execute policies on which the risk should commence from the day on which the ship was accepted by the association, the Court held that the agent had sufficiently complied with his power by executing a retrospective policy (with the clause "lost or not lost"), to commence on the day the ship had been accepted, although, at the time of so executing it, the agent and the assured were both aware that two average losses had, in the meantime, happened on the ship (*s*).

In virtue of a power "to underwrite any policy of insurance not exceeding 100*l.*, and to subscribe the same in his (the underwriter's) name, and to settle and adjust losses," the broker signed a slip for a policy within the terms of the power, and the Court were of opinion that the signature of the broker's clerk to the policy, made in pursuance of the slip, was a good execution of this power, this being a mere ministerial act. There was, however, in the same case, a ratification of this signature by the underwriter (*t*).

Limited authority.

168. The ostensible authority of an agent to underwrite policies may be controlled by local usage. A broker at

(*q*) Willis *v.* Joyce (1911), 16 Com. Cas. 190.

(*r*) Guthrie *v.* Armstrong (1822), 1 Dowl. & Ryl. 248.

(*s*) Mead *v.* Davison (1835), 3 Ad. & E. 303. Cf. Mason *v.* Joseph, *infra*.

(*t*) Mason *v.* Joseph, 1 Smith, 406.

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Liverpool, who had a written authority to underwrite for not more than 100*l*. by any one slip, underwrote a policy for 150*l*. The Court held that the principal was not bound by the subscription, inasmuch as it was common knowledge at Liverpool that such agents had only a limited authority (*u*).

An agent, whose original authority to subscribe a policy has been proved, has an implied authority to perform any subsequent act on behalf of his principal that the relation between the latter and the assured may render necessary.

The authority to sign involves that of settling claims, and of submitting to arbitration.

Thus: the authority to sign or subscribe a policy for the underwriter involves that of signing the adjustment of a loss (*x*). And an agent proved to have been in the habit of subscribing policies and settling losses, was held, by Gibbs, C. J., to have an implied authority to submit a dispute, concerning a loss, to arbitration (*y*).

These were cases of implied authority, arising out of the proved relationship subsisting between the underwriter and the agent. Where, however, the agent of the underwriters derives his authority from express instructions, which profess to define and regulate the duties of his agency, he cannot, as agent, bind his principal by any act which exceeds the limits of such instructions, much less by one that violates or contravenes them, unless the principal have held him out to the public as being invested with a general authority.

Authority of Lloyd's agents.

Thus: Lloyd's agents have no other authority than what they derive from the printed instructions under which they act. By these instructions Lloyd's agent was expressly forbidden to make up or sign any statement of average, either general or particular, as representative of the underwriters.

(*u*) Baines *v.* Ewing (1866), L. R. 1 Exch. 320.

(*x*) Richardson *v.* Anderson (1805), 1 Camp. 43, n.; and per Blackburn, J., Xenos *v.* Wickham (1863), 33 L. J. C. P. 13—19.

(*y*) Goodson *v.* Brooke (1814), 4 Camp. 163. *Sed quære.* The report no doubt bears out the text, but it is a report *ex relatione* of another, and it seems contrary to Stead *v.* Salt (1825), 3 Bing. 101; Adams *v.* Bankart (1835), 1 C. M. & R. 681; confirmed by Hatton *v.* Royle (1858), 3 H. & N. 500; 27 L. J. Ex. 486, that even a partner has no implied authority to submit a partnership dispute to arbitration. Cf. also Thomas *v.* Atherton (1878), 10 Ch. D. 185.

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Where, therefore, such an agent, in a foreign port, signed a certificate that certain sugars were damaged over 5 per cent., the Court held that he had exceeded his authority, and that the certificate so given was not binding on the underwriters (*z*). By the same instructions no Lloyd's agent "is to accept an abandonment as the representative of the underwriters"; and although such acceptance of an abandonment by a Lloyd's agent seemed in one case to have been regarded as binding in the Common Pleas (*a*), Lord Tenterden remarked that, in the case referred to, the instructions to Lloyd's agents could not have been before the Court (*b*).

(*z*) Drake *v.* Marryatt (1823), 1 B. & Cr. 473.

(*a*) Read *v.* Bonham (1821), 3 Brod. & B. 147. See the *dicta* of Burroughs, J., as there reported at p. 155.

(*b*) Lord Tenterden in Drake *v.* Marryatt (1823), 1 B. & Cr. 478. See further as to the position of Lloyd's agents, § 77, *supra*.

CHAPTER VIII.

DESCRIPTION OF THE ASSURED IN THE POLICY— ASSIGNMENT OF THE POLICY.

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Description of the assured in the policy.

169. We have already, in briefly noticing the main requisites of the policy, stated how the blanks in the common printed forms are generally filled up with the names either of the assured himself or of the insurance agent by whose instrumentality the policy is effected. We will now proceed to give, more at large, the history and present state of the law as it relates to the filling up of these blanks in the printed forms.

Practice of effecting policies in blank.

A practice appears to have sprung up in this country in the middle of the eighteenth century of effecting policies in blank; *i.e.*, without inserting the names either of the party for whom or by whom they were effected (*a*). In consequence of complaints on the part of the underwriters, an Act was passed in the year 1784 (*b*), directing that the name of the person interested, or of his agent, should in all cases be inserted in the policy.

25 Geo. 3, c. 44.

The provisions of this Act appear to have been founded on a misconception of the real nature of that grievance of which the underwriters complained. What the underwriters really wanted was merely to know the name of someone concerned in effecting the policy, no matter whether principal or agent,

(*a*) Pray *v.* Edie (1786), 1 T. R. 313; see also the judgment of Buller, J., in Wolff *v.* Horncastle (1798), 1 B. & P. 316, 321.

(*b*) 25 Geo. 3, c. 44.

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to whom they could look as a responsible debtor. What the Legislature appears to have aimed at was, as far as possible, to compel a disclosure of the name of the person really interested as principal.

The Courts interpreted the Act strictly. Very soon after it was passed an underwriter took advantage of it to evade his contract on the ground that the agent's name was not inserted, *eo nomine*, as agent (*c*); and another policy was held void under the same law, because the names of all the parties interested were not inserted therein (*d*).

28 Geo. 3, c. 56.

170. This was evidently going too far. Another statute, therefore, was passed in the year 1787 (*e*), which provided that no policy should be effected without first inserting therein "the name or names, or the usual style and firm of dealing," either—1st, of one or more of the persons interested; or, 2nd, of the consignor or consignee of the property to be insured; or, 3rd, of the person resident in Great Britain who received the order for and effected the policy (*f*); or, 4th, of the person who gave the order to the agent immediately employed to effect it.

Marine Insurance Act, s. 23 (1).

The Courts of Law gave this Act the most liberal construction the words would bear (*g*), so that in practice it was reduced to a mere prohibition of policies in blank. Accordingly when it was repealed by the Marine Insurance Act, 1906, the simpler provision of sect. 23 (1) was substituted, which declares that "a marine policy must specify the name of the assured or of some person who effects the insurance on his behalf" (*h*).

(*c*) Pray *v.* Edie (1786), 1 T. R. 313.

(*d*) Wilton *v.* Reatson (1787), 1 Park, 16; Cox *v.* Parry (1786), 1 T. R. 464.

(*e*) 28 Geo. 3, c. 56.

(*f*) It was held in Bell *v.* Gilson (1798), 1 B. & P. 345, that an insurance broker was such a person; and in De Vignier *v.* Swanson, *ibid.* 346, n., that the person need not be described in the policy as an agent.

(*g*) See Wolff *v.* Horncastle (1798), 1 B. & P. 316.

(*h*) In Wolff *v.* Horncastle, *supra*, it was held that an agent who

Sect. 171. Ratification of an insurance.

171. Sect. 86 of the Marine Insurance Act, 1906, provides that "where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss" (*i*).

Of course, as no act of one man can be ratified by another, unless that other is cognizant of what has previously been done, so the party for whom the insurance is intended to be made cannot, by any after authority to insure, be considered to adopt the previous insurance, unless at the time of giving such authority he knew as a fact that the prior insurance had been made. This, indeed, is so plain on principle, that it requires no authority to enforce it; and it is all that was really decided in the earlier case of Bell *v.* Janson, in which Lord Ellenborough had thrown doubt upon the application of the principle of ratification to the Act of 28 Geo. 3 (*k*). One of the points determined in Wolff *v.* Horncastle (*l*) was this: that the subsequent adoption of the policy by the party for whom it was intended to be made constituted the party making it a "person who received the order for and effected the policy" within the meaning of 28 Geo. 3, c. 56. It therefore seems clear that where a policy has been made, without any previous instruction or authority, by the broker, its adoption or ratification by his principal, after the fact of its having been so effected has been made known, is equivalent to a previous authority to effect it, and constitutes the party by whom the policy has been made a "person

employed the broker by whom the policy was effected was a person who received the order for and effected the policy, within the meaning of 28 Geo. 3, c. 56.

(*i*) See as to ratification, Lucena *v.* Craufurd (1808), 1 Taunt. 325; *S. C.*, in the House of Lords (1806), 2 B. & P. N. R. 269; Stirling *v.* Vaughan (1809), 11 East, 623; Routh *v.* Thompson (1811), 13 East, 274; Hagedorn *v.* Oliverson (1814), 2 M. & S. 485; Barlow *v.* Leckie (1819), 4 J. B. Moore, 8; and the cases cited *ante*, §§ 140—143. The law is the same in the United States; see per Kent, J., in Steinback *v.* Rhinelander (1803), 3 John. New York Cases, 281; 1 Phillips on Ins. s. 388; 3 Kent, Com. 256.

(*k*) Bell *v.* Janson (1813), 1 M. & S. 201.

(*l*) (1798), 1 B. & P. 316.

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who effects the insurance" on behalf of his principal, within the meaning of sect. 23 (1) of the Marine Insurance Act, 1906 (*m*).

Who may avail themselves of an insurance.

172. We have seen that the parties really interested in the subject of the insurance are in our common forms of policy not generally described by name at all, but are comprehended under the clause by which the insurance is expressed to be made by the person effecting it, "as well in his own name as for and in the name and names of all and every other person and persons to whom the same (*i.e.*, the thing insured) doth, may, or shall appertain in part or in all."

Questions have been raised as to the parties who may avail themselves of these very broad and comprehensive terms. In the first place it is clear they must be persons who may lawfully be insured. In the next place they must be persons who, at some time during the risk, have an insurable interest in the property, either as the persons originally insured or as their assignees. Beyond this, it must be shown that the person effecting the insurance either intended it for their benefit, or at all events, did not intend it exclusively for the benefit of others having a conflicting or inconsistent interest, but meant it to apply generally, so as to cover the interests of those who should ultimately appear concerned (*n*): if this be shown, a subsequent adoption of the policy by the parties so intended to be insured, or so appearing ultimately concerned in interest, will be held equivalent to a previous order, and entitle them, under the words of the general clause, to avail themselves of the benefit of the insurance (*o*).

(*m*) For a curious illustration of the general principle, see Barlow *v.* Leckie (1819), 4 J. B. Moore, 8.

(*n*) "I agree that a policy may be made for the benefit of all such persons (*i.e.*, all persons to whom the subject-matter does, may, or shall appertain in part or in all). But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, Courts have disallowed his claim though he might be within the description" (per Lord Loreburn, L. C., in Boston Fruit Co. *v.* British and Foreign Mar. Ins. Co., [1906] A. C. 336, at p. 339).

(*o*) In this passage the text of the second edition is reproduced.

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It is possible that sect. 26 (3) of the Marine Insurance Act, which declares that "where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered," was intended to affirm the rule that a policy covers the interest of any person whose interest it was intended to protect, though the context suggests that the sub-section was perhaps intended to declare a different principle, and that "interest" is equivalent to "subject-matter" (*p*).

The intention of the party directing the insurance to be effected is the test.

173. The intention, at the time, of the party who directs the insurance to be effected is the great point to be ascertained in determining whose interests the policy can be applied to protect; and this point is to be determined, as a question of fact, upon a consideration of all the circumstances (*q*).

Where the intention of the party directing the insurance is to embrace the interests of any person whatever who may ultimately appear to be concerned, there can be no doubt that any person coming within that category, who subsequently chooses to adopt the policy, may obtain the benefit of it.

It implies that the person who procures the insurance need not, at the time when he insures, have a definite person in his mind as his intended principal; and Routh *v.* Thompson (1811), 13 East, 274, is a clear authority for the statement. See also Duer, vol. ii. p. 36, cited by Vaughan Williams, L. J., in Boston Fruit Co. *v.* British and Foreign Mar. Ins. Co., [1905] 1 K. B. at p. 647, and § 143, *ante*. The view of Mathew, J., as expressed in Byas *v.* Miller (1897), 3 Com. Cas. at p. 42, seems to be that a voluntary agent must intend to benefit a particular person, and this seems also to be the view of Willes, J., according to his judgment in Watson *v.* Swann (1862), 11 C. B. N. S. 756. For the rule laid down by the U. S. Supreme Court where the policy was expressed to be "on account of whom it may concern," see Hooper *v.* Robinson (1878), 98 U. S. 528.

(*p*) See *post*, § 252b.

(*q*) Grant *v.* Hill (1812), 4 Taunt. 380; Irving *v.* Richardson (1831), 2 B. & Ad. 193; Hill *v.* Scott (1895), 1 Com. Cas. 140, 200; Scott *v.* Globe Mar. Ins. Co. (1896), 1 Com. Cas. 370; Boston Fruit Co. *v.* British and Foreign Mar. Ins. Co., [1906] A. C. 336. The intention of the broker or other person who, upon instructions, effects the insurance is immaterial: *S. C.*, [1905] 1 K. B. 637, 648, per Mathew, J.; Small *v.* United Kingdom Mar. Mutual Ins. Assn., [1897] 2 Q. B. 42, 45.

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Thus, where a prize agent abroad, who at the time did not know to whose benefit the prize would ultimately accrue, wrote directions to this country for the insurance to be made for the benefit of those concerned, and it ultimately turned out that the Crown had an insurable interest, and had adopted the insurance by an Order in Council, it was held that the nominal plaintiffs might recover in an action on the policy in which the interest was averred in the Crown alone (*r*). In a former action on the same policy, it having been stated as a fact, in the special case on which the argument proceeded, that the policy had been in reality effected on account of the captors, the plaintiffs failed, because the Court were of opinion that the captors had no insurable interest, and they considered themselves precluded, by the statement in the special case, from applying the benefit of the policy to any other parties than those for whom alone it was found to have been effected (*s*). **Routh *v.* Thompson.**

So where a party had insured 3,700*l.* on a ship in which he was interested only as mortgagee, and only to the extent of 900*l.*, Lord Tenterden left it to the jury to say, on the evidence, whether they thought he intended by the insurance to cover his own interest only, as mortgagee, or that also of the mortgagor. The jury having found that he meant only to insure his own interest, the Court would not permit the policy to be extended, by virtue of the general clause, so as to cover the interest of the mortgagor (*t*). In another case, where an insurance agent, being unable to effect such a policy as the plaintiff required, indorsed the risk on his own general policy, it was held that the plaintiff could not recover under it, as it had not been effected on his behalf, nor was it a contract purporting to be made for, and afterwards ratified by, him; the plaintiff was no party to the contract, and consequently could not put it in suit (*u*). **Irving *v.* Richardson.** **Watson *v.* Swann.**

(*r*) Routh *v.* Thompson (1811), 13 East, 274. See note (*o*), *supra*.

(*s*) Routh *v.* Thompson (1809), 11 East, 428.

(*t*) Irving *v.* Richardson (1831), 2 B. & Ad. 193.

(*u*) Watson *v.* Swann (1862), 11 C. B. N. S. 756; 31 L. J. C. P. 210; followed in Byas *v.* Miller (1897), 3 Com. Cas. 39.

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Where a ship was demised by a charter-party which provided that the shipowners should pay for the insurance, but which was held on the construction of the whole instrument not to impose upon them a duty to insure for the benefit of the charterers, and there was no evidence outside of the charter-party that the shipowners intended, in effecting an insurance, to cover the interest of the charterers, the House of Lords held that the latter could not sue upon the policy (*x*).

In another case, teak logs were sold at a price "ex ship, payment against documents," and the buyer, having paid the price, took delivery of the logs ex ship, but while they were still afloat in the form of rafts a large part were driven out to sea by a gale and lost. The logs in question, together with some other logs, had been insured by the sellers for the voyage, by a policy which covered all risk of craft and raft. In an action by the buyer on the policy, it was held by the Privy Council that there was no evidence that the policy was effected on behalf of the buyer, or to cover his interest, and that consequently he could not maintain the suit (*y*).

The true rule, then, would appear to be, that any party to whom an interest in the property insured "doth, may, or shall appertain," at any time during the pendency of the risk, may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, if it appears from extrinsic evidence that the person directing the policy to be effected intended at the time to protect this particular interest, or at any rate to protect the interests generally of the parties who should ultimately appear to be concerned (*z*). The onus of proving that the plaintiff's interest was intended to be insured under these general words is on him (*a*).

(*x*) Boston Fruit Co. *v.* British and Foreign Mar. Ins. Co., *infra*.

(*y*) Yangtsze Ins. Ass. *v.* Lukmanjee, [1918] A. C. 585.

(*z*) See *ante*, § 172. This, of course, has no application to the question of assignment of a policy, as to which, see the following sections.

(*a*) Boston Fruit Co. *v.* British and Foreign Mar. Ins. Co., [1905] 1 K. B. 637, per Vaughan Williams, L. J., at p. 646; [1906] A. C. 336. Cf. Yangtsze Ins. Ass. *v.* Lukmanjee, *supra*.

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A contract of insurance is not an incident of the thing insured.

174. Sect. 15 of the Marine Insurance Act, 1906, provides that—

> Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.
>
> But the provisions of this section do not affect a transmission of interest by operation of law (*b*).

A sea-policy, in its ordinary form, is not an incident of the property insured, so as to follow its transmission from hand to hand during the continuance of the risks; in other words, the purchaser of the property insured does not, by the simple fact of such purchase without more, entitle himself also to the protection of the policy. In order to enable a purchaser of the insured property to derive the substantial benefit of the insurance, there must have been an assignment to him of the policy by the party originally insured, or, at all events, an agreement or understanding to assign it, or to hold it for the benefit of the purchaser (*c*).

When and how policy is assignable.

175. The assignment of marine policies is dealt with in sects. 50 and 51 of the Marine Insurance Act, 1906, in the following terms:—

> Section **50.**—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment (*d*). It may be assigned either before or after loss.
>
> (2) Where a marine policy has been assigned so as to

(*b*) This qualification was, no doubt, inserted *ex abundanti cautela*. Except possibly in the case of death or bankruptcy it is difficult to suggest any transmission of interest by operation of law to which it is applicable: see, however, Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 23, where it is suggested that subrogation comes under the same category.

(*c*) See Mar. Ins. Act, 1906, s. 51, *infra*. The remedy was entirely at law, and not in equity. De Ghetoff *v.* London Ass. Co. (1730), 4 Brown's Parl. Cas. 436, Tomlin's ed.

(*d*) For a clause providing that a policy should "become cancelled" if the vessel insured were sold or transferred to new management, see Pyman *v.* Marten (1906), 22 Times L. R. 834.

pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

Assured who has no interest cannot assign.

Section **51**. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy (*e*), any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

Conditions of valid assignment before loss.

A valid assignment before loss supposes the co-existence of three things at the time of assignment:—(1) An insurable interest in the subject-matter of the policy in the assignor; (2) the continuance of the risk insured in the policy; (3) the assignment of an insurable interest in the subject-matter of the policy to the assignee, and its exposure to the perils during the continuance of the risk.

A cargo of linseed was insured from Constantinople to a port of call and discharge in the United Kingdom to be named, including all risk of craft or lighters to and from the brig, each lighter to be considered as if separately insured. Whilst it was on the voyage the cargo was sold in London to the plaintiffs on the following terms:—To be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash, less $2\frac{1}{2}$ per cent. discount, or on seller's option on handing shipping documents, less 5 per cent. The vessel to go to any safe floating port in the United Kingdom. A safe floating port was named. The ship had arrived there in February,

(*e*) An agreement to "keep the policy alive," or to "hold it" for the benefit of the assignee of the interest insured (see Powles *v.* Innes (1843), 11 M. & W. 10; *ante*, § 174; *infra*, § 178), implies, it is submitted, an agreement to assign it.

and the cargo was being landed in public lighters employed by the plaintiffs, when one of the lighters with her cargo on board was sunk, and would have been a loss within the meaning of the risk in the policy. The policy was assigned to the plaintiffs in the following June, and the assignment indorsed on it in the following October. The plaintiffs sued on it in their own names, but did not recover, because at the time of the assignment the assignor had no interest to assign, the same having ceased by delivery of the goods into the plaintiffs' lighter, and there was no agreement to assign the policy to them, which might otherwise have kept it alive for their benefit when they had become capable of taking an assignment (*f*).

Assignment after loss.

After a total loss, the property insured ceases to be covered by the policy; but there remains a right in the assured to recover damages from the insurer in respect of his loss. Although, technically, a claim for a loss under a policy is for unliquidated damages (*g*), the proposition that a right to unliquidated damages cannot be assigned has no application to policies of marine insurance, and the effect of an assignment after loss is to transfer this chose in action to the assignee (*h*).

Assignee may sue in his own name, or that of another.

176. When there had been an assignment of the policy, or an agreement to assign it or keep it alive for the benefit of the transferee of the thing insured, the transferee could not at common law sue in his own name on the policy, but an action could be brought by the party, by whom or on whose behalf the insurance was originally effected, as trustee for the transferee (*i*). In such cases, it was no objection to the right

(*f*) North of England Oil Cake Co. *v.* Archangel Maritime Ins. Co. (1875), L. R. 10 Q. B. 249.

(*g*) See Pellas *v.* Neptune Marine Ins. Co., *infra;* Baker *v.* Adam (1910), 15 Com. Cas. 227.

(*h*) Lloyd *v.* Fleming (1872), L. R. 7 Q. B. 299, 303; Swan *v.* Maritime Ins. Co., [1907] 1 K. B. 116, 123.

(*i*) Gibson *v.* Winter (1833), 5 B. & Ad. 96; Sparkes *v.* Marshall (1836), 2 Bing. N. C. 761; Powles *v.* Innes (1843), 11 M. & W. 10. The assignor could sue for a loss as trustee, even though he became bankrupt: Castelli *v.* Boddington (1852), 1 E. & B. 66, 879.

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of the nominal plaintiff to recover, as trustee, on the policy, that the property had not been transferred, nor the policy assigned by him, until after the loss was known to all parties (*k*).

By 31 & 32 Vict. c. 86, s. 1, however, whenever a policy on ship, goods or freight had been assigned "so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured," the assignee might sue on the policy in his own name. This provision was repealed by sect. 92 of the Marine Insurance Act, 1906, and re-enacted in sect. 50 (2) (*l*), with the omission of the words "to any person entitled to the property thereby insured." It is apprehended that the omission of these words makes no difference. The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest insured. In other words, a person cannot retain the interest insured by the policy and assign the right to recover whenever a loss takes place to another person (*m*). The Court of Appeal held that sect. 1 of 31 & 32 Vict. c. 86 was merely intended to amend procedure, and not alter the rights of the parties (*n*), and the same construction is applicable to sect. 50 (2) of the Marine Insurance Act.

There is no reason why the assignee should not, as for-

(*k*) In Sparkes *v.* Marshall, *supra*, it was generally believed in December, 1831, that a missing ship was lost. The policy was transferred in April, 1832.

(*l*) *Ante*, § 175.

(*m*) The assured can, however, after a partial loss assign the amount recoverable in respect thereof to another person: Swan *v.* Maritime Ins. Co., [1907] 1 K. B. 116.

(*n*) Pellas *v.* Neptune Marine Ins. Co. (1879), 5 C. P. D. 34, C. A. Therefore the Court of Appeal held in that case that the insurers could not, in an action by the assignee of a policy, set off a debt incurred with them by the assured, as a set-off could not be pleaded to a claim for unliquidated damages, either under the statutes of set-off or in equity. In De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570, it was held that the underwriters could not, as against an assured who was suing on behalf of third persons, set off under the mutual credit clause of 12 & 13 Vict. c. 106, a debt due to them from the assured.

merly, sue in the name of the assignor, or of the brokers named in it as effecting the policy; but in this case he sues subject to all rights of defence that may be set up against the nominal plaintiff (*o*). And so now, when he sues in his own name, he does so subject to those same rights, they being expressly preserved to the defendant by the provision in sect. 50 (2) of the Marine Insurance Act, 1906, that "the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected" (*p*). Thus the underwriter can set up, against an innocent assignee of a policy, the concealment of a material fact on the part of the person by or on behalf of whom the policy was effected (*q*). Or he may set up the defence that the assignee was an alien enemy (*r*). He cannot, however, set off against an assignee any claims that he may have against the assignor under other policies, as such claims do not arise out of the contract sued upon (*s*).

177. "A marine policy may be assigned by indorsement thereon or in other customary manner" (*t*). The Act of

Mode and form of assignment.

(*o*) Gibson *v.* Winter (1833), 5 B. & Ad. 96; 2 Smith's L. C. 12th ed. p. 398. If inequitable defences, such as a release by the nominal plaintiff after assignment, be set up, the plaintiff may set out the true facts by way of reply: De Pothonier *v.* De Mattos (1858), E. B. & E. 461; and the Courts have interfered upon motion to protect the rights of the parties. See Gibson *v.* Winter, *supra*, and the cases therein cited in the judgment.

(*p*) The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6, making choses in action assignable with a complete transfer of remedies to the assignee, does it with this reservation—"Subject to all equities which would have been entitled to priority over the right of the assignee." Notice of the assignment is required by this Act, which is not necessary under the Mar. Ins. Act, s. 50 (2).

(*q*) Pickersgill *v.* London and Provincial Gen. Ins. Co., [1912] 3 K. B. 614.

(*r*) Bank of N. S. Wales *v.* South British Ins. Co. (1920), 4 Lloyd's List L. R. 266, 384.

(*s*) Baker *v.* Adam (1910), 15 Com. Cas. 227.

(*t*) Mar. Ins. Act, s. 50 (3). The learned author of this work stated that assignment of the policy might be made by delivery merely of the

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31 & 32 Vict. gave a form of assignment, though it did not require that form to be followed, nor make indorsement imperative (*u*); but no form of indorsement is given in the Marine Insurance Act, 1906.

Time of indorsement.

When the assignment is made by indorsement, this may be put upon the back of the instrument, either at the time of the transfer of the property insured, or at any other time between the making of the policy and the bringing of the action (*v*).

Rights of parties after assignment of the insurable interest.

178. An absolute sale or transfer by the party originally insured of all his interest in the insured property before the loss, incapacitates him, or the party who has effected the insurance for him, from recovering on the policy on his own account; nor can he, or the party who has so effected the policy, sue thereon as trustee for the purchaser unless there have been either an assignment of the policy, or something which the Courts will consider as equivalent thereto, or as evidence of an agreement or understanding between the vendor and vendee that the policy should be kept alive for the benefit of the latter (*x*).

policy with intention to assign it (see 2nd ed. p. 211). The editors were, however, informed before the seventh edition of this work was published, that the modern practice is to indorse the assignment on the policy; and the case of Baker *v.* Adam (1910), 15 Com. Cas. 227, confirms their belief that mere delivery of the policy is not now a customary mode of assignment. It is possible, however, that the policy may be handed over without indorsement with the other shipping documents, as security for an advance: see De Mattos *v.* Saunders, *supra*, and the dictum of Channell, J., in Swan *v.* Maritime Ins. Co. (1906), 12 Com. Cas. 73, 79.

(*u*) The form given by the Act was as follows:—

I, A. B., of, &c., do hereby assign unto C. D., &c., his executors, administrators and assigns, the within policy of assurance on the ship, freight and the goods therein carried [or on the ship, or freight, or goods, as the case may be]. In witness whereof, &c.

(*v*) Of course, an assignment subsequent to the transfer of the property would be inoperative, if there had not been an agreement, express or implied, to assign the policy: Mar. Ins. Act, s. 51, *ante*, § 175.

(*x*) Hibbert *v.* Carter (1787), 1 T. R. 745; Delaney *v.* Stoddart (1785), *ibid.* 22; Powles *v.* Innes (1843), 11 M. & W. 10; North of England Oil Cake Co. *v.* Archangel Maritime Ins. Co. (1875), L. R. 10 Q. B. 249, stated *ante*, § 175.

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Thus, where a part owner of a ship, after insurance and before loss, had by bill of sale absolutely transferred his share to a third party who was an entire stranger to the insurance, it was held that the plaintiffs, who had effected the policy under the vendor's directions, could neither recover as his agents under a count averring interest in him—for he had no interest left at the time of loss—nor as trustees for the purchaser of his share, because there were no facts stated in the case to warrant the inference that the policy had been handed over with the bill of sale, or that there had been an order on the broker to hand it over, or any understanding that the policy should be kept alive for the purchaser's benefit (*y*).

Powles *v.* Innes.

Right of assured in whom some interest remains.

179. Nothing short of an absolute transfer, however, of the insured property, will preclude the party originally insured from recovering on the policy, either for his own benefit or, even where there has been no assignment of the policy, and nothing that amounts to it, for the benefit of the transferee (*z*); a mere pledge of the bill of lading, as a collateral security, does not divest the assured of all his insurable interest. Thus, where Kerr, having consigned a cargo of produce to this country, and directed an insurance to be made thereon by the plaintiffs, his correspondents in London, subsequently, but before the policy was actually effected, assigned the bill of lading over to Dellprat, the Court of King's Bench, proceeding upon the ground that an indorsement of the bill of lading passed the whole property, at first held that the plaintiffs could not recover on the policy;—not as agents for Kerr, because he had absolutely divested himself of all interest before the policy was effected, nor as trustees for Dellprat, because there had been no transfer to him of the policy and no agreement to transfer it. Subsequently, however, on affidavits that Kerr had no intention to pass the whole property by indorsement of the bill of lading, but only

Hibbert *v.* Carter.

(*y*) Powles *v.* Innes (1843), 11 M. & W. 10.

(*z*) Hibbert *v.* Carter (1787), 1 T. R. 745; Alston *v.* Campbell (1779), 4 Brown's P. C. 476, Tomlin's ed.

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to bind it to the extent of the net proceeds, as a security for Dellprat's debt, which debt had since been paid on Kerr's behalf, a new trial was granted, and on the second trial, the facts appearing as set forth in the affidavits, the plaintiffs had a verdict for the whole amount of the loss (*a*).

Right of assignee limited by the assignment.

180. An assignee of a policy can only avail himself of the insurance to the extent to which the assignor has agreed to assign his rights to him.

A ship was chartered with grain from Galatz to Emden for orders, to discharge in a port of the United Kingdom, and the cargo-owners effected an insurance on the grain from Galatz to Emden and thence to the United Kingdom. The cargo was sold while on the voyage to Emden, the price "including freight and insurance to Emden," and the bill of lading and policy were delivered to the buyer. A loss having occurred between Emden and the port of discharge in the United Kingdom, the Court of Exchequer held that the buyer was only entitled to the insurance as far as Emden, and consequently that he could not recover against the underwriter for the loss (*b*).

Consent of insurer unnecessary.

Unless the policy (as is usually the case in insurances by mutual associations (*c*)) imposes such a condition, the consent of the underwriter is never necessary to the validity of an assignment of it (*d*).

Agreements to transfer insurances to

181. Where a policy is assigned to the purchaser of the insured property, it is usual to indorse on it a memorandum

(*a*) Hibbert *v.* Carter, *supra*.

(*b*) Ionides *v.* Harford (1859), 29 L. J. Ex. 36; see also Ralli *v.* Universal Marine Ins. Co. (1862), 31 L. J. Ch. 313, *post*, § 181.

(*c*) See, *e.g.*, Laurie *v.* West Hartlepool Thirds Indemnity Association (1899), 4 Com. Cas. 322.

(*d*) In Sparkes *v.* Marshall (1836), 2 Bing. N. C. 761, it was found as a fact that the defendants did not assent to the transfer of the property, or to the assignment of the policy. This practice of merchants with regard to marine policies accounts for the absence from the 31 & 32 Vict. c. 86, and the Mar. Ins. Act, of any such provision as is to be found in the Judicature Act, 1873, requiring notice to be given of the assignment of the chose in action. See 2 Duer, 62, 68, for clauses in American policies restricting the right of assignment.

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to the effect that "the interest in this policy is transferred" to the purchaser. When a floating cargo (*i.e.*, a cargo at sea) is sold in London, it is generally on what are called "The London Floating Conditions," which comprise the delivery to the purchaser for his benefit of the policies which have been effected on the cargo (*e*), the understanding being that it is insured to the full value. If it be objected by the buyer that the vendor has committed a breach of his contract in handing over policies apparently short of the full value of the cargo, the question whether the policies are sufficient as regards amount is one of fact, and if the sum by which they fall short is small, the jury are entitled to find that the contract has been fulfilled (*f*). In another case a cargo of wheat, still afloat, was sold at a depreciated price, and the vendor indorsed over the policy for so much only as would cover the depreciated price, being part merely of the sum insured in a valued policy. The underwriters having paid the full amount of the insurance into Court, it was held that the buyer was entitled to the full sum, the wheat having been sold as insured, so that the full benefit of the insurance passed by the contract to the buyer (*g*). Again, where a contract for the sale of goods contained a clause "insurance for 5 per cent. over net invoice amount to be effected by sellers for account of buyers," and the sellers obtained an insurance for a larger amount, and handed the cover-note to the buyers, it was held that the buyers were entitled to retain the whole of the insurance money, which the underwriters

buyer of property.

(*e*) See North of England Oil Cake Co. *v.* Archangel Ins. Co. (1875), L. R. 10 Q. B. 249, 254.

(*f*) Tanvaco *v.* Lucas (1861), 1 B. & S. 185; 30 L. J. Q. B. 234; in error (1862), 3 B. & S. 89; 31 L. J. Q. B. 296.

(*g*) Ralli *v.* Universal Mar. Ins. Co. (1862), 31 L. J. Ch. 313; 2 John. & H. 159. The vendor claimed that by indorsing over the policy for only part of the amount insured, he had expressly reserved to himself, as against the buyer, an interest in the balance. If, however, the underwriters had not paid the full amount insured into Court, and the Court had decided against the buyer's claim to the balance, it is difficult to understand upon what principle the vendor could have based his claim thereto. Cf. Harland *v.* Burstall (1901), 6 Com. Cas. 113.

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It is an implied condition in a contract which provides that the seller shall hand over policies of insurance that the policies handed over are valid (*k*).

(*h*) Landauer *v.* Asser, [1905] 2 K. B. 184.
(*i*) Strass *v.* Spillers & Bakers (1911), 16 Com. Cas. 166.
(*k*) Cantiere Meccanico Brindisino *v.* Constant (1912), 17 Com. Cas. 192; *S. C.*, in C. A., *id.* 346.

CHAPTER IX.

OF THE SHIP.

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Naming Ship in Policy	182—184
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182. WE have already seen (*a*) that the name of the ship in which the voyage is to be performed must be accurately specified in every policy, on the ground that the underwriter has a right to be informed of everything material to the risk; the nature of which would obviously be very different upon ships of different degrees of seaworthiness. Reasons why the ship must be named in the policy.

It has also appeared that, although the name must generally be inserted with accuracy, yet, as it is only required to be so inserted for the purpose of identifying the ship, an error in the name will be unimportant, if it can be clearly shown that the underwriters were not misled by it, but that they really intended to insure a risk to be carried on in the very ship on which the loss occurred, the principle being that *nil facit error nominis cum de corpore constat* (*b*). Accordingly, in our common policies, after the names of the ship and master, come the words, "or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called."

The following cases show the degree of accuracy practically required on this subject:—An insurance was effected on ship, as on a ship called the "Leopard"; it appeared that the name Degree of accuracy required.

(*a*) *Ante*, § 16.
(*b*) See 1 Emerigon, 160: "Error nominis alicujus navis non attenditur, quando ex aliis circumstanciis constat de navis identitate."

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of the ship was in fact the "Leonard," and that she had never been called the "Leopard"; it being proved, however, that the ship lost was the same that the underwriters intended to insure, the Court held, that by virtue of the above clause in the policy, the variance in the name had no effect on the validity of the insurance (*c*). So, where an American ship called the "President" was described in the policy as "the good ship called 'The American ship President'"; but it clearly appeared that the error had arisen from the blunder of the broker's clerk, and that the ship lost was really that on which the underwriters meant to insure, the error of name was held immaterial (*d*). And the decision of the Court was the same in another case, where a ship really called by the Spanish name of "Las Tres Hermanas," was described in the policy by an English translation of the name, as "The Three Sisters" (*e*).

Mistake as to age of ship.

183. The importance of accuracy in cases where the underwriter may be misled by a mistake in the name of the ship is well illustrated by a case in which an insurance was effected on goods on board the "Socrates." During the negotiation reference was made by the insurer to Veritas, and when it was found that Veritas contained the "Socrates, Albertson," a new Norwegian ship, and the "Socrate, Jean Card," an old French ship, he asked whether it was the Norwegian ship that was proposed, and he was told by the broker's clerk that he thought it was (*f*). The

(*c*) Hunter *v.* Molineux, before Lee, C. J. (1744), cited in 6 East, 385. It appears, from the judgment in Ionides *v.* Pacific Ins. Co. (1871), L. R. 6 Q. B. at p. 683, that, apart from the clause, "or by whatsoever name, &c.," the decision would have been the same.

(*d*) Le Mesurier *v.* Vaughan (1805), 6 East, 382.

(*e*) Clapham *v.* Cologan (1813), 3 Camp. 382.

(*f*) The Court considered this expression tantamount to an assertion that the ship was the Norwegian; but added that even if it were a representation as to an expectation or belief, there were no reasonable grounds for the belief. The rule applicable to such a representation, as declared by sect. 20 (5) of the Marine Insurance Act, 1906, is that it is true if made in good faith; but the Court refrained from stating whether they thought that a want of good faith must be imputed to the clerk. See as to representations of matters of belief, *post*, §§ 545, 546.

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goods were in fact loaded on the French ship the "Socrate, Jean Card," and were lost during the voyage; it was held that the underwriter was not liable on the policy for this loss, on the ground of a misrepresentation as to the age of the ship in which they were carried (*g*).

Mistake in name of ship immaterial when goods insured by floating policy.

On the other hand, when goods are insured "by ship or ships," the underwriter engages, as will presently appear, to insure them by any ship on which they are loaded. Consequently in such an insurance a mistake made subsequently in the name of the ship is immaterial. Thus in the last-mentioned case the insurer had also initialed a slip for 5,000*l.* on hides by ship or ships; and afterwards, at the request of the broker, he initialed a slip for 2,445*l.* on hides by the "Socrates," this second slip being expressly made in order to be substituted for the slip "by ship or ships" already mentioned. The jury found that the parties, in entering into the contracts, both meant to insure the goods by the vessel on which they were actually shipped, whatever her name might be, and the assured recovered on the policy issued in respect of this insurance (*h*).

Importance of correct name with reference to maritime news.

One reason why accuracy in specifying the name of the ship may be required is that news calculated to make the underwriter cautious about undertaking the risk may have come to hand; he may have heard of storms, of losses, and of facts affecting particular ships; and consequently it is necessary that he should be able to identify the proposed ship in order to apply this information (*i*).

"Ship" in English policies applies to all builds of vessels.

184. If an underwriter were fraudulently misled by the designation of a vessel to suppose that he is insuring goods on board a *ship*, as distinct from a bark, brig, sloop, schooner and the like, the policy would be void (*k*). But as the

(*g*) Ionides *v.* Pacific Fire and Mar. Ins. Co. (1871), L. R. 6 Q. B. 674.

(*h*) Ionides *v.* Pacific, &c. Ins. Co. (1872), L. R. 7 Q. B. 517, Ex. Ch.

(*i*) See Bates *v.* Hewitt (1867), L. R. 2 Q. B. 595.

(*k*) 1 Emerigon, c. vi. s. 3, pp. 163, 164.

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generic designation *ship* is used, probably invariably, in English policies for vessels of every build, it is difficult to see how, apart from fraud, any question of misrepresentation by the mere use of the generic term can arise.

Insurance on goods "on board ship or ships."

185. Cases frequently occur in which it is impossible to compel the insertion in the policy of the name of the ship in which the goods will be carried.

A merchant who has ordered goods from abroad may be anxious to effect an immediate insurance on them, while he is ignorant of the particular ship by which they may be sent. By the laws and practice of all maritime states, it is allowable under such circumstances to effect a policy on goods "on board ship or ships" (*l*).

This mode of insuring amounts to a representation of ignorance of the ship's name.

This mode of insuring, however, being an exception to the general rule, which requires the name of the ship in every case to be stated in the policy at the time of its subscription, can only be allowed in those cases in which the party effecting the insurance is *bonâ fide* and in fact ignorant of the name of the ship or ships by which the goods insured have been consigned.

It amounts, indeed, to a representation of such ignorance; and therefore, if a party who has adopted this mode of insurance knew, at the time of effecting the policy, the name of any one of the ship or ships on board of which the goods insured were really loaded, the withholding such name would vitiate the policy (*m*).

(*l*) In England the legality of this practice was declared, as far back as 1794, to be too well established to be disputed. Kewley *v.* Ryan (1794), 2 H. Bl. 348. In France it has been ably explained by Emerigon, c. vi. s. 5, "Assurance in quovis," vol. i. p. 173; see also Ordonn. tit. vi. art. 4; Code de Comm. art. 337; 3 Boulay-Paty, Droit Mar. 410—416. So in the United States, see 3 Kent, Com. 257, 258; 1 Phillips, s. 438. An insurance, however, of this kind, where the goods are specified, is not a "floating policy" within the definition in sect. 29 (1) of the Mar. Ins. Act, *infra:* see per Atkin, J., in Dickson *v.* Devitt (1916), 21 Com. Cas. 291.

(*m*) Lynch *v.* Hamilton (1810), 3 Taunt. 37; confirmed in error in Lynch *v.* Dunsford (1811), 14 East, 494, *infra,* § 607. It should be noted, however, that in this instance there was a report to the effect

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Floating policies by "ship or ships."

186. It is now necessary to describe the system of insuring by floating policies, *i.e.*, policies in which the name of the ship is not specified. It is dealt with in sect. 29 of the Marine Insurance Act, 1906, in the following terms:—

> (1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.
>
> (2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.
>
> (3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.
>
> (4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration (*n*).

Use of floating policies.

Floating policies are very largely used by merchants at the present day, in order to cover all such property as the merchant expects to have at risk, to a certain specified amount, within stated limits of space and of time. Thus, a firm of merchants in London with a branch house in a foreign country will, at the beginning of their business year, take out a policy (*o*) upon all goods to be shipped on

that the ship in question had suffered a mishap. Her name, therefore, was a material fact of which the underwriters were entitled to be informed. See per Lawrence, J., 3 Taunt. at p. 38. The point for which the case was cited by Arnould is expressly declared by Mansfield, C. J., to be left undecided. See 3 Taunt. at p. 45; see also Knight *v.* Cotesworth (1883), 1 Cab. & Ell. 48.

(*n*) See *post*, § 360.

(*o*) A similar result is often effected in practice by "open covers." These are unstamped agreements to insure, and are commonly considered, whether rightly or wrongly, as binding in honour only. The insurance

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their account up to an aggregate value of, say, 100,000*l.* within the ensuing twelve months for carriage between termini more or less specifically designated. The policy will then attach automatically on all shipments comprised within its terms up to the amount insured; "declarations" being meanwhile made upon the policy by indorsing thereon the names of the vessels and the particulars of the cargoes to which it applies. When the amount insured is exhausted by such declarations, the policy is said to be "fully declared" or "written off" (*p*). By virtue of the words "to be hereafter declared and valued," the assured is enabled to make the policy a valued one as regards any particular consignment by declaring and valuing before a loss; otherwise the amount of interest must be proved at the trial as in the case of an open policy (*q*). A firm of merchants will often have a succession of such floating policies, each one being expressed "to follow policy for £——, No. ——," the meaning of which is that, "there being consecutive policies, any loss declared is to be borne first by the earlier policies, and that it is not till after the earlier policy is exhausted that the underwriters on the policy which follows are to bear the balance of the loss, if any" (*r*). When the policy contains a stipulation to this effect, it seems clear that, while the earlier policies are unexhausted, no shipments of goods are within the terms of the later policy; for they are excluded by the stipulation. Therefore the provision of sect. 29 (3) of the Marine Insurance Act, 1906, that all consignments of goods within the terms of a floating policy must be declared, does not, under these circumstances, apply to the later policy.

is not regarded as legally binding until the goods are "put on stamp," *i.e.*, until the underwriter, in pursuance of his undertaking, issues a policy covering the particular consignment. See Gow, 229.

(*p*) McArthur, 3.

(*q*) See Mar. Ins. Act, 1906, s. 29 (4), *supra*. The valuation must be communicated to the underwriters before loss: Harman *v.* Kingston (1811), 3 Camp. 150.

(*r*) Per Lord Blackburn in Inglis *v.* Stock (1885), 10 App. Cas. at p. 269.

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"The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is," said Blackburn, J., "that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyage specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this, for he has no option to reject any vessel which the assured may select, nor is it necessary that the declaration should do more than identify the adventure, and so prevent the possible dishonesty of a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he should come on them if there was a loss; and then, when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks" (*s*).

Floating policies cannot be applied to interests not intended to be protected.

A floating policy cannot, however, be applied to an interest which it was not intended to cover. A shipowner, who ordinarily carried goods on terms excluding liability for negligence, was in the habit of effecting floating policies for the purpose of protecting goods which he was requested to insure on behalf of the shippers; and the policies were not intended to insure his personal interest as carrier of the goods. It was held that he could not declare on one of these policies for a loss of goods for which he was respon-

(*s*) Ionides *v.* Pacific Ins. Co. (1871), L. R. 6 Q. B. 674, at p. 682, cited with approval in Davies *v.* National Fire Co. of N. Z., [1891] A. C. 491. See also per Lord Blackburn in Inglis *v.* Stock (1885), 10 App. Cas. 263, 269. For an instance of such "possible dishonesty," see Rivaz *v.* Gerussi (1880), 6 Q. B. D. 222. Lord Blackburn's opinion that the assured may elect whether he will or will not disclaim a particular shipment is inconsistent with sect. 29 (3) of the Mar. Ins. Act, *supra*. See Dunlop *v.* Townend, [1919] 2 K. B. 127, where an insurer successfully defended an action on a policy on the ground that if all proper declarations had been made the policy would have run off.

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sible, because in this instance he was carrying them under the ordinary liability of a common carrier (*t*).

Name should be subsequently declared.

187. With regard to the subsequent declaration by the assured of the name of the ship or ships when known to him, the practice generally is for the broker, on ascertaining the fact, to indorse the declaration of the name or names as a memorandum on the policy. It is not, however, necessary that this declaration should be in writing, nor will an error in the declaration either as to the name of the ship or as to other particulars be fatal to the contract (*u*).

A mistake in such declaration may be corrected.

Thus: a policy was effected for a voyage at and from Archangel to Great Britain, on goods to be thereafter valued and declared by ship or ships. The broker, having received wrong information as to the ships on which the goods were to be loaded at Archangel, wrote the following declaration on the policy and got it signed by the underwriters:—

"The interest attached to this policy is hereby declared to be shipped on board the 'Tweende Venner' and the 'Neptunus.'" Shortly afterwards the broker, discovering that the goods had, in fact, been shipped, not on board the "Tweende Venner" and the "Neptunus," but on board the "America," inserted a fresh memorandum in the policy, by which the interest was declared to be on board the latter ship. This the underwriter would not sign, and afterwards refused to pay a loss on the goods, on the ground that the policy had never attached on any goods shipped by the "America." But Lord Ellenborough and the Court of King's Bench held, that, as the declaration of interest need not have been in writing at all, the first declaration did not form any part of the contract, and that the mistake, being a mere blunder in the names of the ships first declared, might be corrected without any fresh stamp, and that the policy

(*t*) Scott *v.* Globe Mar. Ins. Co. (1896), 1 Com. Cas. 370. See now Mar. Ins. Act, 1906, s. 26 (3), discussed *infra*, § 252b.

(*u*) Mar. Ins. Act, 1906, s. 29, sub-ss. (2) and (3), *ante*, § 185.

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attached upon the goods shipped on board the "America," in the same manner as if the first declaration had never been made (*x*).

Where port of loading unknown.

188. As the merchant may be ignorant of the name of the exact port at which the goods may be loaded on board, an insurance on goods "on board ship or ships" will attach on goods landed at any port within the limits of the voyage insured (*y*); though of course it would not cover a consignment sent from a different part of the world from that mentioned in the policy, or from any place, in short, not comprised within the limits of the risk, upon a fair construction of the terms of the policy (*z*).

Declaration before loss is not a condition precedent to plaintiff's recovery.

As a general rule, the name of the ship ought to be declared before notice of the loss. As, however, cases may occur in which this would not be possible, as where the assured does not ascertain the name of the ship till he hears of her loss, it is in no case a condition precedent to the plaintiff's right to recover on the policy (*a*). It was a recognized usage, now incorporated in sect. 29 of the Marine Insurance Act, 1906, that such a declaration may, and indeed must, be made, and if necessary rectified, even after the loss is known (*b*).

(*x*) Robinson *v.* Touray (1811), 3 Camp. 158; 1 M. & S. 217.

(*y*) Hunter *v.* Leathley (1830), 10 B. & C. 858. The policy in this case contained a very extensive licence to touch, stay and trade.

(*z*) 2 Valin, tit. vi. art. 4, p. 46; 3 Boulay-Paty, Droit Mar. 410; and his Comment. on Emerigon, vol. i. p. 175.

(*a*) Craufurd *v.* Hunter (1798), 8 T. R. 16; Harman *v.* Kingston (1811), 3 Camp. 150.

(*b*) Gledstanes *v.* Royal Exch. Ass. Co. (1864), 34 L. J. Q. B. 30; Ionides *v.* Pacific Fire and Mar. Ins. Co. (1871), L. R. 6 Q. B. 674; 7 Q. B. 517; and per Brett, J., Stephens *v.* Australasian Ins. Co. (1872), L. R. 8 C. P. 18, 23. See Dunlop *v.* Townend, [1919] 2 K. B. 127.

The usage on which s. 29 (3) of the Mar. Ins. Act, 1906, is based was stated in Stephens *v.* Australasian Ins. Co. in these words:—"According to the usage of the insurance business, when a policy is effected on goods by ship or ships to be thereafter declared, the policy attaches to the goods as soon as and in the order in which they are shipped; and directly the assured knows of the shipment of the goods, he is bound

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Gledstanes *v.* Royal Exch. Ass. Co.

The plaintiffs were the agents in London of the Hong Kong Insurance Company, and had for some time kept that company re-insured with the Royal Exchange Assurance Company for all sums in excess of 5,000*l.* upon goods by any one ship under a Hong Kong policy. The manner was to effect a policy of re-insurance for 7,000*l.* or 10,000*l.* on goods by ship or ships, to be afterwards declared as particulars came to hand by the Calcutta mail. On the 15th of February, 1860, the Calcutta agent of the Hong Kong company wrote to the plaintiffs notifying an excess in the cargo of the "Red Gauntlet." On the 16th of March the "Red Gauntlet" was posted at Lloyd's as having been burned and scuttled, with partial salvage of her cargo. On the 17th of March the plaintiffs appropriated the residue of the sum insured by the policy then current to other shipments underwritten by the Hong Kong company; and on the 19th they effected a new policy for 10,000*l.* on goods by ship or ships, lost or not lost, which new policy was expressly declared "to succeed" the last current policy. On the 21st the plaintiffs received from Calcutta the letter of the 15th February, and then for the

to declare them to the underwriter on the policy, and to declare them in the order in which they are shipped. He is not entitled to declare some of the risks, and remain his own insurer as to the others. In case, by oversight or otherwise, the goods are declared on the policy in an order different from that in which they were shipped, the assured is bound to rectify the declarations, and make them correspond with the order of shipment. The underwriter would require to see the bills of lading, and could insist on the declarations being made to follow the sequence of the bills of lading. Declarations are often thus rectified, and sometimes even after loss."

The usage, as here stated, was held in the case of the Imperial Mar. Ins. Co. *v.* Fire Ins. Corp., Ltd. (1879), 4 C. P. D. 166, to be binding on a fire insurance company which had re-insured a marine insurance company against fire risks.

In a later case, Inglis *v.* Stock (1885), 10 App. Cas. 263, 269, Lord Blackburn said that if the assured had several adventures, all within the description in the policy, the assured might select at his pleasure which was to be protected by the policy, subject to the qualification that if there was nothing to show that the first adventure which came in safe was selected not to be under the policy, it must be taken to have been covered, though not declared. This differs to some extent from the rule in the Mar. Ins. Act, 1906, s. 29 (3).

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first time learned that their Company had taken risks on the cargo of the "Red Gauntlet" in excess of 5,000*l.*, whereupon they immediately desired the defendants to apply the new policy to the "Red Gauntlet." This was refused by the defendant company; but the Court held, to the contrary, that the plaintiffs were entitled to have the policy of the 19th of March so applied (*c*). It is always expected, and it may be made an express condition, that the assured shall declare his interest at the earliest possible opportunity (*d*). Where a contract of insurance required such declarations to be made as soon as possible after the sailing of the vessel, it was held by the Privy Council that this was a promissory warranty and that failure to comply with it disentitled the assured to recover for a loss (*e*).

How loss was formerly applied where there were two or more policies effected on goods on board "ship or ships."

189. A very nice question has sometimes arisen as to the application of the loss when there are two or more policies of this loose description on different parcels of goods. In this country it was established by the following decisions, that the assured, in case of loss, had a right to apply either policy to a loss on board any ship he pleased that came within the terms of such policy.

Henchman *v.* Offley.

A merchant in India caused two insurances to be effected in London, one for 6,000*l.* on goods on board any ship or ships which should sail from Bengal to London between the 1st of November, 1779, and the 1st of July, 1780; the other on goods on board any ship or ships which should sail on the same voyage between 1st February and 31st December, 1780. He loaded goods to the amount of 4,889*l.* on board the "General Barker," and to the amount of 4,500*l.* on board the "Ganges," and entered a declaration before the Chief Justice in Bengal, that he had shipped on board the "General Barker" 4,889*l.* of the risk intended to be covered by the 6,000*l.* policy (*f*). Both ships sailed within the time men-

(*c*) Gledstanes *v.* Royal Exch. Ass. Co. (1864), 34 L. J. Q. B. 30.
(*d*) See Weskett, 520; 1 Phillips, s. 438.
(*e*) Union Ins. Soc. of Canton *v.* Wills, [1916] 1 A. C. 281.
(*f*) Lord Mansfield overruled an objection taken at the trial to the admissibility of this declaration in evidence, and allowed it to be read.

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tioned in both policies. The "Ganges" arrived safe, but the "General Barker" was lost. The plaintiff claimed a total loss under the 6,000*l.* policy. Lord Mansfield at the trial, and the Court in Banc, held that he had a right to apply the loss to the "General Barker," and he recovered accordingly 4,889*l.* (*g*).

Kewley *v.* Ryan.

Freeland and Rigby, a mercantile house at St. Vincent, directed the plaintiffs, their Liverpool correspondents, to get 1,260*l.* insured on cotton on board the "Elizabeth" from Granada to London; and 1,300*l.* on other cotton, which they intended to send by some other ship that would sail by the first convoy. The plaintiffs accordingly got 1,260*l.* insured in London on goods on board the "Elizabeth," and also 1,300*l.* on goods "on board ship or ships," viz., 700*l.* in Liverpool and 600*l.* in London. The 700*l.* policy, on which the action was brought, was "at and from Granada to Liverpool, on any kind of goods as interest should appear in ship or ships on account of Freeland and Rigby, warranted to sail on or before the 1st of August, 1793," without any exception of the goods on board the "Elizabeth." The "Elizabeth" arrived safe in Liverpool: the "Heart of Oak," on board of which the second cargo ultimately turned out to have been shipped, was totally lost on the voyage. Both ships had sailed before the 1st of August, the time warranted for sailing in the 700*l.* policy (*h*). The plaintiffs' claim for a total loss under this policy was resisted, mainly (*i*) on the ground "that, as a ship, answering the description in the 700*l.* policy and having on board property of Freeland and Rigby to the full amount therein insured, had arrived, this policy, being on ship or ships, might and ought to be applied to that ship, and was satisfied." The Court, however, held, that the assured had clearly a right to apply such an insurance to whatever ship they thought proper, within the

(*g*) Henchman *v.* Offley (1782), 2 H. Bl. 345, n.

(*h*) Marshall omits this circumstance, 1 Ins. 168.

(*i*) The other ground was the illegality of insurances on ship or ships, as to which, however, the Court entertained no doubt.

terms of it; and were therefore, under the circumstances, entitled to recover the whole sum therein insured (*j*). Sect. 189.

The rule that the assured may select the policy on which he will declare a particular shipment has no application where it is stipulated that one floating policy shall follow another (*k*). Moreover, as sect. 29 (3) of the Marine Insurance Act, 1906 (*l*), provides that the declarations under a floating policy must comprise all consignments within its terms, the rule seems to be no longer law (*m*); for when the assured has effected two or more floating policies not stated to be successive, it seems to follow from sect. 29 (3) that he must declare his shipments on all the policies on which it is possible to declare them. He cannot, of course, recover more in all than the value of the goods, and a difficulty arises, therefore, in determining when the policies become exhausted: must the whole value of each shipment be deducted for this purpose from the total sum insured by each policy, or must this value be divided rateably among the different policies?

Of changing the ship.

190. It is an implied condition of the policy, that the ship named therein should not, after the commencement of the risk, be changed without necessity or the consent of the underwriters; for such unnecessary or unsanctioned change of the ship produces an alteration of the risk, and therefore exempts them from liability (*n*).

(*j*) Kewley *v.* Ryan (1794), 2 H. Bl. 343; 1 Marshall, Ins. 168.

(*k*) See *ante*, § 186.

(*l*) *Ante*, § 185.

(*m*) Sir M. Chalmers and Sir Douglas Owen are of opinion that the rule, for which Henchman *v.* Offley and Kewley *v.* Ryan are clear authorities, had ceased to be law before the Act was passed; but the only reason given for this statement is that floating policies are now commonly effected "to follow and succeed." See Chalmers and Owen, Mar. Ins. Act, p. 44. No usage has been established, by virtue of which the rule can be treated as having ceased to apply to policies not expressed to be consecutive.

(*n*) Upon this subject, generally, consult Emerigon (c. xii. s. 16, vol. i. pp. 419—425), who discusses it with his usual masterly display of research and reasoning; see also Pothier, d'Assurance, Nos. 68, 69, 70, 71.

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In insurances on ship.

If the policy be upon ship, it is clear that the liability of the underwriters will be at an end directly the specific subject of insurance has been wholly lost, as by foundering at sea; or wholly destroyed as a ship, either by shipwreck or irreparable damage.

In policies on goods, &c., an unnecessary change of ship will discharge the underwriters.

191. It is only, therefore, in policies upon other subjects of insurance, as, for instance, goods, freight, profits, &c., that any question as to the effect of changing the ship can possibly arise. With regard to these it may be laid down, that if either before the commencement of the voyage or during the course of it, the ship named in the policy be changed without necessity, or without the consent of the underwriters, they will be discharged from their liability (*o*). This rule holds good even though the substituted ship may be of larger dimensions or greater strength than that originally named in the policy, or though both ships perish on the voyage (*p*); for, by the fact that a given ship is named in the instrument, the underwriter has a right to say that he had some peculiar reasons for insuring a risk on that very ship which would not apply to any other.

Thus, if the underwriter has agreed to insure three several parcels of goods, each of the value of 1,000*l.*, one on board the "St. Joseph," another on board the "Triton," and a third on board the "Syren," making together 3,000*l.*, but the merchant afterwards loads these parcels all on board the "St. Joseph," the underwriter will only be liable upon the policy effected on goods on board the "St. Joseph," and that only to the extent of 1,000*l.*; and as to the remaining 2,000*l.* he will be discharged, although all the three ships may have perished in the course of the voyage (*q*).

192. By sect. 59 of the Marine Insurance Act, 1906—

Where, by a peril insured against (*r*), the voyage is

(*o*) 1 Emerigon, c. xii. s. 16, p. 419. See *post*, § 468.

(*p*) Emerigon, *ibid.* 420; Pothier, d'Assurance, No. 68, p. 111, par Estrangin.

(*q*) Code de Commerce, art. 361; 4 Boulay-Paty, Droit Mar. 132. See Dickson *v.* Devitt (1916), 21 Com. Cas. 291.

(*r*) If these words imply that where the transhipment is made necessary by a peril not insured against, the liability of the insurer does not continue, they seem, so far as the insurance is concerned, to impose a restriction upon the right to recover, for which, before the Act, there was no authority. For instance, if goods insured only against war risks or fire are necessarily transhipped in consequence of the ship being disabled by perils of the sea, does the insurance come to an end?

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interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment (*s*), to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment (*t*).

Transhipment by consent, or under necessity.

The general rule, as stated previously in this work, is that if the underwriters consent to the change of ship, or if in the course of the voyage the ship becomes so disabled (*u*) as to be incapable, by any means at the master's disposal, of being repaired at all, so as to take on the cargo, the master, as agent for all concerned, may procure another ship in which to forward the cargo to its port of destination; and in such case the change of ship does not discharge the underwriters, on goods, freight, or profits, from their liability for loss on the subjects insured, which may occur subsequently to such change of ship. Many cases will occur in the later part of this work, under the head of Constructive Total Loss of Goods and Freight, which will serve to illustrate this position: we shall also have occasion, in considering the duties of the master, to discuss those cases of necessity which give him the right, if they do not impose upon him the duty, of forwarding the goods in another ship. This position was

(*s*) Wide powers of transhipment are sometimes given by the contract, especially by bills of lading for goods carried on a general ship. The transhipment must, however, be justifiable independently of the express terms of the contract of carriage, if the insurer's liability is to continue. Where, however, the contract of affreightment gave liberty to tranship, and the policy contained the clause "all liberties as per contract of affreightment," the C. A. held that the goods were covered after transhipment: Belgian Grain, &c. Co. *v.* Cox, [1919] W. N. 308.

(*t*) See *post*, § 468.

(*u*) See note (*r*), *supra*, as to the position when the ship is disabled by a peril not insured against.

Sect. 192. first established in this country by the case of Plantamour *v.* Staples (*x*), and has ever since been recognized (*y*). It is apprehended that, even where goods are insured "on board ship or ships," there is no general right to tranship. As soon as the shipment has taken place, the effect is the same as if the ship selected had been expressly named in the policy (*z*).

(*x*) (1781), 1 T. R. 611, n.; *S. C.*, 3 Dougl. 1.

(*y*) See the rule further discussed *infra*, § 207 *et seq.*; and cf. Shipton *v.* Thornton (1838), 9 A. & E. 314.

(*z*) See *infra*, § 468.

CHAPTER X.

OF THE MASTER.

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Of the master.

193. It is not intended, in this place, to discuss those general duties of the master, which more properly form part of a treatise on shipping; it is proposed to notice such points only, in respect to the master, as have a bearing on the subject of sea insurance; and to this end we will consider—(1) The naming of the master in the policy, and subsequently changing him; (2) His power, in a port of distress, of hypothecating the cargo, or selling part of it, in order to repair the ship; (3) His power to sell the ship or the whole cargo; (4) His power, in case the first ship is disabled, of sending on the cargo in another; and (5) The relation in which he stands to the assured and to the underwriter in case of abandonment.

Of naming the master in the policy, and of subsequently changing him.

194. After the blank left in our common printed forms of policy for the name of the master come the following words: "or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called."

From this clause it is abundantly evident, that it is no implied condition in our English policies either that the

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master should be correctly named, or that the same master should continue on board throughout the voyage (*a*).

What change of master vitiates the policy.

The law is the same in France (*b*). Emerigon, however, limits the generality of the words to this extent, that they shall not apply to a master who is of any other nation, especially in time of war, so as to increase the risk of the underwriters, by substituting a belligerent as master instead of a neutral (*c*).

Thus there seems no doubt that another master may be substituted to command the ship, instead of him who is named in the policy, without the consent of the underwriters, and before the commencement of the voyage; provided always that the change be made in perfect good faith, and the substitute be competent (*d*). If the substitution can be shown to have been effected for any fraudulent purpose, it will, of course, vitiate the policy (*e*).

If in the course of the voyage, from death, disability, or other necessary cause, the master originally named in the policy be rendered incapable of acting, or if he abandon his command, the substitution of another captain in such case of necessity will, of course, make no difference to the policy (*f*). Even in such case the command ought not in time of war to be delegated to an enemy; nor, except in case of absolute necessity, if the ship be British, ought the appointment to

(*a*) The blank for the name of the master is now seldom filled up: *ante*, § 17.

(*b*) 1 Emerigon, c. vii. ss. 1, 2, 3, pp. 184—190.

(*c*) *Ibid.* p. 187; Boulay-Paty, in his Comment. *ibid.* p. 188, agrees with Emerigon in this construction of the clause. Arnould added: "This limitation seems very reasonable, and, should the case ever arise, would no doubt be ratified in our Courts." The Editors submit, however, that the shipowner is under no obligation to appoint a master of his own nation when, as under English law, an alien is not disqualified from acting as master.

(*d*) See Walden *v.* N. Y. Firemen's Ins. Co. (1815), 12 Johnson's R. 128; 3 Kent's Comm. 257.

(*e*) Boulay-Paty on Emerigon, c. vii. s. 2, p. 189. *Secus*, however, where the owners were not themselves parties to the fraud. See Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. 581.

(*f*) Emerigon, c. vii. s. 3, pp. 189, 190.

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be conferred on any one that does not possess a British certificate of qualification for master on such a voyage (*g*).

Master's powers of borrowing under necessity.

195. The duty of the master, in case of damage to the ship, is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship (if there be a reasonable prospect of doing so at an expense not ruinous), and to bring home the cargo, and earn the freight if possible (*h*). To accomplish this object of repairing his vessel, the master is authorized to bind his owner, by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale, and in this case the shipper may sue the shipowner; or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the shipowner for his account and for his use, to enable him to do his duty by repairing the ship, and in all the shipowner must repay the lender. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case (*i*). He may also hypothecate the ship or the freight, or both, which gives the lender a right of arrest by Admiralty process. There is this one condition, however, imposed by the law on these various powers as an indispensable pre-requisite to their exercise, that the master is bound to communicate with the owner of the subject to be so dealt with, whenever such communication is under the circumstances practicable, and would not be

(*g*) Merchant Shipping Act, 1894, s. 92; cf. Emerigon, c. vii. s. 3, pp. 189, 190.

(*h*) Opinion of the judges in Benson *v.* Chapman (1849), 2 H. L. Cas. 720. See also Hansen *v.* Dunn (1906), 11 Com. Cas. 100.

(*i*) Judgment of Court of Exchequer in Duncan *v.* Benson (1847), 1 Exch. 555; in Benson *v.* Duncan (1849), 3 Exch. 655.

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attended with such delay as must prove seriously detrimental to the interests involved (*j*).

Power to hypothecate or sell cargo.

196. It is not proposed to consider here the authority of the master to bind his owner by borrowing money to repair, or by causing repairs to be done on his credit (*k*), but merely to notice a few points connected with his power to hypothecate and sell the cargo, or part of it. With regard to his right to hypothecate, it is now clear law, that,—to use the language of Lord Stowell, in the celebrated case of The Gratitudine —in cases "of instant, unforeseen, and unprovided necessity," the master having no other means whatever of procuring funds, may hypothecate not the ship only, but the cargo also, in order to raise money for the repairs of the ship (*l*). In such cases the master, who, in the ordinary course of things, is a stranger to the cargo, except for the purposes of safe custody and conveyance, has forced upon him the character of agent and supercargo, not by the immediate act and appointment of the owner, but by the general policy of the law (*m*).

The extent of this agency, thus created by necessity, is only to bind the owner of the cargo, or (in cases of hypothecation) the cargo itself, to the lender of the money: it does not bind the owner of the cargo as against the owner of the ship (*n*).

(*j*) See Carver on Carriage by Sea, s. 316, and cases there cited; to which may be added Australian Steam Nav. Co. *v.* Morse (1872), L. R. 4 P. C. 222; The Gipsy (1864), 33 L. J. Ad. 185; Maclachlan's Shipping, 5th ed. 59, 164. Such communication is not required, when it is not necessary under the law of the flag: The Gaetano and Maria (1882), 7 P. D. 137, C. A. When the master does not know who the owner of the cargo is, he will satisfy his obligation by communicating with the shipper of the cargo, or his agent: Klein *v.* Lindsay, [1910] S. C. 231.

(*k*) The authorities are collected in Maude & Pollock on Shipping, 4th ed. p. 564; and see Carver, s. 310.

(*l*) The Gratitudine (1801), 3 C. Rob. 240. See The Pontida (1884), 9 P. D. 177.

(*m*) The Gratitudine, *supra*.

(*n*) "The case of The Gratitudine dealt only with the authority of the master in respect of binding the cargo to the lender of the money, it determined nothing as to the relative rights of the owners of the ship, and of the cargo, *inter se*;" per Patteson, J., delivering the judgment

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Benson *v.* Duncan.

197. An attempt was made in one case to carry the doctrine of Lord Stowell beyond this limit, and to contend that the act of the master, in necessarily and justifiably hypothecating the cargo, bound the owner thereof so as to preclude him from recovering against the owner of the ship for loss incurred in consequence of the hypothecation. The facts were shortly these: The master of the "Lord Cochrane," a ship damaged by perils of the seas, hypothecated at a foreign port (Pernambuco), by one bottomry bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods. The ship and freight realized less than the sum borrowed, and the plaintiff, being obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond, brought his action against the defendant, as owner of the ship, on an implied promise to indemnify. The Court of Exchequer were unanimously of opinion that the plaintiff might maintain such action, on the simple principle, that as between him and the defendant (the shipowner), his cargo had been pledged to secure the defendant's debt, and therefore, as the plaintiff had been compelled to pay the debt through the medium of the pledge, he must be reimbursed by the defendant (*o*). The point was decided the same way by the Court of Exchequer Chamber on a bill of exceptions (*p*). Patteson, J., who delivered the judgment of that Court, thus stated the law as to the authority of the master and the liability of the shipowner:—

Master agent of shipowner.

"In ordering the repairs of the ship, the master acts exclu-

of the Exchequer Chamber in Benson *v.* Duncan (1849), 3 Exch. 655. The passage in the text is taken from the 2nd ed. p. 229, but Arnould was probably wrong in suggesting that the master could involve the cargo-owner in any personal liability for the money borrowed for repairs of the ship.

(*o*) Duncan *v.* Benson (1847), 1 Exch. 537; *S. C.*, 17 L. J. Exch. 238.

(*p*) The bill of exceptions raised two substantial questions, viz., whether, as against the owners of the ship, the master, under the circumstances, had authority (1) to order the repairs; (2) to execute the bottomry bond. The Court of Exchequer Chamber held in the affirmative on both.

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sively as the agent of the owner of the ship, and no other person but the owner of the ship and his agent can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry if prevented by perils of the sea, and he is bound by it if prevented by inherent defects in the ship. Being, then, the agent of the shipowner in ordering the repairs, how can he be the agent of any one else in borrowing money to pay for them? If, in order to borrow that money, he is obliged to hypothecate not only the ship but the cargo, he, in effect, borrows money on the cargo for the benefit of the shipowner, just as much as he would have done had he sold a part of the cargo to raise the necessary funds, in which case it is not doubted that the shipowner must have indemnified the owner of the cargo" (*q*).

Power to hypothecate strictly confined to cases of necessity.

198. The exercise of this power of hypothecation must be very strictly watched, and rigorously confined to cases of necessity. The master must, in the first instance, endeavour to raise the money upon the credit of his owners: it is only when he cannot otherwise obtain the money, that he will be justified in hypothecating (*r*). The ship and freight must always be resorted to in the first instance, even though the bond be upon the cargo alone (*s*), and even where there is an earlier bond on ship alone, and subsequent bonds include cargo, the latter will be enforced against the ship alone, even though the result may be to exhaust the proceeds of the ship and leave nothing to satisfy the earlier bond (*t*). The right to hypothecate is not absolutely confined to cases arising in a country other than that of the owner's residence. The master may, in cases that otherwise justify such a step, hypothecate, even although the ship is in a port of the country where his owners reside, provided he have no means of communicating

(*q*) Benson *v.* Duncan (1849), 3 Exch. 665, 666; *S. C.*, 18 L. J. Exch. 172, 173.

(*r*) Per Jervis, C. J., in Stainbank *v.* Fenning (1851), 11 C. B. 88.

(*s*) The Constancia (1845), 2 W. Rob. 404.

(*t*) *Ibid.*; The Priscilla (1859), Lush. 1; 1 L. T. 272; Carver on Carriage, s. 318.

with them, and there is no other mode of escaping from the pressure of the necessity (*u*). Sect. 198.

Power to hypothecate, not to mortgage or pawn.

199. This power of the master is apparently confined solely to hypothecation, strictly and properly so called, as distinct either from a mortgage, which transfers the property, or a pledge or pawn at common law, which gives a lien on the chattel, and is void without actual possession. Hypothecation gives a maritime lien, which exists independently of possession, and which can be enforced against the subject of it, through the medium of legal process on the termination of the voyage: it is also essential to the validity of hypothecation, that the sea risk should be incurred by the lender, and that the privilege or claim should take effect only in the event of the ship's safe arrival (*x*).

Hence, where the master, besides drawing bills on his owners, also executed an instrument which purported to be an hypothecation of ship, cargo, and freight, whereby the merchant forbore to take maritime interest, and the master took on himself and his owner the risk of the voyage, making the money payable at all events, it was held that this was beyond the scope of his authority as agent, and did not, therefore, bind his owner to the merchant who had advanced the money (*y*).

But as instruments of hypothecation are the creatures of necessity and distress, and usually contain the language of commercial men and not of lawyers, they receive a liberal construction. It is not, therefore, necessary that the risk should be mentioned in express terms; it is sufficient, if it can be fairly and reasonably inferred from the whole document,

(*u*) Maude & Pollock on Shipping, 4th ed. p. 565; Abbott, 14th ed. p. 163, and cases there cited.

(*x*) See the judgment of Jervis, C. J., in Stainbank *v.* Fenning (1851), 11 C. B. 88; and of Parke, B., in Stainbank *v.* Shepard (1853), 13 C. B. 441; see also Broomfield *v.* Southern Ins. Co. (1870), L. R. 5 Ex. 192.

(*y*) Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853) (in the Exch. Chamber), 13 C. B. 418; Carver on Carriage, s. 312.

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that it was the intention of the parties to make the repayment of the money dependent on this contingency (*z*).

Power to sell portion of cargo in port of distress for repairs.

200. The sale of a portion of the cargo by the master, for the repairs of the ship in a port of distress, stands on the footing of a forced loan from the owner of the goods through the medium of a sale, and is only to be resorted to in cases of necessity (*a*).

It can only be exercised in a port of distress, for the sole purpose of enabling the ship (or a substituted ship as it should seem) to proceed with the cargo, or the residue of it, on the voyage chartered or insured: hence, if the master unduly puts an end to the voyage insured, it has been held in the United States, and apparently on very good grounds, that the master is not justified in selling any part of the cargo for repairs for a new voyage (*b*).

Amount which the owner of the goods sold is entitled to recover.

The owner of the goods, if the ship afterwards arrives at her destination, is entitled to recover against the shipowner in respect of the goods so sold: and he may claim, at his option, either the price for which the goods actually sold at the port of distress (*c*), or, the amount for which they would have sold at the port of discharge (*d*).

But the owner of goods sold for repairs at a port of distress, is only entitled to recover the amount which they would have realized at the port of discharge, in case of the ship's arrival there (*e*); whether, if the ship be lost, or fails to arrive at her

(*z*) The above passage was adopted literally by Arnould from Maude & Pollock on Shipping. See 4th ed. p. 571; see also The Great Pacific (1868), L. R. 2 A. & E. 383; The Haabet, [1899] P. 295.

(*a*) See the judgment of the Court of Exchequer in Duncan *v.* Benson (1847), 1 Exch. 555.

(*b*) Watt *v.* Potter (1820), 2 Mason's R. 77; 3 Kent, Com. 173; and see The Julia Blake (1882), 107 U. S. 418.

(*c*) Campbell *v.* Thompson (1816), 1 Stark. 490; Richardson *v.* Nourse (1819), 3 B. & Ald. 237; cf. Hopper *v.* Burness (1876), 1 C. P. D. 137.

(*d*) Alers *v.* Tobin (1802), Abbott on Shipping, 14th ed. p. 551; Hallett *v.* Wigram (1850), 9 C. B. 580; *S. C.*, 19 L. J. C. P. 281.

(*e*) Atkinson *v.* Stephens (1852), 7 Exch. 567; *S. C.*, 21 L. J. Exch. 329.

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port of destination after the repairs, to procure which the goods were sold, the owner of the goods can recover against the shipowner the price for which they actually sold at the port of distress, seems an open question in our Courts (*f*).

Right of sale for repairs can only extend to part of cargo.

As this power of selling the goods of the shipper for the repairs of the ship is conferred for the sake of ultimately procuring the arrival of some part of the cargo in the repaired ship, it is obvious that it can only extend to the sale of part of the cargo and not of the entirety; for it cannot be presumed to be for the interest of the shipper that the whole should be sold, in order to enable the ship to proceed empty to her port of destination (*g*).

But the whole cargo may be hypothecated.

On the other hand, the master may well hypothecate the entirety of the cargo, for the hypothecation of the whole may be for the benefit of the whole, because it may enable the whole to be brought to a proper market, where it may realize far more than the amount raised on hypothecation and the expenses of the loan (*h*). It will be sufficient here to have pointed out thus generally the extent and limits of this power, reserving any particular instances of its exercise for a more detailed examination in subsequent parts of this work (*i*).

Power of the master to sell ship, or the whole cargo.

201. The point of the preceding inquiry was, the extent of the power vested in the master to hypothecate the ship and

(*f*) See the judgment of the Court in Atkinson *v.* Stephens. Lord Tenterden inclines to the opinion of Emerigon as the more reasonable, viz., that the money is only payable in case of the ship's arrival, on the ground that the merchant is thus not placed in a worse condition than if his goods had not been sold, but had remained on board. See Abbott on Shipping, 5th ed. p. 246; 14th ed. p. 551. It seems, nevertheless, to be always competent for the merchant to consider himself as having lent to the shipowner the money which the sale of his goods actually fetched, and to recover this amount, at least, in any event. See Hopper *v.* Burness (1876), 1 C. P. D. 137; cf. also Maclachlan on Shipping, pp. 491—494.

(*g*) Freeman *v.* East India Co. (1822), 5 B. & Ald. 617: *per curiam*, Duncan *v.* Benson (1847), 1 Exch. 537.

(*h*) The Gratitudine (1801), 3 C. Rob. 240; and see Duncan *v.* Benson (1847), 1 Exch. 537; Benson *v.* Duncan (1849), 3 Exch. 655. The Supreme Court of the United States affirmed the same principles in The Julia Blake (1882), 107 U. S. 418.

(*i*) See chapters on "Total Loss" and "Abandonment."

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cargo, or to sell part of the cargo for the purpose of repairing the ship and enabling her to prosecute her voyage. The cases now to be considered are those in which, where the further prosecution of the enterprise has become hopeless—where the ship cannot be repaired or the cargo forwarded—a still further extension is given to the powers of the master, and he is held justified, from the paramount necessity of the case, in selling the ship or the whole of the cargo, or both.

Nothing but a case of absolute and supreme necessity, such as sweeps all ordinary rules before it, can justify the master in such sale. He is employed, as servant of the owners, to navigate the ship, and, as agent for both the shipowner and the merchant, to carry the goods to their port of destination; his disposal by sale of that which he is thus entrusted solely to navigate or convey, would in ordinary cases be the mere unauthorized act of a servant manifestly exceeding his commission. Extreme emergencies, however, may arise in which the master, being at a distance from his home port, and without any opportunity of consulting either the shipowner or the merchant, has no alternative left him, acting with perfect good faith as a prudent and skilful man, and for the best interests of all concerned, but to sell the property entrusted to his charge. What those circumstances of emergency are, we shall have frequent occasion to consider in treating the question of constructive total loss; we, therefore, confine ourselves here to a brief statement of the nature of this power, and the limitations on its exercise (*k*).

Nature of this power as vested in the master by the necessity of the case.

202. The nature of the power has been thus expressed by Parke, B.: "The master has, by virtue of his employment, not merely those powers that are necessary for the navigation

(*k*) The statement which follows is retained in substance from the 2nd ed. pp. 235—237. In the chapters on "Absolute and Constructive Total Loss," the editors have ventured to discuss certain points in connection with this subject which appeared to them to be controversial; for instance, what constitutes such a necessity as will justify the master in selling.

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of the ship, and the conduct of the adventure to a safe termination, but also a power when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit" (*l*).

Limitations on this power, as it relates to sale of ship.

Thus, if the ship is driven ashore and wrecked to pieces, or broken up so as no longer to retain the character of a ship at all, the master will clearly be justified in selling the remains of the wreck (*m*).

It is not, however, necessary that the ship should be thus absolutely destroyed in order to justify a sale by the master.

If by the perils of the sea she be reduced to such a condition that, although her timbers still hold together, yet the master, after the utmost endeavours, is compelled to renounce all hope of repairing her so as to bring her home, either from the physical impossibility of extricating her from the peril at all with the utmost exertion of force he can command, or from his inability to find the necessary funds for the purpose, in such cases, if the danger is imminent, and delay likely to prove destructive, the master will be justified in selling the ship as she lies, although at the time of sale she may still retain the character of a ship (*n*).

Thus, to take the case put by Lord Stowell, in The Fanny and Elmira, of a ship cast away in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her in repair, and all this at such a distance from the home port that the ship may rot before the master can hear from his owners, our Courts in such a case have held a sale by the master to be justifiable (*o*).

(*l*) Hunter *v.* Parker (1840), 7 M. & W. 342.
(*m*) Cambridge *v.* Anderton (1824), 2 B. & Cr. 691.
(*n*) Robertson *v.* Clarke (1824), 1 Bing. 445; Mount *v.* Harrison (1827), 4 Bing. 388; Hunter *v.* Parker (1840), 7 M. & W. 342.
(*o*) Fanny and Elmira (1809), Edw. Ad. R. 117; see also Read *v.* Bonham (1821), 3 Brod. & B. 147; The Margaret Mitchell (1858), Swab. Ad. 382; The Glasgow (1856), Swab. Ad. 145; The Bonita (1861), Lush. 252.

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Sale of ship only justified by extreme necessity.

203. The exercise, however, of this power is most jealously watched by the English Courts, and rigorously confined to cases of extreme necessity: such a necessity, that is, as leaves the master no alternative as a prudent and skilful man, acting *bonâ fide* for the best interests of all concerned, and with the best and soundest judgment that can be formed under the circumstances, except to sell the ship as she lies (*p*).

If he come to this conclusion hastily, either without sufficient examination into the actual state of the ship (*q*), or without having previously made every exertion in his power, with the means then at his disposal, to extricate her from the peril, or to raise funds for her repair (*r*), he will not be justified in selling, even though the danger at the time appear exceedingly imminent (*s*).

A mere difficulty in procuring the necessary funds for the purpose of the repairs (*t*), or the necessary materials (*u*), although it may be very considerable, and such as to impose great sacrifice of time and money, will not justify the master in selling instead of repairing; unless the difficulty is insurmountable by any means within the master's disposal at the time and on the spot, he is bound to repair.

If, indeed, it is clearly manifest, as a matter not of probable conjecture, but of absolute moral certainty, that, although the ship is not, in the literal sense, irreparable, yet the cost of repairing her, so as to keep the sea, will exceed her value when

(*p*) Alcock *v.* Royal Exch. Co. (1849), 13 Q. B. 292; Knight *v.* Faith (1850), 15 Q. B. 649. See Farnworth *v.* Hyde (1865), 34 L. J. C. P. 207.

(*q*) Hayman *v.* Moulton (1803), 5 Esp. 65; Reid *v.* Darby (1808), 10 East, 143; Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48.

(*r*) Gardner *v.* Salvador (1831), 1 Mood. & Rob. 118; The Fanny and Elmira (1809), Edw. Ad. R. 117.

(*s*) Idle *v.* Royal Exch. Co. (1821), 3 Brod. & B. 151, in which the Court of King's Bench reversed the judgment of the Common Pleas, which had been given in favour of the right to sell. *S. C.*, 8 Taunt. 755; Australian Steam Nav. Co. *v.* Morse (1872), L. R. 4 P. C. 222; Cobequid Marine Ins. Co. *v.* Barteaux (1875), L. R. 6 P. C. 319; see, however, Hunter *v.* Parker (1840), 7 M. & W. 342.

(*t*) Somes *v.* Sugrue (1830), 4 C. & P. 274.

(*u*) Furneaux *v.* Bradley (1780), 1 Park on Ins. 365.

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repaired, the master, as agent for the owners, will be justified in selling her (*x*). The excess, however, of the cost of repairs above her value must be no mere measuring cast, no subject of probable conjecture, it must be so far certain that no prudent owner, if on the spot and uninsured, would hesitate for a moment, in the exercise of a sound discretion, to sell the ship as she lay, rather than attempt to repair her (*y*); neither will it be sufficient to justify the master in selling under such circumstances, that he acted *bonâ fide*, and for the best interests of all concerned: the sale will not be justified unless the master in selling acted upon the best and soundest judgment that could be formed under the existing circumstances (*z*).

In the United States.

204. In the United States, the limitations upon the exercise of this power do not seem to be very certainly defined: in some cases a more extensive liberty than that allowed by the English rule has been avowedly conceded; and the position advanced, that the master may sell in all cases where he has good reason to believe that the owner would elect to abandon, *i.e.*, in all cases of constructive total loss (*a*). On the other hand, the stricter doctrine of the English law has been asserted and maintained in decisions of the Courts of Massachusetts (*b*), which derive additional sanction from the opinion of Chancellor Kent, who declares "the strict rule to be the one best supported by reason and authority" (*c*).

(*x*) Cambridge *v.* Anderton (1824), 4 Dowl. & Ryl. 203; 1 C. & P. 213; Ryan & Mood. 60; 2 B. & Cr. 691. The editors have, however, ventured elsewhere to express the view that Cambridge *v.* Anderton is at best a doubtful authority in support of the position laid down in the text. See *post*, § 1054.

(*y*) Somes *v.* Sugrue (1830), 4 C. & P. 274; Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48.

(*z*) Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48.

(*a*) American Ins. Co. *v.* Center (1829), 4 Wendell's (Supreme Courts) R. 45.

(*b*) Gordon *v.* The Massachusetts Fire & Mar. Ins. Co. (1824), 2 Pickering's R. 249; Hall *v.* The Franklin Ins. Co. (1830), 9 Pickering, 466.

(*c*) 3 Kent, Com. 173, 174, n.; 2 Parsons on Insurance, 145.

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In France, the sale of the ship by the master is permitted in the sole case of "innavigability legally certified" (*innavigabilité légalement constatée*), that is, as Boulay-Paty explains it, upon the report of experienced navigators appointed to act as surveyors by the local authorities, and followed by a formal condemnation in the local tribunals (*d*).

In one case in the United States, the power of the master to sell was limited to stranding on a foreign coast (*e*); but it has since been decided there, by Story, J., that in a case of overwhelmingly urgent necessity, the master has a right to sell the vessel as well on a home as on a foreign shore, and whether the owner's residence be near or at a distance (*f*).

Power of master to sell the whole cargo.

205. The power to sell the whole cargo.

This depends on exactly the same principles as the power to sell the ship, and, like it, can only be exercised in cases of extreme necessity.

In the admirable language of Lord Stowell, "though the master, in the ordinary state of things, is a stranger to the cargo, except for the purposes of custody and conveyance; yet in cases of instant and unforeseen and unprovided necessity his character of supercargo or agent is forced on him by the general policy of the law, unless the law can be supposed to mean that valuable property in his hands is to be left without protection or care. Suppose the case of a ship driven into port with a perishable cargo; or suppose the vessel unable to proceed, or to stand in need of repairs, what must be done? The master, in such case, must exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it: he is not bound to tranship, he may not have the means of transhipment, but even if he has, he may act for the best in deciding to sell. If he has

(*d*) 2 Boulay-Paty, 86; Code de Com. art. 237. See, however, Lyon-Caen & Renault, vol. v. s. 137, as to a sale in a place where the legal formalities cannot be observed.

(*e*) Scull *v.* Briddle (1808), 2 Wash. Circ. Court R. 150.

(*f*) The brig Sarah Ann (1835), 2 Sumner's R. 206, cited 3 Kent. Com. 174, n. (*d*).

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not the means of transhipment, he is under an obligation to sell the cargo, unless it can be said that he is under an obligation to let it perish" (*g*).

Where the ship is disabled, and the cargo, being sea-damaged and of a perishable nature, is in danger of being destroyed by the rapid progress of putrefaction if not sold, it is the master's right, if not his duty, immediately to sell it (*h*); and the duty, it seems, would be equally imperative, or, at all events, the right equally clear, in such case, even where the ship is not permanently disabled, but capable, after repair, of taking on the cargo (*i*). But a sale even of perishable goods is not justifiable, unless it be practically impossible to obtain the instructions of their owner before they perish (*k*).

Power to sell strictly limited.

206. The power of sale, however, where the ship is not disabled, or where there exist means of transhipment, must be strictly confined to cases in which the cargo is of a perishable nature, and has suffered so much sea-damage as renders it physically impossible, that, if sent on, it can arrive in specie at its port of destination (*l*).

Where the original ship is disabled, but there exist means of transhipment, and the cargo is not of a perishable nature, and not sea-damaged, the master will not be justified in selling, but is bound, or, at all events, entitled to tranship (*m*).

Where the original ship is disabled, and there exist no means of transhipment, or hope of any,—as where the ship is cast away on some desolate and unfrequented coast, or if the cost of saving and transhipping and sending home the cargo

(*g*) Per Lord Stowell in The Gratitudine (1801), 3 C. Rob. 240.

(*h*) Vlierboom *v.* Chapman (1844), 13 M. & W. 230.

(*i*) Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Australian Steam Nav. Co. *v.* Morse (1872), L. R. 4 P. C. 222.

(*k*) Acatos *v.* Burns (1878), 3 Ex. D. 282, C. A.; Carver, s. 297.

(*l*) Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 55; Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Wilson *v.* Royal Exch. Co. (1811), 2 Camp. 623; Meyer *v.* Ralli (1876), 1 C. P. D. 358.

(*m*) Anderson *v.* Wallis (1813), 2 M. & S. 240; Wilson *v.* Millar (1816), 2 Stark. N. P. 1; Morris *v.* Robinson (1824), 3 B. & Cr. 196; Freeman *v.* East India Co. (1822), 5 B. & Ald. 617.

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would be more than its worth when landed at its port of destination—the master might possibly be held empowered to sell the cargo, even though it were neither sea-damaged nor of a perishable nature (*n*). But if not otherwise justifiable, a sale will not be justified by a decree of a Vice-Admiralty Court ordering it (*o*).

"In our opinion," say James and Cotton, L. JJ., "purchasers of cargo from a master cannot justify the sale, unless it is established that the master used all reasonable efforts to have the goods conveyed to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination." In this case, the insurers of cargo filed a bill against the purchasers of cargo to have the purchase set aside and the purchasers treated as salvors only. The plaintiffs were successful (*p*).

The master is not the agent of the shipper for purpose of creating *pro ratâ* freight.

The justifiable sale by the master of a perishable cargo at a port of distress transfers the property, and binds the shipper, on the ground that the character of agent for the shipper is necessarily devolved on the master by the emergency; but the master cannot in such case be considered as the agent of the shipper for the purpose of receiving the damaged goods at the port of distress, dispensing with their further carriage, and thereby entitling the shipowner to *pro ratâ* freight. The presumption that he is agent for the shipper in such cases in selling the goods is incompatible with the presumption that he is also agent for the shipper in dispensing with their further carriage, "for the agency of the master from necessity, arises from his total inability to carry the goods to the place of destination, which dispensed with the performance of that primary duty altogether; and the right to freight *pro ratâ* arises from the presumed waiver on the part

(*n*) Per Bayley, J., in Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 56, 57; Farnworth *v.* Hyde (1865), 34 L. J. C. P. 207.

(*o*) Van Omeron *v.* Dowick (1809), 2 Camp. 43; Reid *v.* Darby (1808), 10 East, 143; Morris *v.* Robinson (1824), 3 B. & Cr. 196.

(*p*) Atlantic Mutual Ins. Co. *v.* Huth (1880), 16 Ch. D. 474, 481.

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of the shipper of the performance of a duty which the master (on behalf of the shipowner) was ready to execute" (*q*).

Power of the master, in case the first ship is disabled, to send on the cargo in another.

207. The subject of which we now come to treat has been in some degree anticipated in our discussion of the continuing liability of the underwriter, notwithstanding the shifting of the goods, in cases of necessity, into a ship different to that named in the policy.

In the first place, it is now clearly established in English law, in conformity with the Continental and American authorities, that in cases where the original ship is disabled by the perils of the seas the master is empowered to procure another ship in which to forward the goods to their destination, and on their arrival by such substituted ship, the owner is entitled to receive from the merchant the whole amount of freight which he might have claimed, had they arrived on board the original ship (*r*).

Shipton *v.* Thornton.

This position was first directly established in English law by the case of Shipton *v.* Thornton (*s*); in that case the "James Scott," a general ship of which the plaintiff was owner and master, had taken on board at Singapore certain goods, of which the defendant was owner, under bills of lading according to which they were to be delivered to him in London. The "James Scott" sailed from Singapore with the goods on board, but having suffered much injury from tempest was obliged to put into Batavia to refit, where she was found to be so disabled that it became necessary to tranship the goods, and they were accordingly forwarded by two other vessels, the "Mountaineer" and "Sesostris,"

(*q*) Per Parke, B., Vlierboom *v.* Chapman (1844), 13 M. & W. 230; Hopper *v.* Burness (1876), 1 C. P. D. 137. See also Acatos *v.* Burns (1878), 3 Ex. D. 282, 288, C. A.

(*r*) Shipton *v.* Thornton (1838), 9 A. & E. 314; Matthews *v.* Gibbs (1860), 30 L. J. Q. B. 55; Blasco *v.* Fletcher (1863), 32 L. J. C. P. 284; The Hamburg (1864), 33 L. J. Ad. 116; 2 Moore, P. C. N. S. 289; De Cuadra *v.* Swann (1864), 16 C. B. N. S. 772; Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535; Notara *v.* Henderson (1870—2), L. R. 5 Q. B. 346; 7 Q. B. 225; Hansen *v.* Dunn (1906), 11 Com. Cas. 100.

(*s*) 9 A. & E. 314.

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by which they were duly delivered to the defendant at London.

The freight payable for the transport of these goods from Batavia to London, in the "Mountaineer" and "Sesostris," was less than it would have been had it been sent on thence in the "James Scott." The defendant paid the freight actually due for their carriage by the "Mountaineer" and "Sesostris," but refused to pay the higher rate of freight that would have been due had they been sent on in the "James Scott" (*t*): the plaintiff brought this action for the difference, and the Court of Queen's Bench, after a very elaborate discussion of the whole question and a copious reference to foreign authorities, held that he was entitled to recover what he claimed, on the ground that, where transhipment is necessary, the master is at all events empowered, if not bound, to send on the cargo in a substituted ship for the purpose of earning freight (*u*).

Master's duty to his owners to tranship?

208. In the case just cited, inasmuch as the freight by the substituted was lower than that by the original ship, it was obviously to the interest of the shipowners that the master should effect the transhipment and so earn the whole freight. It was therefore clearly a duty which the master owed to his employers, the shipowners, to take this course.

When the freight by the substituted ship is higher.

Where, however, the transhipment and conveyance by a substituted ship can only be effected at a higher than the original amount of freight, it may not be for the interest of the shipowner to tranship. In such a case, therefore, it is difficult to see how, merely as between the master and shipowner, there can be any duty on the master to take measures which will not be for his employers' benefit.

Does he owe a duty to cargo owners to tranship?

209. But there are other considerations to which weight must be given. It may be the law that the master, though owing no duty to his employers, may nevertheless under

(*t*) The freight due for their transport by the "James Scott," from Singapore to Batavia, was also paid.

(*u*) Shipton *v.* Thornton (1838), 9 A. & E. 314.

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certain circumstances owe a duty to the owners of the cargo, and that in their interest he may be bound to tranship, although at a higher rate of freight than they had agreed to pay to the owners of the original vessel.

It never has been formally decided in this country whether, under any circumstances, he is bound to do so.

"By the Rhodian law (*x*), it is left discretionary, as it is by the laws of Oleron (*y*), and would appear to be so left by the ordinance of Wisby, did not a subsequent article, copied also into the Hanse Ordinance (*z*), bear testimony of a contrary disposition, thereby agreeing with the maritime law of Amsterdam (*a*). According to the interpretation put by Vinnius upon the Roman law, the master is thereby under no obligation to procure another ship when that by which he contracted to carry the goods is disabled (*b*). But the Antwerp (*c*) and Rotterdam (*d*) Ordinances, as translated by Magens, employed the strongest terms of obligation. The French law is so framed as to leave the intention thereof in doubt (*e*), and the most distinguished jurists of that country divided in opinion, Valin (*f*) and Pothier (*g*) holding that he is no further bound to procure another vessel than by losing his freight if he omit to do so, while Emerigon (*h*), followed by Pardessus (*i*), and Boulay-Paty (*k*), maintained that, by the express language of the law and the nature of the trusts reposed in the master, it is his duty to hire another vessel,

(*x*) Chap. 42, 1 Pardess. 256.
(*y*) Art. 4, 1 Pardess. 325.
(*z*) Ord. Wisby, art. 18, 1 Pardess. 472; Hans. Ord. (1614), t. iii. art. 17, 2 Pardess. 536.
(*a*) Art. 17, 1 Pardess. 413.
(*b*) Vinnius in Peckium, 285, 295.
(*c*) Art. 3, 2 Magens, 14.
(*d*) Art. 148, 2 Magens, 105.
(*e*) Co. Com. art. 296, 391; Ord. 1681, liv. 3, t. iii. art. 11, 4 Pardess. 362.
(*f*) 1 Valin, 651.
(*g*) Charte-partie, No. 68.
(*h*) 1 Emerig. 422, 423, 427.
(*i*) 3 Pardess. Droit. Com. No. 715, and No. 644.
(*k*) 3 Boulay-Paty, Droit Mar. 400—405.

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if it be possible, for the cargo, and that he is answerable in damages if he neglect it" (*l*).

Statement by Chancellor Kent of the law as to this point in the United States.

210. Chancellor Kent (*m*), stating the law of America, says: "In this country we have followed the doctrine of Emerigon and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case."

The same learned jurist adds: "He may tranship the cargo, if he has the means, or let it remain. He may bind it for repairs to the ship. He may sell part, or hypothecate the whole. If he hires another vessel for the completion of the voyage, he may charge the cargo with the increased freight, arising from the hire of the new ship. . . . The master may refuse to hire another vessel, and insist on repairing his own; and whether the freighter be bound to wait for the time to repair, or becomes entitled to his goods without any charge of freight, will depend upon circumstances. What would be a reasonable time for the merchant to wait for the repairs cannot be defined, and must be governed by the facts applicable to the place and time, and to the nature and condition of the cargo. A cargo of a perishable nature may be so deteriorated as not to endure the delay for repairs, or may be too unfit and worthless to be carried on. The master is not bound to go to a distance to procure another vessel, and encounter serious impediments in the way of putting the cargo on board another vessel. His duty is only

(*l*) The above paragraph is abbreviated from Maclachlan on Shipping, 5th ed. pp. 479, 480.

(*m*) 3 Kent, Com. 212.

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imperative when another vessel can be had in the same or in a contiguous port, or at one within a reasonable distance, and there be no great difficulties in the way of a safe reshipment of the cargo."

English authorities as to duty of master to tranship.

211. As to the English authorities, Lord Tenterden appears to have thought that where the cargo is perishable, and the master has no opportunity of consulting the merchant, he ought either to tranship or sell, according as the one or the other course will be more beneficial to the merchant, and sums up the case a little later on by saying, "in general, he is to do that which a wise and prudent man will think most conducive to the benefit of all concerned" (*n*). And such was the view of Lord Denman and the Court of Queen's Bench, expressed in the case of Shipton *v.* Thornton (*o*), as follows: "For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's *right* to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master, as his agent, to do so. *In such a case* the freighter will be bound by the act of his agent, and, of course, be liable for the increased freight. The rule will be the same whether the transhipment be made by the shipowner or the master; and, in applying it, circumstances make it necessary on the one hand to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched."

(*n*) Abbott on Shipping, 5th ed. pp. 240, 243; 14th ed. pp. 528, 530.

(*o*) (1838), 9 A. & E. at p. 337.

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212. There are, however, undoubtedly dicta to be found in our reports to a different effect from those already quoted. For example, in Metcalfe *v.* The Britannia Ironworks Co. (*p*), Cockburn, C. J., appears to have said: "If the master desires to earn the entire freight, he must cause the ship to be repaired, or send on the cargo in another vessel. But if he chooses to forego the freight, he is not bound to do either." But this can hardly be regarded as a deliberate expression of opinion by that learned judge, as it is clear that three years afterwards (*q*) he regarded the point at present under discussion as being still an open question.

Result of authorities.

On the whole, it is submitted that the weight of authority in England, as in America, is in favour of the position that under certain circumstances, the master may owe a duty to the owners of the cargo, even where he owes none to his own employers, to tranship. For instance, where the cargo is perishable, where there is an emergency, and it is impossible to obtain instructions, it is his duty to remember the double capacity in which he acts, and to take such measures for the protection of the cargo as the exercise of a sound discretion may dictate (*r*). If, after the exercise of such a discretion, under such circumstances, he forms the opinion that the right thing to do is to tranship, and that this course can be adopted without prejudicing the interests of his owners, it is his duty to do so. And in such a case he will have power to bind the cargo-owners to pay any freight, which he may on their behalf have properly agreed to pay.

Whose agent is the master when he transhipsº

213. The question whether the master, if he tranship, is acting as the agent of his owners or of the freighters was discussed in Matthews *v.* Gibbs (*s*), and appears to be a question of fact in each case. It is a natural presumption, if the

(*p*) (1876), 1 Q. B. D. 613.
(*q*) In Atwood *v.* Sellar (1879), 4 Q. B. D. at p. 359.
(*r*) See Hansen *v.* Dunn (1906), 11 Com. Cas. 100, as to the duty of the master, where the cargo is perishable and he can communicate with its owners.
(*s*) (1860), 30 L. J. Q. B. 55.

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freight of the substituted ship be lower than the freight of the original ship, that in hiring her he is agent for his owners, and that he is agent for the freighters if he *bonâ fide* send on the goods at an increased freight. Where the transhipment is effected on the shipowner's behalf, the latter remains under the same liabilities with respect to the completion of the voyage as were imposed upon him by his original contract of carriage (*t*).

Is underwriter on goods liable for increased freightº

214. Where the cargo is forwarded in the freighter's interest at an increased freight, is such increased charge to be made good by the underwriters on the goods? This is a question which was not dealt with by Lord Denman in Shipton *v.* Thornton.

In France the law upon this point is, that such excess of freight by the substituted ship, together with all expenses of unloading, warehousing, and reloading the goods, shall be made good by the insurer up to the amount of his subscription (*u*).

In the United States it has been decided that the underwriter on goods is not liable for the loss occasioned by such extra freight, because he only guarantees the safe arrival in specie of the goods (*x*); to which Phillips adds, that such loss seems to be not a proximate, but only an indirect consequence of the perils insured against (*y*).

Arnould was of opinion (*z*) that on these grounds the underwriter would in this country be exempt from liability in respect of this claim; which, moreover, seemed to him to fall clearly within the principle established by the case of Baillie

(*t*) The Bernina (1886), 12 P. D. 36.
(*u*) 1 Emerigon, c. xii. s. 16, p. 426; Code de Commerce, art. 392, 393; and see a very able statement of the French law as to this point in 2 Boulay-Paty, Droit Mar. tit. viii. s. 8, Du Fret en Cas de Radoub, et d'Innavigabilité du Navire, pp. 398—416.
(*x*) Schulz *v.* Ohio Ins. Co., 1 Monroe's Kentucky R. 339; 3 Kent's Com. 212, n. (*a*).
(*y*) 2 Phillips, s. 1462.
(*z*) 2nd ed. p. 246.

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v. Moudigliani (*a*), that the underwriter on goods can never be affected by any loss occasioned by the payment of freight. It is not clear, however, that this case has any relation to the payment of extra freight, which, we may remark, may have to be taken into consideration in determining whether there is a constructive total loss of goods (*b*). When, in consequence of a peril insured against, the voyage cannot be accomplished in the original ship, it seems that the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges (*c*), and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination, it is submitted that this practice is correct in principle (*d*). It is certainly not inconsistent with the provisions of the Marine Insurance Act, 1906 (*e*).

Duty of master to check progress of damage,

215. In this country it has been held, in respect of perishable cargo sustaining such damage as may, if not checked, go on increasing, that the master, being in an intermediate port, is not entitled to proceed on his voyage with such damaged cargo on board, the progress of the damage being unchecked, and that if he do so he or his owners are liable for the further loss that ensues in consequence (*f*). If in such a case, instead of proceeding on his voyage with the damaged cargo, he

(*a*) (1785), 2 Marshall, Ins. 736; 1 Park, Ins. 116.

(*b*) Farnworth *v.* Hyde (Ex. Ch.) (1866), L. R. 2 C. P. 204.

(*c*) See Booth *v.* Gair (1863), 15 C. B. N. S. 291; 33 L. J. C. P. 99; and the remarks of Willes, J., in Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 548—550.

(*d*) When the policy is against total loss only, the owner of goods cannot, however, recover the excess of freight, except where a total loss has been prevented by the expenditure: Booth *v.* Gair, *supra;* Great Indian Peninsular Rail. Co. *v.* Saunders (1862), 2 B. & S. 266; 31 L. J. Q. B. 206.

(*e*) See the definition in s. 64 (2), *post,* § 869, of particular charges, which are recoverable under the suing and labouring clause: s. 78, *post,* § 870.

(*f*) Notara *v.* Henderson (1870—2), L. R. 5 Q. B. 346; 7 Q. B. 225.

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incurs expense in checking the progress of the damage, he is entitled to be recouped by the owner of the goods, who has a right of action over against his underwriter, under the sue and labour clause of the policy, notwithstanding the damage actually sustained does not reach the memorandum percentage, provided it appear that but for such expenditure the damage would have increased until it had become a loss for which the insurer was answerable (*g*). In short, if it appear that a loss which would have fallen on the insurer has been prevented or mitigated by the expenditure of money, the insurer is liable for the expense. Accordingly, where the vessel, in consequence of the perils insured against, was properly abandoned at an intermediate port, and the goods were transhipped and carried on to their destination at a heavy cost for incidental charges and for freight, the underwriter on freight was held liable for the whole of this expense, because thereby a total loss of the original freight was prevented (*h*).

and liability of underwriters for expense of doing so.

Of the powers and duties of the master in cases of abandonment.

216. By a clause invariably inserted in our common forms of policy, "the assured, his factors, servants, and assigns," are allowed, or, as the law construes it, are bound, "in case of any loss or misfortune," to make every exertion in their power "for the defence, safeguard and recovery" of the property which is the subject of the insurance. In almost all cases of "loss or misfortune," the duty of acting for the benefit of all concerned, under the emergency, is thrown upon the master. If the casualty should prove to be of such a nature as to justify the assured in giving notice of abandonment, a question may, and frequently does, arise as to whose agent the master is in taking the steps which in his judgment are necessary under the circumstances. This question will be more fully noticed when we come to treat on the subject of abandonment; the principle, however, upon which it

(*g*) Per Willes, J., in Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535.

(*h*) Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357; cf. Rose *v.* The Bank of Australasia, [1894] A. C. 687.

Sect. 216. depends is, that as the effect of a notice of abandonment, if accepted, or made on good grounds, is to entitle the underwriter to take over the interest of the assured in whatever remains of the subject-matter insured as from the moment of the loss (*i*), the master will be considered, if the ownership has thus vested in the underwriter, as the agent of the latter in all acts done by him from that time, within the authority given to him by the clause (*k*).

If no effective notice of abandonment is given, the master, in all that he does within the scope of his duty, is the agent of the assured (*l*); and it is his duty, as such, to take such measures as may be reasonable for the purpose of averting or minimizing a loss (*m*).

(*i*) Mar. Ins. Act, 1906, s. 63, *post*, § 1205.
(*k*) See *post*, §§ 1218, 1220; Phillips, vol. ii. s. 1584. See also Gilchrist *v.* Chicago Ins. Co. (1899), 104 Fed. R. 566; Hume *v.* Frenz (1907), 150 Fed. R. 502.
(*l*) Fleming *v.* Smith (1848), 1 H. L. Cas. 513.
(*m*) Mar. Ins. Act, 1906, s. 78 (4).

CHAPTER XI.

THE SUBJECTS OF MARINE INSURANCE.

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What may and may not be insured.

217. GENERALLY speaking, everything which is exposed to risk by the perils of the seas may be made the subject of a contract of marine insurance, unless its insurance is prohibited by law—including in this term the general law maritime, and the rules of international law so far as they form part of the law of the land. "Subject to the provisions of this Act," it is declared in sect. 3 (1) of the Marine Insurance Act, 1906, "every lawful marine adventure may be the subject of a contract of marine insurance" (*a*).

In this chapter we will consider what may be insured, and what is covered by the description in the policy of the usual subjects of insurance, leaving to another part of the work the consideration of those things the insurance of which is unlawful, owing to the prohibited nature of the traffic, or voyage, for or on which they are insured. The reason for this arrangement is that, as the prohibition of insurance in these latter cases generally arises not from anything in the nature

(*a*) For the meaning of "marine adventure," see s. 3 (2) of the Act, *ante*, § 1.

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Ships and goods have always, and universally, been regarded as the proper and main subjects of insurance, and in dealing with them it will only be necessary to consider what is covered by a policy on "ship" or "goods" respectively.

What is covered by a policy on ship.

218. In our common printed forms the policy, after stating that it is effected "upon any kind of goods and merchandises," proceeds thus—"and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the," &c.

When the insurance is intended to be confined to the ship alone, this is generally effected by inserting, either at the foot or margin of the policy, the words "on ship"; or by stating in the valuation clause that, as between the assured and underwriters on the particular policy, the subject of insurance is agreed to be the ship, or as many sixty-fourth shares thereof as the assured owns. The effect of either mode of specifying the subject of insurance is to obliterate, as it were, such other words of the general form as are inapplicable to the specified subject (*b*). It is hardly necessary to remark that a policy in this form on ship alone, even when effected by one who is owner both of the ship and cargo, cannot extend to protect the latter (*c*).

Not any part of the cargo.

(*b*) See Robertson *v.* French (1803), 4 East, 130, 140, 141; Haughton *v.* Ewbank (1814), 4 Camp. 89; and the other cases cited *ante*, § 73, which lay down the general principle which subordinates the printed portions of the policy to the effect of those in manuscript. Thus, the interest of a mortgagee, if misdescribed as bottomry, would remain uncovered by the policy, although there are printed words in the policy which would cover a mortgage notwithstanding the misdescription in manuscript. See Simonds *v.* Hodgson (1829), 6 Bing. 114; and *S. C.* (in error), per Lord Tenterden (1832), 3 B. & Ad. 50.

(*c*) 1 Marshall, Ins. 328; per Smith, L. J., Field SS. Co. *v.* Burr, [1899] 1 Q. B. 585.

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Policies on hull and machinery.

Sometimes a policy is made upon the hull and machinery of a steamship, and in valued policies on steamships it is a common practice to have separate valuations of hull and machinery. It is unnecessary to mention the machinery in the policy, for the term *ship* in a policy upon a steamship covers the machinery as well as the hull (*d*). The object of the separate valuation is to provide that for certain purposes, in particular as regards average, the hull and the machinery are to be considered separately insured (*e*).

Sched. I. Rule 15 of Marine Insurance Act.

219. Schedule I. of the Marine Insurance Act, 1906, contains Rules for the construction of policies in the ordinary form, which apply where the context does not otherwise require. No. 15 of these Rules provides that "the term 'ship' includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured" (*f*).

Provisions are comprised as part of the ship, under the word "furniture."

The clause "and also upon the body, tackle, &c.," in this policy made it unnecessary before the Act to decide whether fittings or stores were covered by the word "ship." Thus it was held that the provisions put on board the ship, when she sails, for the use of the crew on the voyage, are comprehended under the word "furniture," and protected by an insurance on the "body, tackle, apparel, ordnance, furniture," &c. of the ship in the common printed form (*g*). The contrary position had been erroneously inferred from the case of Robertson *v.* Ewer, which decided no such point, but merely established that the underwriter on ship could not be liable

(*d*) Mar. Ins. Act, 1906, Sched. I. r. 15, *infra*. See per Kennedy, J., in Roddick *v.* Indemnity Mutual Marine Ins. Co., [1895] 1 Q. B. 842.

(*e*) See Oppenheim *v.* Fry (1863), 3 B. & S. 873; in the Ex. Ch. (1864), 5 *id.* 348; 33 L. J. Q. B. 267.

(*f*) Cf. s. 16 of the Act, *post*, § 365, by which the insurable value of a ship includes also money advanced for seamen's wages. See s. 30 (2).

(*g*) Brough *v.* Whitmore (1791), 4 T. R. 206.

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for the consumption of such provisions while the ship was detained by an embargo (*h*).

Stores and tackle also included in insurance on ship.

It was admitted, in Brough *v.* Whitmore, that all the ship's stores and tackle were also included in the insurance on ship in the common form (*i*).

And outfit in the sense of stores and provisions.

The word "outfit" is sometimes used to denote the necessary stores and provisions put on board the ship for the use of the crew on the voyage; and, in this sense, outfit is included in a general insurance on ship. It is in this sense that Lord Ellenborough uses the word when he says that hull and outfit are both protected by an insurance on ship (*k*).

Not so the fishing stores for whaling voyages.

In whaling voyages, however, the word "outfit" has a peculiar sense, and means the fishing stores of the ships so employed; *i.e.*, the harpoons, lances, spears, and whale lines, for the purpose of catching whales and seals on the voyage, and the casks, cisterns, boilers, &c. for preparing and containing the oil and blubber: in a word, all the instruments and apparatus necessary for taking the fish, and preparing and bringing home their animal produce (*l*). It is established, in accordance with the general custom of whaling voyages, that outfits in this sense are not protected by a general insurance in the common form on the "body, tackle, apparel, &c. of the ship" (*m*); and the practice in

Mode of insuring

(*h*) Robertson *v.* Ewer (1786), 1 T. R. 127; and see per Buller, J., 4 T. R. 210. Maclachlan said that if provisions for the crew are laid in double, for reasons of economy or necessity, the policy on the ship will only cover the provisions for the voyage insured; the provisions in excess being cargo. Rule 15, *supra*, may be construed in accordance with this opinion. He also said that provisions intended for the use of passengers, although incidental to the earning of passage money, are not covered by an insurance on ship, but should be insured *eo nomine*. Arnould, 6th ed. p. 48; and see McArthur, Ins. 58. This view is confirmed by Rule 15.

(*i*) 4 T. R. 206. The doubts expressed by Lord Esher, M. R., and Smith, L. J., in Roddick *v.* Indemnity Mutual Marine Ins. Co., [1895] 2 Q. B. 380, whether the word "ship" alone covers provisions or stores, are removed by Rule 15.

(*k*) Hill *v.* Patten (1807), 8 East, 373, 375; Forbes *v.* Aspinall (1811), 13 East, 323, 325.

(*l*) 8 East, 375; Gale *v.* Laurie (1826), 5 B. & Cr. 156.

(*m*) Hoskins *v.* Pickersgill (1783), 3 Dougl. 222; 1 Marshall, Ins. 241; 1 Park, Ins. 126. Admitted in the case of The Dundee by Lord Stowell (1823), 1 Hagg. Ad. R. 109, 123 (see 1 Marshall, Ins. 241); and by Lord Tenterden in Gale *v.* Laurie (1826), 5 B. & Cr. 156, 164. See Hill *v.* Patten (1807), 8 East, 373, 375. It is possible that some of these stores are "fittings" requisite for the special trade in which the vessels are engaged, within the meaning of Rule 15, *supra*.

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whaling risks in the United States.

the United States, accordingly, is stated by Phillips to be to describe the different interests insured in a fishing voyage as "ship, outfit, and cargo" (*n*).

Fittings and damage.

According to McArthur, temporary dunnage, ballast or fittings are in practice not treated as covered by a general policy on ship, but the rule is different when they are in permanent use on a ship regularly employed in a particular trade (*o*). It is probable that the words "vessels engaged in a special trade" in Rule 15 will, at any rate to some extent, be construed in accordance with this practice, so that fittings required specially for a single voyage will not be covered by the common policy.

The word "furniture," in a time policy on a ship employed in the grain trade, has been held to cover separation cloths and dunnage mats required for the proper carriage of grain cargoes, although in the particular voyage, not being in use, they were temporarily stowed away in the fore-peak (*p*).

Bunker coals and engine stores.

220. The bunker coals and engine stores of a steamship necessary for the voyage are covered by an insurance for a voyage in the common form (*q*). When the insurance is for time, it seems that proper effect will be given to the words of the policy and to Rule 15 by allowing the policy to cover a reasonable quantity of coals and stores, regard being had to the service on which the ship is engaged, and average adjusters usually allow such a quantity.

Roddick *v.* Indemnity Mutual Mar. Ins. Co.

In Roddick *v.* Indemnity Mutual Marine Insurance Co., the question arose whether a time policy on the "hull and

(*n*) 1 Phillips, Ins. ss. 496, 497.

(*o*) McArthur, Mar. Ins. 58.

(*p*) Hogarth *v.* Walker, [1899] 2 Q. B. 401; 68 L. J. Q. B. 888; affirmed by the Court of Appeal, [1900] 2 Q. B. 283; 69 L. J. Q. B. 634.

(*q*) Mar. Ins. Act, 1906, Sched. I. r. 15, *supra*. See Lowndes, Ins. 2nd ed. s. 65; McArthur, 57; Gow, Mar. Ins. 46.

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machinery" of a steamship covered her bunker coals and stores. Evidence was given that in a voyage policy an insurance on hull covers, according to the practice of underwriters, the coals and stores necessary for the voyage described in the policy. Kennedy, J., however, held that, in a time policy at any rate, they were not covered by the term "hull" (*r*), and this judgment was affirmed in the Court of Appeal (*s*). Further, the learned judge thought that, even in a voyage policy, this extended meaning of the word "hull" could not be adopted, and both Lord Esher and Smith, L. J., seem to have been of the same opinion (*t*). It may be remarked, however, that policies simply on hull and machinery are not common. There are often words in the policy which show that the intention was to insure such stores, &c. as would be covered by a policy in the ordinary form.

The boat.

221. The "boat" is included by name as part of the ship in the common policies of insurance (*u*); hence, in a policy on ship in the common form upon the "body, tackle, apparel, munition, ordnance, boat, and other furniture" of the ship, Lord Lyndhurst would not admit evidence of a usage to show that underwriters never paid for boats outside the ship slung upon the quarters, on the ground that, though "usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain" (*x*).

In this case it had been proved that such slinging of the boat was proper and necessary in voyages of the description insured against: if it could be shown that the boat was carried in any way which, while exposing it to extraordinary risk, was not proper and necessary, it might fairly be considered that, as in the case of goods carried on deck, the

(*r*) [1895] 1 Q. B. 836.
(*s*) [1895] 2 Q. B. 380.
(*t*) [1895] 1 Q. B. 842; 2 Q. B. 384, 386.
(*u*) See Dennis *v.* Home Ins. Co. (1905), 136 Fed. R. 481, where it was held that a launch was covered by the policy while being used in the ordinary way between the vessel and the shore.
(*x*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 244, 250.

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underwriter would not be liable unless informed by the policy of the nature of the risk. Thus, in a case decided in the United States it seems to have been assumed that, if it could be shown that carrying boats slung at the stern davits, besides being a dangerous, was also an unusual mode of carrying them on the voyage insured, the underwriter, under the common form of policy, could not be liable for their loss (*y*).

What is covered by a general insurance on "goods" or "merchandise."

222. According to Rule 17 in Schedule I. of the Marine Insurance Act, 1906, "the term 'goods' means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board." The Rule continues: "In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods." Thus, in most cases, the merchant who wishes to insure his merchandise against sea risks need only give a general description of it as "goods" or "merchandise" (*z*).

Successive cargoes shipped in the course of the same voyage.

Hence it is laid down by the French jurists, and apparently on sound principles, that if, under such a general form of insurance, the ship, in the course of the voyage insured, and under liberty given her in the policy, touches at an intermediate port, and there lands the goods which were on board at the commencement of the risk, and takes on board others on account of the assured, such substituted goods are covered by the general words of the policy (*a*).

So, in this country, although after a policy has been once effected on a particular subject of insurance, it cannot, in consequence of the stamp laws, be so changed in its terms as to be made to attach on a totally different subject, "Yet it is not to be inferred from hence," says Lord Ellenborough, "that shifting or successive cargoes on board the same ship,

(*y*) Hall *v.* Ocean Ins. Co. (1839), 21 Pick. 472; cited 1 Phillips, s. 465.
(*z*) Pour que telle assurance soit valable, il suffit que l'aliment du risque existe lors du sinistre. 1 Emerigon, c. x. s. 1, p. 296.
(*a*) Emerigon, *ibid.*; see also 3 Boulay-Paty, Droit Com. Mar. tit. x. s. 6, p. 384.

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in the course of the same continued adventure, as in the African and other trades, out and home, may not properly be the subject of insurance under the word 'goods'; for in some of these cases the successive cargoes—*i.e.*, of English goods, African articles of traffic, and, lastly, West India produce—are, according to the course of such trading adventures, one continued subject-matter of insurance under the one name of 'goods'" (*b*).

Goods subject to leakage, perishable articles, and contraband are insurable under a general policy in this country.

223. The law of France is, that goods subject to deterioration or leakage must be specifically described in the policy (except where the assured is ignorant of the nature of the cargo at the time of effecting the insurance); otherwise no loss is recoverable upon such goods under the general description. The same rule is extended to perishable articles and to contraband of war, by the laws of other foreign states (*c*).

No such rule exists in this country. As to articles liable to leakage or deterioration, the underwriters, by the common memorandum, expressly exempt themselves either from all liability for particular average losses, or from liability for such losses not amounting to a certain percentage. As to contraband of war, although the underwriter might avoid the insurance, unless he were told of the nature of the intended risk, yet it has never been decided that the contraband character of the cargo must be specified in the policy.

Bullion, coin and jewels put on board for the purposes of commerce.

224. Considerable doubt appears at one time to have been entertained whether money, bullion or jewels could be insured under the general denomination of "goods, wares and merchandise." This doubt, in all probability, arose from mis-

(*b*) Hill *v.* Patten (1807), 8 East, 373, 377; see also Tobin *v.* Harford (1863), 32 L. J. C. P. 134; in error (1864), 13 C. B. N. S. 791; 34 L. J. C. P. 37.

(*c*) Ord. de la Marine, l. iii. t. 6, art. 31; Code de Commerce, art. 355; 1 Emerigon, c. x. s. 2, pp. 302—307. See the Commercial Codes of Belgium, art. 208; Holland, art. 596; Spain, art. 745; Chile, art. 1215. The earlier ordinances are collected in the learned work of Magens, n. (*a*) to s. 14, vol. i. p. 9; and in Nolte's edition of Benecke, vol. i. pt. ii. tit. iii. c. ii. pp. 549—552.

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taken theories of the balance of trade, which led to the notion that all exportation of such commodities, as articles of trade, was detrimental to the common weal. There is now, however, no doubt that, when put on board as merchandise, they may be insured, in this country, under the general description of goods and merchandise (though in actual practice they are generally insured under a specific description); it being at the same time understood that the underwriter is not liable for the risk of a clandestine exportation (*d*). The laws of some Continental states require these commodities to be specifically designated in the policy (*e*).

Bank notes and bills of exchange.

Bank notes and bills of exchange should, it seems, be specifically described (*f*). A policy "on goods" means only such goods as are merchantable (*merces*), *i.e.*, cargo put on board for the purposes of commerce (*g*). Hence it is that clothes and other personal effects are not covered by a general policy on goods and merchandise, nor the ship's provisions (*h*), even though the ship carries nothing but passengers (*i*).

(*d*) For an instance, see the case of Da Costa *v.* Firth (1766), 4 Burr. 1966. "Goods, wares and merchandise" will cover dollars, if entered at the custom-house: per Dampier, J. (1815), in Manning's Dig. Index to N. P. Rep. 164, n. 5, 2nd ed.; see also 1 Magens, art. 15. p. 10. Phillips points out (vol. i. s. 432) that there is no reason for this exception of clandestine trade which is made by the text-writers, saying that the fact that the trade is prohibited appears to involve the question of concealment, or the legality of the contract, rather than that of the sufficiency of the description.

(*e*) Dutch Code, art. 596; Spanish Code, art. 745.

(*f*) Per Dampier, J., Manning's Index, 165; Palmer *v.* Pratt (1824). 2 Bing. 185.

(*g*) So stated by underwriters in Ross *v.* Thwaites, before Lord Mansfield (1776), 1 Park, 23, 24; and so defined by Best, C. J., in Brown *v.* Stapyleton (1827), 4 Bing. 121. "Wares or cargo for sale," per Lord Ellenborough in Hill *v.* Patten (1807), 8 East, 375. See, however, Wilkinson *v.* Hyde, *infra*.

(*h*) Mar. Ins. Act, 1906, Sched. I. r. 17, *ante*, § 222; Ross *v.* Thwaites (1776), 1 Park, 23. It is submitted, however, that the personal effects of persons on board are covered, if shipped as cargo. See 1 Parsons, Ins. 521. It was not disputed in Wilkinson *v.* Hyde (1858), 3 C. B. N. S. 30; 27 L. J. C. P. 116, that a policy on goods covered an emi-

(*i*) Brown *v.* Stapyleton (1827), 4 Bing. 119, 122.

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Money and jewels attached to the person.

"In merchandise," says Park, J., "is included all property of great value, unless attached to the persons of the passengers" (*k*). Thus jewels, ornaments, cash, &c. not designed for trade, but carried about, or belonging to the persons of those on board, do not (as the better opinion seems to be) fall within the general description of goods and merchandise; and in case of loss would not, it seems, be recoverable under a policy on goods in the general form (*l*).

Goods on deck are not covered by a general policy "on goods," unless there is a usage.

225. The reason why goods carried on deck are not usually covered by a general insurance in the common form on goods and merchandise is that they are exposed to a greater hazard than goods carried in the ordinary way (*m*); if, indeed, they are carried on deck by virtue of a general custom of the particular trade on which the insurance is effected, the underwriter is presumed to be acquainted with such usage without having notice of it, and therefore may fairly be supposed to undertake the risk of their being so carried on deck. As, however, the custom only applies to certain descriptions of goods in any trade (*n*), it may be doubtful whether, even in this case, the goods ought not to be specifically described in the policy, in order that the underwriter may be apprised that he is to run the extra risk. In the only case in which the point directly arose, the insurance was declared by the policy to be "on forty carboys of vitriol" (*o*). The observa-

grant's outfit. In Duff *v.* Mackenzie (1857), 3 C. B. N. S. 16; 26 L. J. C. P. 313, the master insured his clothes, charts, instruments, &c. as master's effects, and this seems the proper way to describe them. Provisions are covered by the common policy on ship. Stevens on Average, 60; *ante*, § 219.

(*k*) Brown *v.* Stapyleton (1827), 4 Bing. 122; and see *S. P.*, as to provender of live stock, Wolcott *v.* Eagle Ins. Co. (1827), 4 Pick. 429.

(*l*) Mar. Ins. Act, 1906, Sched. I. r. 17, *ante*, § 222. See 1 Park, Ins. 30; 1 Marshall, Ins. 327; 1 Emerigon, c. xii. s. 42; and c. x. s. 11.

(*m*) Ross *v.* Thwaites (1776), 1 Park, 23; and Backhouse *v.* Ripley (1802), *ibid.* 24. Deck goods are sometimes covered by the "in and over" clause.

(*n*) In Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, a general custom to carry deck cargo on Rhine voyages was established, and the insurer was held to be liable for such cargo.

(*o*) Da Costa *v.* Edmunds (1815), 4 Camp. 142. So in the instance

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Observations of Lord Lyndhurst.

tions of Lord Lyndhurst on this point are well deserving of attention. "Goods carried on deck," he says, "are not in the part of the ship where goods are usually carried; they are in more than usual peril, and an usage that they are not covered by an ordinary policy on goods, but that they require a distinct explanation to the underwriter, of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to the information which the underwriter ought to receive, to enable him to estimate the risk and calculate the premiums, and is a portion of that fairness which ought to be rigidly observed upon all these contracts" (*p*).

The general conclusion arrived at by Phillips is, that, if by the description of the voyage, or the character of the article specified in the policy, the underwriter may be presumed to be apprised of a usage to carry it on deck, the policy will attach to it so carried (*q*). This appears very fairly to represent, if not the actual doctrine of the authorities, at all events the result of established principles.

The language of Rule 17 in Schedule I. of the Marine Insurance Act, 1906 (*r*), literally construed, does not alto-

given by Phillips, in which an insurance on "outfits and catchings" was held to cover "blubber" remaining on deck, to be "tried" according to the usage of the whale fishery. Here, as Phillips remarks, "there is an uniform usage to carry on deck, and also an indication by the description of the subject and the voyage, that the part of the subject in the form of 'blubber' is to be on deck": 1 Phillips, s. 460. In the two cases of Gould *v.* Oliver (1837), 4 Bing. N. C. 134, and Milward *v.* Hibbert (1842), 3 Q. B. 120, the point decided was, that goods carried on deck by the usage of trade are entitled, if jettisoned, to contribution in general average; but there is nothing in either case upon the point how far such goods are insurable under the general description.

(*p*) Per Lord Lyndhurst, C. B., in Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 250.

(*q*) 1 Phillips, s. 460 *ad finem*. Phillips considers that when an article is sometimes carried on deck, and sometimes in the hold, there is no usage to carry on deck of which the underwriter is bound to take notice. Da Costa *v.* Edmunds (1815), 4 Camp. 142, however, in which it appeared that vitriol was carried either on deck or below, is not consistent with this opinion.

(*r*) *Ante*, § 222.

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gether agree with the foregoing statement, which is reproduced from the second edition of this work. It implies that deck cargo must be insured specifically, unless the usage be not merely to carry the cargo on deck, but to insure it when so carried under the general denomination. In a recent case, however, in the Court of Appeal (*s*), Lord Sterndale, M. R., and Atkin, L. J., expressed the view that the law has not been altered by Rule 17, although, as the latter said, the more natural meaning of the language of the Rule is that which has just been mentioned.

It has been doubted whether the rule that deck cargo is not in general covered by an insurance on "goods" has any application to inland voyages by river or canal (*t*); and inasmuch as the reason for the rule, viz., the increased hazard when goods are carried on deck, does not exist, the doubt seems to be well founded.

The produce of the whale fishery in whaling ships is covered by "goods" or "merchandise."

226. In whaling voyages the only cargo, properly so called, on board the ship, from first to last, is in general the homeward-bound cargo, consisting of the immediate produce and result of the fishing adventure; such proceeds, therefore, may be covered under the general designation of "goods and merchandise" (*u*).

Not so the outfit.

Outfit in such voyages principally consists of the apparatus and instruments necessary for taking fish, seals, &c., and the disposing of them when taken in such a manner as to bring home the oil, whalebone and other animal produce of the adventure. Outfit, therefore, in such a voyage cannot be considered as "goods" in any proper sense of that word; *i.e.*, as Lord Ellenborough defines it, "as part of the wares or cargo for sale laden on board the ship"; accordingly it cannot be recovered under a general policy on goods (*v*).

(*s*) Gaunt *v.* Brit. & Foreign Ins. Co., Ltd., [1920] 1 K. B. 903.
(*t*) Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252.
(*u*) Hill *v.* Patten (1807), 8 East, 373. So held also in the United States, in a case where the insurance was "on the cargo of a ship for a whaling voyage." Wolcott *v.* Eagle Ins. Co. (1827), 4 Pick. 429.
(*v*) Hill *v.* Patten (1807), 8 East, 373.

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Nor live stock or provender.

227. It has been held in the United States that a general insurance on "cargo" will not cover provender taken on board for live stock, which constituted a great part of the cargo (*w*); nor will it cover the live stock itself (*x*).

Live stock must be specifically described.

With regard to live stock, the rule has been the same in this country; such interest being always, in fact, described specifically. Thus, where a general policy on goods was intended to cover live stock, the insurance was declared, at the foot of the policy, "to be on thirty mules, ten asses, and thirty oxen," &c. (*y*); and in another case, where a policy was effected "on goods, as per annexed statement, valued at 2,800*l.*," the horses insured were specifically valued in the statement (*z*). As we have seen, the Marine Insurance Act, 1906, declares that living animals must, in the absence of any usage to the contrary, be insured specifically (*a*).

General practice, when the cargo consists of few commodities, to specify.

228. Although the commodities already mentioned comprise the greater number of those which must be specifically designated in the policy, yet in practice, whenever the cargo consists of few commodities, or where the goods are valued by the hogshead, pipe, bale, &c., it is almost invariable to specify the commodities by name and number. This is generally done by writing at the foot or on the margin of the policy "on woollen goods," "on piece goods," "on one hundred tierces of coffee," "on twenty hogsheads of sugar," adding also the mark of each bale, cask, &c. (*b*); or it may be done by altering the valuation clause so as to meet the views of the parties.

(*w*) Wolcott *v.* Eagle Ins. Co. (1827), 4 Pick. 429, cited 1 Phillips, Ins. s. 452; and see Brown *v.* Stapyleton (1827), 4 Bing. 119.
(*x*) Wolcott *v.* Eagle Ins. Co., *supra*, cited 1 Phillips, s. 453.
(*y*) Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.
(*z*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793.
(*a*) Sched. I. r. 17, *ante*, § 222.
(*b*) De Symonds *v.* Shedden (1800), 2 B. & P. 153. In Brown *v.* Fleming (1902), 7 Com. Cas. 245, Bigham, J., held that a policy on "228 cases whisky" covered the labels on the bottles and the straw in which the bottles were packed.

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When goods are specified the description must be accurate. "Hats" not covered by "piece goods."

It must be carefully borne in mind that, whenever the goods are specified in the policy, if no property of the assured be on board which fairly answers the description given, the policy will not attach (*c*). Thus, if an insurance be made on goods described in the policy as "piece goods," and by the invoice it appears that the goods really shipped were "hats," the underwriter will not be liable for any loss on the hats (*d*): so an insurance on tortoiseshell will not cover a loss on indigo, &c. (*e*).

Nor a manufactured article by the separate ingredients of it.

If an insurance purports to be effected on several ingredients, described *nominatim* in the policy, which enter into the composition of a manufactured article, such policy will not cover a loss on the manufactured article itself, which is a new product, and has a distinct appropriate name: thus, though oil and barilla both enter into the composition of soap, yet an insurance on oil and barilla will not cover a loss on soap (*f*). An insurance, however, effected on the raw material of a simple fabric, or utensil, into the composition of which no other ingredient enters to any extent, will, according to Emerigon, cover a loss on such fabric or utensil: thus, an insurance on "gold" or "silver" will, according to this doctrine, cover the loss of a gold cup or silver spoons (*g*).

(*c*) A clause providing that the assured should be held covered at a premium to be arranged in case of any incorrect definition of the interest insured, was held to protect him only where there was no intentional misdescription: Hewitt *v.* Wilson, [1914] 3 K. B. 1131; [1915] 2 K. B. 739; and see Hood *v.* West End Motor Car Packing Co., [1916] 2 K. B. 395; [1917] 2 K. B. 46. "Interest insured" in this clause means subject-matter insured, and not insurable interest: Hewitt *v.* Wilson, *ubi supra*.

(*d*) Hunter *v.* Prinsep (1806), per Sir J. Mansfield, 1 Marshall, Ins. 323.

(*e*) 1 Emerigon, c. x. s. 1, p. 294.

(*f*) 1 Emerigon, c. x. s. 3, p. 306.

(*g*) *Ibid.*, *ubi supra*. Maclachlan suspected "that this is a solitary instance of a peculiar *usus loquendi* as to the precious metals, and that it will not bear to be extended." Arnould, 6th ed. p. 30. There are few things, except metals, which can be restored to their original form; but Emerigon's distinction, which is derived from the Roman law of accession, is intelligible, and, if the principle be sound, is there any good reason for limiting it to the precious metals? Where a policy

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Freight. Meaning of the word in insurance law.

229. The next subject demanding our attention is freight. The word freight in insurance law has a more extensive signification than in the general law of shipping, and is used comprehensively to denote "the benefit derived by the shipowner from the employment of his ship" (*h*).

Freight, strictly speaking, as between the shipowner and the freighter, is the price to be paid by the latter to the former for the carriage of goods in the ship, and is only payable on the arrival of the goods at their port of destination; but in policies of insurance it also denotes that which is less properly called freight, viz., the price agreed to be paid by the charterer to the shipowner for the hire of his ship, or a part of it, under a charter-party or other contract of affreightment (*i*), and also the benefit which the shipowner expects to derive from the carriage of his own goods in his own ship, in the shape of their increased value to him at the port of delivery (*k*). As Lord Tenterden observes with respect to the meaning of the term "freight," it is the same thing to the shipowner whether he receives the benefit of the use of his ship by a money payment from one person who charters the whole ship; or from various persons who put specific quantities of goods on board; or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship (*l*).

Definition of freight in Mar. Ins. Act.

Rule 16 in Schedule I. of the Marine Insurance Act, 1906, states that in the ordinary policy "the term 'freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables (*m*), as well as

contained a warranty against more than a certain quantity of "iron cargo," the Court of Appeal held that the warranty applied to a cargo of steel blooms. Hart *v.* Standard Marine Ins. Co. (1889), 22 Q. B. D. 499.

(*h*) Per Lord Tenterden in Flint *v.* Flemyng (1830), 1 B. & Ad. 48.

(*i*) Per Lord Tenterden in Winter *v.* Haldimand (1831), 2 B. & Ad. 649; per Lord Ellenborough in Forbes *v.* Aspinall (1811), 13 East, 323, 325.

(*k*) Flint *v.* Flemyng (1830), 1 B. & Ad. 45; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519.

(*l*) 1 B. & Ad. 48.

(*m*) "Moveables" means any moveable tangible property, other than

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freight payable by a third party, but does not include passage money" (*n*). Both freight in the strict sense of the word and the price paid for the hire of a ship under a charter-party are no doubt covered by the words "freight payable by a third party."

Expected freight is a lawful subject of insurance in this country.

230. In whichever of these three senses the word is used, it has long been a clearly established principle in this country that expected freight is a lawful subject of marine insurance. "It would, indeed, be extraordinary," says Chambers, J., in Lucena *v.* Craufurd, "if freight could not be made the subject of protection by an instrument which had its origin in commerce, and was introduced for the very purpose of giving security to mercantile transactions; it is a solid substantial interest ascertained by contract, and arising out of labour and capital employed for the purposes of commerce" (*o*).

The party insuring must have an inchoate right to the freight.

As we shall see more at large hereafter, the party who insures freight must have an inchoate right to it, in order to entitle him so to insure; *i.e.*, he must be in such a position with regard to the expected freight that in the ordinary course nothing would prevent him from ultimately having a perfect right to it but the intervention of the perils insured against, or other maritime perils incident to the voyage (*p*).

If, by the perils of the sea, the shipowner is prevented from realizing that which, but for the intervention of those perils, he would have earned, it is but fair and reasonable that he should have the means of protecting himself, by a policy of marine insurance, against the loss he is thus exposed to. For this reason, in this country, in America, and now in most of the Continental states, the shipowner is allowed to effect

the ship, and includes money, valuable securities, and other documents: Mar. Ins. Act, 1906, s. 90.

(*n*) The definition of freight in the interpretation clause, s. 90, is literally the same.

(*o*) 3 B. & P. 102.

(*p*) The question when this inchoate right begins belongs to the subject of insurable interest, and is fully discussed under that head, *post*, § 265 *et seq.*

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an insurance on that freight which he expects to earn, and which he may be prevented from earning by maritime perils.

French law.

231. The French legislature, proceeding rather on scholastic refinements than mercantile considerations, used to prohibit all insurance of expected or future freight (*q*), on the ground that expected freight is a mere contingency in which there is no present existing interest; that it is but a gain which the assured may miss making, not a property which he can risk losing. By a law of the 12th August, 1885, however, the law of France as to the insurance of expected gains has been completely altered, and the net freight (*le fret net*) is now insurable (*r*).

Advances on freight.

232. Sect. 12 of the Marine Insurance Act, 1906, declares that "in the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss." Therefore sums paid by the charterer or his agent as an advance of part of the freight are insurable by him in this country. The question that usually arises as regards payments by the charterer is whether the sum paid is an advance of freight (in which case it cannot be recovered back if the goods are lost on the voyage by excepted perils), or merely a loan which the shipowner must repay though no freight be subsequently earned; and this question usually depends, as we shall see hereafter, on the particular terms of the charter-party (*s*).

Contingency freight.

The owner of goods who, if they arrive sea-damaged, will still have to pay full freight for their carriage will, by reason

(*q*) "Fret à faire," Ord. de la Marine, tit. vi. art. 15. "Fret des marchandises existant à bord," former art. 347 of the Code de Commerce.

(*r*) See Code de Commerce, art. 334.

(*s*) See next chapter, §§ 263, 264, and the discussion in Allison *v.* Bristol Mar. Ins. Co. (1875, 1876), 1 App. Cas. 209; De Silvale *v.* Kendall (1815), 4 M. & S. 37; Manfield *v.* Maitland (1821), 4 B. & Ald. 582; Winter *v.* Haldimand (1831), 2 B. & Ad. 649; Wilson *v.* Martin (1856), 11 Ex. 684; Hicks *v.* Shield (1857), 7 E. & B. 633; 26 L. J. Q. B. 205; Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757; The Red Sea, [1896] P. 20, C. A.; Maclachlan, Merchant Shipping, 5th ed. pp. 575—577.

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of the damage, lose in whole or in part the benefit which he would otherwise derive from the enhancement of the value of goods by their carriage to their destination. Sometimes cargo-owners protect themselves against such loss by a policy on "contingency freight," *i.e.*, the freight payable on the delivery of the goods (*t*); but the insurance in such case is not really one on freight. It is substantially one on an interest in the goods akin to an insurance on profits.

Freight may be insured for part of the voyage or time.

It was laid down by Lord Kenyon, at Nisi Prius, that freight could not be insured for part of the intended voyage (*u*); but this position, for which no ground of principle ever existed, was subsequently overruled by Lord Ellenborough and the Court of King's Bench, and it is now quite clear that freight, like any other subject, may be insured either for part or for the whole of the voyage or of the time over which it is likely to extend (*v*); indeed, it may perhaps be insurable even for a previous and independent voyage or period of time (*x*). A portion only of the freight at risk on a particular voyage may also be insured (*y*).

Freight must be insured *nominatim*.

233. Freight must be insured *eo nomine* in the policy, which is generally adapted to an insurance on this interest by inserting the words "on freight" at the foot or in the margin of the instrument (*z*).

(*t*) The policy usually contains a clause stating that "the freight insured under this policy being payable at port of destination, the amount shall be treated as an additional valuation of cargo, and this insurance is to cover only particular average on such additional value over and above the amount claimable in the usual way on the goods themselves." When no freight is payable in the event of the loss of the goods or ship, the assured has obviously no insurable interest in the "contingency freight" so far as total loss is concerned: see Kung *v.* Methuen (1907), 24 Times L. R. 145, C. A.

(*u*) Murdock *v.* Potts (1795). See 1 Marshall, Ins. 322; 2 Park, Ins. 634.

(*v*) Taylor *v.* Wilson (1812), 15 East, 324; Hall *v.* Brown (1814), 2 Dow, 367; Michael *v.* Gillespy (1857), 2 C. B. N. S. 627; 26 L. J. C. P. 306.

(*x*) See *post*, § 513.

(*y*) Griffiths *v.* Bramley-Moore, C. A. (1878), 4 Q. B. D. 70.

(*z*) Frequently the insurance is expressed to be on "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered, on board or not on board." See as to the meaning of this clause, per Lord Esher, M. R., in The Bedouin, [1894] P. 1, 12; the judgments in Williams *v.* Canton Ins. Office, [1901] A. C. 462; per Hamilton, J., in Scottish Shire Line, Ld. *v.* London & Provincial, &c. Ins. Co., [1912] 3 K. B. 51, 62. The words "as if chartered" do not cover expected freight not yet contracted for: *ibid.* p. 63. See also, as to the meaning of "on board or not on board," New York & Cuba Mail SS. Co. *v.* Royal Exch. Assn. (1907), 154 Fed. Rep. 315.

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What is covered by the word "freight."

Such a policy would cover not only freight in its strictest acceptation, but also the chartered hire of the vessel (whether a gross sum for the whole voyage, or a fixed sum per month payable as long as the voyage lasts) (*a*), and the benefit derived by the shipowner from carrying his own goods in his own vessel (*b*).

Advance freight.

The charterer may insure advance freight—*i.e.*, money advanced by him to the shipowner under their agreement as part payment of the freight—specifically, *e.g.*, as "advances on account of freight," or "advances against freight" (*c*). It used to be thought that advances against freight at the time of loading could not be insured by the charterer simply as "freight"; the reason being that several eminent judges have said that such a payment is not freight (which is not earned until the goods are delivered), but money paid for taking the goods on board and undertaking to carry them (*d*). Arnould, however, thought that the charterer could insure advance freight *eo nomine* as freight, though it might be safer to insure it specifically; and his opinion is supported

(*a*) Etches *v.* Aldan (1827), 1 Man. & R. 157; *S. P.*, Clark *v.* Ocean Ins. Co. (1835), 16 Pick. 289. For an insurance of such monthly hire specifically as "chartered or hire moneys," see Manchester Liners *v.* British & Foreign Mar. Ins. Co. (1901), 7 Com. Cas. 26.

(*b*) Mar. Ins. Act, 1906, Sched. I. r. 16, *ante*, § 229. See Flint *v.* Flemyng (1830), 1 B. & Ad. 45, 48; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519.

(*c*) Wilson *v.* Martin (1856), 11 Ex. 684; 25 L. J. Ex. 217; Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757, 761.

(*d*) See Blakey *v.* Dixon (1809), 2 B. & P. 321; Winter *v.* Haldimand (1831), 2 B. & Ad. 649, 653, 658; Etches *v.* Aldan (1827), 1 Man. & R. 157; Kirchner *v.* Venus (1859), 12 Moore, P. C. C. 361, 390; per Blackburn, J., Allison *v.* Bristol Mar. Ins. Co. (1876), 1 App. Cas. 229.

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by high judicial authority (*e*). Rule 16 in Schedule I. of the Marine Insurance Act, 1906 (*f*), does not profess to be exhaustive, and therefore it does not prevent the insurance of advance freight simply as "freight."

In a case before the Privy Council, where a charterer had insured an advance of freight by a policy on disbursements, it was not questioned that the subject of the insurance was properly described, and the assured recovered for a loss (*g*). It is not, however, the practice in this country to insure advance freight as disbursements. The owner of goods who has made an advance of freight sometimes insures the goods and the advance by the same policy, the amount of the insurance on the advance freight being expressly stated (*h*).

The charterer who carries goods on freight, or the owner who sells his ship, reserving the freight, may insure by a policy on freight.

234. It has been doubted in the United States whether a charterer who hires a vessel for a voyage at a certain rate per month, payable on completion of the voyage, can insure, under a general policy on freight, the freight payable to him for carrying the goods of other persons (*i*); and also whether such a policy will cover the interest of a party who has sold his vessel, reserving to himself a right to receive the freight for the voyage insured (*k*). The ground of this doubt is the same in both cases, viz., that the assured has not the same stake in the safety of the ship as though he were owner; and that the underwriters, when asked to insure freight generally, may presume that they are dealing with the owner of the ship. The objection, however, is not well founded; for the

(*e*) See Arnould, 2nd ed. p. 272; Allison *v.* Bristol Mar. Ins. Co. (1876), 1 App. Cas. 209; per Lord Chelmsford, p. 223; Lord Hatherley, p. 239; Lord O'Hagan, p. 251; *per cur.* Hall *v.* Janson (1855), 4 E. & B. 509; per Byles, J., Trayes *v.* Worms (1865), 19 C. B. N. S. 177; and see Robbins *v.* New York Ins. Co. (1828), 1 Hall, 363.

(*f*) *Ante*, § 229.

(*g*) Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 72.

(*h*) See, however, Thames and Mersey Mar. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476.

(*i*) Riley *v.* Delafield (1811), 7 Johns. 522; cited 1 Phillips, s. 480.

(*k*) Mellen *v.* National Ins. Co. (1829), 1 Hall, 452; cited 1 Phillips, ss. 337, 480.

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charterer or former owner must be regarded as owner *pro hâc vice*, having as much interest in the ship's arriving so as to earn freight as the owners would have if insured to the full value of the freight to be earned (*l*).

Passage money. At common law no liability when ship lost to forward passengers.

235. In some respects similar to freight, in others very different, is our next subject of insurance—passage money (*m*). It differs from freight in point of practice, if not of principle, by a very important usage that requires it to be paid before sailing. Yet "no liability is by the common law thrown upon the owner or master of a ship, if the ship be lost, to forward passengers to their place of destination. Nor usually is there any obligation to do this imposed by the actual contract between the parties" (*n*). A passenger who has paid his passage money under these conditions has an insurable interest analogous to that of the merchant upon freight paid in advance.

Statutory liabilities.

The law has been materially altered by statute; and it is now in many cases the duty of the owner, charterer, or master of a ship to have the passenger carried to his destination even when the vessel is lost (*o*). The Merchant Shipping Act, 1894, expressly provides that no insurance in respect of any steerage passage or of any steerage passage or compensation money which any person is by the Act made liable to provide or pay, or in respect of any other risk under Part III. of the Act, shall be invalid on account of the nature of the risk or interest insured (*p*).

(*l*) See 1 Phillips, ss. 339, 480. For insurances by a charterer of his expected profit on subletting the ship, see *post*, § 239.

(*m*) See, generally, Maclachlan on Shipping, c. vii. *Passengers*. The insurability of passage money is recognized in s. 3 (2) (b) of the Mar. Ins. Act, 1906, *ante*, § 1.

(*n*) Per Lord Campbell, C. J., in Gibson *v.* Bradford (1855), 4 E. & B. 586, 589; 24 L. J. Q. B. 159, 160; Gillan *v.* Simpkin (1815), 4 Camp. 241. If, however, the ship be lost before the voyage commences, the passenger is entitled at common law to recover the passage money, as for a total failure of consideration: per Gibbs, C. J., Gillan *v.* Simpkin (1815), 4 Camp. 241.

(*o*) Merchant Shipping Act, 1894, ss. 331—335. The Act repealed the Passenger Acts then in force.

(*p*) Merchant Shipping Act, 1894, s. 335.

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Under a policy against all costs, charges and liabilities to which the owner or charterer might be subjected under sections 46, 47, 48, 49, 50 and 51 of the repealed Passengers Act, 15 & 16 Vict. c. 44, the owner recovered against the underwriter for money expended in forwarding the passengers to their ultimate port from New Providence, off which place the vessel in the course of her voyage had been totally lost (*q*). A year after, under another policy "on passage money of emigrants, to pay a loss *pro rata* subject to (the same clauses almost as in the foregoing case) and against these risks only," the owner sought to recover the money spent in provisions for the emigrants during six weeks' stay at Fayal whilst the ship was being repaired after sea damage, and failed in his suit simply because his obligation to maintain the passengers during the detention was imposed by a section not included in the policy (*r*).

Passage money is not covered by a policy on "freight," unless the context of the particular policy necessitates a different construction (*s*). A ship was partly laden with goods, and also carried a number of coolies whose passage money was only payable on arrival. The shipowner took out a policy on freight, the risk to attach "from the loading of the said goods or merchandise on board the said ship." It was contended, but not established, that by the custom of the particular trade freight included passage money. In this state of facts, and on the construction of the policy, the Court of Common Pleas held that the freight of the merchandise only was insured (*t*).

Insurance on profits.

236. Insurances on expected profits are lawful in this country (*u*) and in the United States, and are in general

(*q*) Gibson *v.* Bradford (1855), 4 E. & B. 586; 24 L. J. Q. B. 159. See New Zealand Shipping Co. *v.* Duke, [1914] 2 K. B. 682, for a modern form of policy covering disbursements on account of passengers.

(*r*) Willis *v.* Cooke (1855), 5 E. & B. 641; 25 L. J. Q. B. 16.

(*s*) Mar. Ins. Act, 1906, s. 30, Sched. I. Introduction and r. 16, *ante*, § 229.

(*t*) Denoon *v.* Home & Colonial Ins. Co. (1872), L. R. 7 C. P. 341; 41 L. J. C. P. 162.

(*u*) See Mar. Ins. Act, 1906, s. 3 (2) (b), *ante*, § 1.

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expressly allowed by the commercial codes of the Continental States (*x*). For the same reasons which led to the prohibition of insurances on freight, the law of France forbade insurances on expected profits (*y*); but the law of the 12th August, 1885, introduced a more liberal rule, and profits are now insurable in France (*z*).

Principle upon which they are insurable, as expressed by Lawrence, J.

The grounds upon which profits are insurable are expressed with admirable force and clearness in the following passage from Lawrence, J.'s, judgment in the case of Barclay *v.* Cousins. "As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which but for the perils insured against the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived, not only of the things immediately subjected to the perils insured against, but also of the advantages to be derived from the arrival of those things at their destined port. If they do not arrive, his loss is not merely that of his goods . . ., but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to: and if when the capital is subject to the risks of maritime commerce it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that principal should not, in consequence of such bad fortune,

(*x*) See the Codes of Holland, art. 593; Spain, arts. 743, 748; Germany, art. 779; Russia, art. 545; Scandinavia, art. 230; Belgium, art. 191.

(*y*) See 1 Emerigon, c. viii. s. 9, pp. 236—239, and the former art. 347 of the Code de Com.

(*z*) Code de Com. art. 334. In Spain and Denmark, also, profits were formerly uninsurable, but in those countries also the law has been altered. See the Spanish and Scandinavian Codes, *ubi supra*.

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be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capitals entire" (*a*).

Such are the principles upon which insurances on expected profits are allowed in this country.

Profits may be insured either in valued or open policies. The assured must prove that some profit would have been made.

237. Profits may be insured equally by valued and by open policies (*b*); but, whether insured by one or the other, the assured cannot recover unless he prove that but for the intervention of the perils insured against some profit would in fact have been realized by the sale of his goods on arrival (*c*).

The ordinary policy does not cover loss of profits on goods not shipped.

238. He must also, said Arnould, prove that the goods from the sale of which the profits were expected to arise were at one time or other actually exposed to the perils of the sea (*d*). It was so held in one case, where the policy was in the ordinary form, with the term "beginning the adventure from the loading of the goods" (*e*); but the Court admitted in that case, and in the later case of Halhead *v.* Young (*f*), that by a properly framed policy the assured may protect himself against a loss due to the happening of some event before shipment of the goods.

McSwiney *v.* Royal Ex. Ass. Co.

The facts in McSwiney *v.* Royal Exchange Assurance Co. were as follows. McSwiney, who had bought 6,000 bags of rice to arrive from Madras by the ship "E. B." before the end of May, effected an insurance at and from Madras to London on profit on rice loaden on or to be loaden on the

(*a*) Per Lawrence, J., delivering the judgment of the Court in Barclay *v.* Cousins (1802), 2 East, 544.

(*b*) Eyre *v.* Glover (1812), 3 Camp. 276; 16 East, 218.

(*c*) Hodgson *v.* Glover (1805), 6 East, 316; Eyre *v.* Glover, *supra*. The law is different in the United States. See Patapsco Ins. Co. *v.* Coulter (1830), 3 Peters' Supreme Court R. 222; 1 Phillips, Ins. s. 318. It is there a conclusive presumption that some profit would have accrued had the goods arrived, and upon this the valuation in the policy attaches. 1 Parsons, Ins. 194, 195.

(*d*) 2nd ed. p. 255; 6th ed. p. 38.

(*e*) McSwiney *v.* Royal Exchange Ass. Co. (1849), 14 Q. B. 634; *S. C.*, in error (1850), *ibid.* 646.

(*f*) (1856), 6 E. & B. 312; 25 L. J. Q. B. 290.

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"E. B." When 1,200 bags were on board, the other 4,800 bags being ready to be shipped, the "E. B." was disabled by perils of the sea and prevented from performing the voyage, and the rice on board was spoiled. McSwiney's purchase thus became inoperative. The policy was in the ordinary form, and the adventure was to begin from and after the loading on board. The Exchequer Chamber held that the policy only attached to the rice which was on board, and also that the losses insured against were only losses by perils of the seas directly affecting the goods and consequently the profits on the goods. Therefore, even if the rice on shore had been covered by the policy, the loss of profit on such rice was not caused by a peril of the seas within the meaning of the policy (*g*). The Court, however, said: "We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the time that the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profits, not merely by the loss of all the rice by perils of the seas, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated" (*h*).

Opinion of Court that profits are insurable before goods shipped.

Halhead *v.* Young.

H. contracted to buy a cargo of timber at Quebec, and chartered a ship then on her way to New York to proceed thence to Quebec and take the cargo to Liverpool. He effected a policy "on profit on cargo" for a voyage from New York to Quebec and thence to Liverpool, beginning the adventure from the loading of the goods. The ship was lost between New York and Quebec; in consequence of which the cargo which was ready at Quebec could not be shipped during the shipping season, and the plaintiff lost his profit. The Court of Queen's Bench held that the policy had not

(*g*) McSwiney *v.* Royal Exchange Assurance (1849), 14 Q. B. 634, 646.

(*h*) 14 Q. B. 660. Cf. Wilson *v.* Jones (1867), L. R. 2 Ex. 139.

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attached; but they were of opinion that where the profits of a purchaser of goods depend on the contingency of a particular ship carrying them on a particular voyage a policy might be framed to indemnify him for a loss of profits caused by the ship being lost before she reaches the port of loading (*i*).

Profits on cargo are sometimes insured by a policy with a clause "to pay on non-arrival of the cargo at its destination," to which sometimes the words "in such ship" (*i.e.*, the ship in which they are intended to be carried) are added (*j*).

Profits on charter.

239. A charterer who enters into a sub-charter or contracts to carry goods in the ship may insure his expected profit, which is properly described as "profit on charter" (*k*), or "difference of freight" (*l*).

Profits from use of ship.

Whether a shipowner can insure the profit which he expects to make by the use of his ship is a question which has not been determined (*m*). In a case where the plaintiff contended that the benefit to be derived from the use of a ship is insurable, although there be no actual contract for freight, Walton, J., agreed that a shipowner has an interest in the use of his vessel, and may insure against loss through

(*i*) Halhead *v.* Young (1856), 6 E. & B. 312; 25 L. J. Q. B. 290. In this case an attempt was made by parol evidence to set up a different risk from that which was expressed in the policy, but it failed.

(*j*) In Wyllie *v.* Povah (1907), 12 Com. Cas. 317, the clause without the words "in such ship" was adopted. The ship became a total wreck in the course of the voyage; but the goods were carried to their destination in another ship, and tendered to the assured, the purchasers, who refused to accept them as they seem to have been entitled to do under the contract of sale. Pickford, J., held that they could not recover.

(*k*) See Asfar *v.* Blundell, [1895] 2 Q. B. 196; C. A., [1896] 1 Q. B. 123, for the nature of such an insurance.

(*l*) See Smith *v.* Fenning (1898), 3 Com. Cas. 75. The contract was "to pay a total loss in the event of the steamer being unable to fulfil her charter, through inability to load by November 20," and Kennedy, J., held that the assured could not recover where a part-cargo had been loaded before that date.

(*m*) It is clear that he cannot insure such profit as "freight" unless he has entered into a binding contract for freight: see *post*, § 269.

his being deprived of such use by perils of the sea, or other causes (*n*). Sect. 239.

240. A party may also insure the sums which he is to receive by way of commission on the sale of merchandise; and if the merchandise from the sale of which such commissions were to arise was only prevented from arriving at the place of sale by the perils insured against, the assured may recover to the extent of his loss (*o*). Commissions.

It was held in 1809 that the goods from the sale of which the commissions are to arise must also have been on board at the time of the loss (*p*). There is, however, a close analogy between profits and commissions; and it is submitted, on the authority of the later cases relating to the insurance of profits, that on a properly framed policy the assured may recover although the goods were not on board at the time of the loss, provided that he had an insurable interest.

The commission or brokerage which a ship's husband or shipbroker expects to earn under a binding contract can, no doubt, be insured if the earning thereof is liable to be prevented by maritime perils affecting the ship (*q*).

241. Profits and commissions to arise from the sale of goods are really an interest in the goods themselves, and in one sense an insurance on them is an insurance on goods (*r*). It is, however, well established that such profits or commissions are not covered by a policy on *goods* or *merchandise;* Profits and commissions must be specifically named.

(*n*) Manchester Liners *v.* British and Foreign Mar. Ins. Co. (1901), 7 Com. Cas. 26, 33. See also per Mathew, J., in Lawther *v.* Black (1900), 6 Com. Cas. 5, 8, and *post*, § 288.

(*o*) Mar. Ins. Act, 1906, s. 3 (2) (b), *ante*, § 1; Flint *v.* Le Mesurier (1796), before Lord Kenyon, 2 Park, Ins. 563; Barclay *v.* Cousins (1802), 2 East, 544; King *v.* Glover (1806), 2 B. & P. N. R. 206.

(*p*) Knox *v.* Wood (1809), 2 Park, Ins. 564; *S. C.*, 1 Camp. 543.

(*q*) See Buchanan *v.* Faber (1899), 4 Com. Cas. 223; and per Lord Mansfield as to prize agents in Le Cras *v.* Hughes (1782), 2 Park, Ins. 569.

(*r*) See Smith *v.* Reynolds (1856), 1 H. & N. 221; 25 L. J. Ex. 337; Allkins *v.* Jupe (1877), 2 C. P. D. 375; Berridge *v.* Man On Ins. Co. (1887), 18 Q. B. D. 343.

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they must be specifically named (*s*). This rule is absolute in England (*t*). In the United States it appears to have been held that "a right to a certain percentage, proportion, or share of a cargo as commissions or profits is covered by a policy on 'property'" (*u*).

Lloyd's form of policy is adapted, as usual, by insertion of the words *profits* or *commissions* in the margin; or in the valuation clause, adopting or adapting the language of the clause according as the subject of the policy is valued or not (*x*).

Bottomry and respondentia loans.

242. Loans on bottomry and respondentia, though themselves a species of insurance, may yet be the subjects of insurance, inasmuch as they are an interest exposed to risk from the perils of the sea (*y*).

Who can insure them.

Sect. 10 of the Marine Insurance Act, 1906, declares that "the lender of money on bottomry or respondentia has an insurable interest in respect of the loan." The lender alone can insure the sum advanced: the nature of the contract shows this. The condition of the bond is that if the ship perishes the borrower is to pay him nothing; if it arrives safely he pays the capital and the maritime interest. The lender, therefore, risks his capital and interest, and may consequently insure them (*z*). Where the loan is made repayable in any event, the lender cannot insure it as a bottomry loan (*a*).

(*s*) So resolved by all the judges in Lucena *v.* Craufurd (in Dom. Proc.) (1806), 2 B. & P. N. R. 315; Anderson *v.* Morrice (1875), L. R. 10 C. P. 609, 622, 624. For the reason see Mackenzie *v.* Whitworth (1875), 1 Ex. D. 36, 43. See, however, Buchanan *v.* Faber (1899), 4 Com. Cas. 223; *post*, "Disbursements," § 246.

(*t*) In a valued policy the owner of the goods may, of course, include his expected profit in the valuation. See Lowndes, Mar. Ins. s. 25.

(*u*) Holbrook *v.* Brown (1807), 2 Mass. R. 280; cited 1 Phillips, s. 462. It has been stated to be the custom in Philadelphia to insure profits under the general denomination of goods. 1 Phillips, s. 462.

(*x*) See Eyre *v.* Glover (1812), 16 East, 218.

(*y*) 1 Emerigon, c. viii. s. 11, pp. 241, 243; Pothier, Traité d'Assurance, Nos. 30, 31; Glover *v.* Black (1763), 3 Burr. 1394; 1 W. Bl. 405.

(*z*) 1 Emerigon, c. viii. s. 11, p. 243; 1 Nolte's Benecke, 295, 296.

(*a*) Stainbank *v.* Fenning (1851), 11 C. B. 51; 20 L. J. C. P. 226; Stainbank *v.* Shepard (1853), 13 C. B. 418; 22 L. J. Ex. 341; and see Simonds *v.* Hodgson (1829), 6 Bing. 114; *S. C.*, in error (1832), 3 B. & Ad. 50.

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The borrower clearly cannot insure the sum advanced, for the risk of its loss does not fall upon him, and as in case of loss of the ship he would have nothing to pay the lender, were he to receive the whole sum insured from the underwriters he would have a direct interest in the destruction of the vessel (*b*).

The law in France.

In France, though the capital lent on bottomry was insurable, the maritime interest which the lender on bottomry is to receive on the prosperous termination of the voyage used not to be, on the ground, as Pothier expresses it, that such interest is a gain, which the lender will miss making if the ship perishes, and not a loss by the perils of the sea (*c*). Now, however, the maritime interest (*le profit maritime*) is insurable in France as well as the sum lent (*d*).

In this country and the United States.

In this country, and also in the United States, a more liberal practice has always prevailed, and both bottomry and respondentia interest have always been lawful subjects of insurance.

Respondentia and bottomry loans must be specifically insured.

243. It has always been said that respondentia and bottomry loans must be specifically described in the policy; they cannot be insured under the general denomination of goods. Lord Mansfield based this rule on the custom of merchants (*e*); but Kent, J., has also suggested, as a reason for the rule, "that the risk is peculiar, as there is neither average nor salvage; and a capture does not mean a temporary taking only, but one that occasions a total loss" (*f*). It is doubtful whether the latter ground can now be con-

(*b*) Pothier, Traité d'Assurance, Nos. 31, 32.

(*c*) *Ibid.* No. 32, p. 40, edit. par Estrangin.

(*d*) Code de Com. art. 334.

(*e*) Glover *v.* Black (1763), 2 Burr. 1394; 1 W. Bl. 399, 405, 422; see also Simonds *v.* Hodgson (1832), 3 B. & Ad. 50. Glover *v.* Black was commented on in Mackenzie *v.* Whitworth (1875), L. R. 10 Exch. 142; C. A., 1 Ex. D. 36.

(*f*) Robertson *v.* United Ins. Co. (1801), 2 Johnson's Cases, 250; cited 1 Phillips, Ins. s. 427.

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sidered sufficient; but, notwithstanding sect. 26 (2) of the Marine Insurance Act, 1906, on the ground of usage it will apparently still be necessary, by reason of sect. 26 (4), to insure bottomry and respondentia loans specifically (*g*).

Unless there be a usage to the contrary.

Yet if it can be shown to be the usage of any particular course of trade to insure these interests under the general words, they may be recovered under a policy containing such words only. Thus, on the ground of such a custom of the East India trade, an East India captain was permitted to recover, at respondentia interest, money he had laid out for the use of the ship, under the general words "goods, specie, and effects on board" (*h*).

The specific description should be true.

Of course, if the instrument of hypothecation be not in law what it is described in the policy to be, the policy is invalid. The Court of Common Pleas, therefore, upon the construction of such an instrument, being of opinion that it was not a bottomry bond, because it made the lender's claim under it depend, not on the arrival of the ship, but on the arrival of the master, held that the lender could not recover under a policy "on bottomry" (*i*). The Court of King's Bench, in error, admitted that, had the Court of Common Pleas been correct in their construction of the instrument, the policy as framed would not have covered the interest of the lenders (*k*).

Stainbank v. Fenning.

The master of a ship borrowed money in a foreign port for necessary repairs and disbursements, to secure which he drew bills on his owner, and executed what purported to be an hypothecation of ship, cargo, and freight. By this instrument the lender forbore all interest beyond the amount necessary to insure the ship and cover the advances; and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale in the event of the bills being refused acceptance or dishonoured. The Court held, that as this was

(*g*) See *post*, §§ 251, 252.

(*h*) Gregory *v.* Christie (1784), 3 Dougl. 419; 1 Marshall, Ins. 326.

(*i*) Simonds *v.* Hodgson (1829), 6 Bing. 114.

(*k*) See remarks of Lord Tenterden in delivering the judgment of the Court in Simonds *v.* Hodgson (1832), 3 B. & Ad. 57.

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not such an hypothecation as would be enforced by the Court of Admiralty, the merchant had no insurable interest in the ship (*l*). The interest was described in this policy as "1,500*l*. advances for repairs and disbursements, the whole valued at 1,675*l*., including premiums of insurance." *Semble* that this was not a good description whether the insurance was to be taken as on the ship in respect of the advance, or on the debt (*m*).

Seamen's wages formerly not insurable. The maritime law of England.

244. Seamen have been debarred by the laws of most, if not of all, maritime states from insuring their wages, the reason being the belief that such an insurance might tempt them in time of danger not to exert themselves to the utmost for the preservation of the ship. By the law of England it was an implied condition of the seaman's contract with the shipowner that his wages were dependent on the earning of freight by the ship. This rule was generally expressed by saying that freight is the mother of wages. Therefore, when a ship was lost in the course of a voyage, the seaman was usually a loser to the extent of the wages already earned by him, and also (except when he obtained another ship) in respect of the wages which he would have earned during the remainder of the voyage. Yet, on grounds of policy, as has just been said, the insurance of his wages, or of any commodities which he was to receive at the end of the voyage in lieu of wages, was not permitted (*n*).

The Merchant Shipping Acts.

The law relating to the earning of wages was altered by the Merchant Shipping Act, 1854. Wages are no longer dependent on freight being earned, and seamen are now

(*l*) Stainbank *v.* Fenning (1851), 11 C. B. 51; 20 L. J. C. P. 226; Stainbank *v.* Shepard (1853), 13 C. B. 418; 22 L. J. Ex. 341; cf. The Haabet, [1899] P. 295.

(*m*) 11 C. B. 74, 78.

(*n*) Webster *v.* De Tastet (1797), 7 T. R. 157; King *v.* Glover (1806), 2 B. & P. N. R. 206, 209, 210; The Neptune (1824), 1 Hagg. Ad. 227, 232, 239; The Lady Durham (1835), 3 Hagg. Ad. 196, 201; 1 Emerigon, c. viii. s. 10, p. 235, where all the learining of the foreign jurists on this point is collected. So in the United States, Galloway *v.* Morris (1802), 3 Yeates, R. 445.

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entitled, in the event of the ship being lost, to be paid their wages until the time of the loss (*o*). Thus the loss of the ship cannot now be the immediate cause of a loss of wages already earned. Such loss of wages can only be directly due to the inability of the shipowner to pay his debt to the seaman; but indirectly it may be caused by the loss of the ship, as the seaman's lien on the ship for his wages may become valueless (*p*). But the loss of the ship may still involve a loss of the wages which the seamen would have earned during the remainder of the voyage, or of the period of time for which they were engaged.

Wages are now insurable.

In a previous edition of this work (*q*), Maclachlan raised the question whether, as a result of the alteration in the law made by the Merchant Shipping Act, 1854, seamen's wages became insurable. It is, however, unnecessary to repeat his arguments, which the present editors did not think convincing; for when the Marine Insurance Act, 1906, was passed there was a consensus of opinion that seamen should be allowed to insure their wages, and sect. 11 declares that "the master or any member of the crew of a ship has an insurable interest in respect of his wages" (*r*).

Goods purchased by seamen with their wages.

Even when they were debarred from insuring their wages, seamen were allowed to insure any goods which they might have purchased with their wages and shipped on board (*s*).

Goods they are privileged to carry (United States).

So it has been held in the United States that a mariner, who has the privilege of carrying a certain quantity of goods, may insure them (*t*).

(*o*) 17 & 18 Vict. c. 104, ss. 183, 184; repealed by the Merchant Shipping Act, 1894, and therein re-enacted by ss. 156, 157.

(*p*) The seaman retains his lien on the wreck (The Neptune (1824), 1 Hagg. Ad. 239); but he has no claim for his wages out of the owner's insurance on the lost vessel. The Lady Durham (1835), 3 Hagg. Ad. 196.

(*q*) 6th ed. p. 44.

(*r*) In France seamen's wages have been insurable since the Law of 1885 (Code de Com. art. 334), and they are also insurable in Belgium (Code, art. 191).

(*s*) 1 Emerigon, c. viii. s. 10, 240; 1 Park, 11.

(*t*) Galloway *v.* Morris (1802), 3 Yeates, R. 445.

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245. All that has been said of the crew's wages applied to all officers of lower rank than the master, *e.g.*, the mate (*u*).

The master's wages and commissions insurable.

The master, however, was regarded as a person of too much trust and character to be rendered indifferent to the fate of the adventure merely by having secured his own interest in it. He was, therefore, allowed to insure his wages, or his commissions, or any interest he might have in the vessel as part owner (*x*); and his right to insure his wages is, as we have seen, affirmed in sect. 11 of the Marine Insurance Act, 1906 (*y*).

Master's effects.

The master may insure his personal effects; they must, however, be specifically mentioned, and are not protected by a policy on goods (*z*).

Seamen's effects.

There is no decision as to the insurability of seamen's effects; but it is impossible to suppose that the prohibition against insuring wages, which the Legislature has removed, would now apply to personal effects, especially as it was conceded that seamen might insure merchandise on board belonging to them (*a*).

(*u*) Webster *v.* De Tastet (1797), 7 T. R. 157.

(*x*) King *v.* Glover (1806), 2 B. & P. N. R. 206; Hawkins *v.* Twizell (1856), 5 E. & B. 883; 25 L. J. Q. B. 160. Wilson *v.* Royal Exchange Ass. Co. (1811), 2 Camp. 626, decided that a policy effected by the lender on money advanced to the captain payable out of freight was void; see also Siffken *v.* Allnutt (1813), 1 M. & S. 39.

(*y*) *Supra*, § 244.

(*z*) Mar. Ins. Act, 1906, Sched. 1. r. 17, *ante*, §§ 222, 224. See Duff *v.* Mackenzie (1857), 3 C. B. N. S. 16; 26 L. J. C. P. 313; Anstey *v.* Ocean Mar. Ins. Co. (1913), 19 Com. Cas. 8.

(*a*) After seamen's wages, Arnould in the 2nd edition (vol. i. p. 259) dealt with slaves as a subject of insurance. He mentioned that the practice of insuring slaves as articles of traffic was prohibited in this country in 1806 by 47 Geo. 3, c. 36, s. 5. They must therefore, he said, be more properly classed with those subjects the insurance of which is prohibited by the positive laws of our own country than with those which in their own nature are not insurable. Although the practice required to be suppressed by a positive prohibition, and when he wrote was still permitted in other states, "it will yet be allowable in writing, as an Englishman to Englishmen," he said, "to consider the statute which exterminated the practice as a mere affirmation of the law of nature, and to declare that a man, whatever be his race or colour, cannot, from the nature of things, be made the subject of insurance as an article of merchandise."

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Disbursements.

246. In modern times "disbursements" have become a common, and important, subject-matter of insurance. Inasmuch, however, as the policies are usually "honour" or "p. p. i." policies, and for an agreed valuation, they have given rise to comparatively little litigation, and there is consequently a dearth of legal decision as to what items of loss are properly recoverable thereunder. In its ordinary sense, a disbursement means an expenditure of money. In this sense it may be said that all expenditures the benefit of which will be lost, or the object of which will be frustrated, by marine perils would be properly covered by a "disbursement" policy, and these alone (*b*). But inasmuch as money expended cannot be itself at risk, this statement is probably subject to the qualification that a disbursement, to be insurable, must be represented by some interest in the tangible property at risk, *i.e.*, in the ship or the property on board (*c*). Yet it was

Ordinary meaning of "disbursements."

Meaning of term

(*b*) Where a charterer who had made an advance of freight for the ship's purposes protected himself by a policy on disbursements, it was not disputed that the subject was properly described, and the assured recovered. Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 72. It is not, however, usual to insure advance freight as disbursements. For an instance of an insurance on disbursements made to cover an expenditure on coal, engine-room stores, provisions and port charges, see Roddick *v.* Indemnity Mutual Marine Ins. Co., [1895] 1 Q. B. 836; 2 Q. B. 380. The editors have been informed that in some trades when a ship has sustained damage and been repaired, it is usual for the assured to effect a policy on "disbursements" against total loss only, in respect of the repairs, for the benefit of his underwriter, who invariably pays the premium.

(*c*) See Moran *v.* Uzielli, [1905] 2 K. B. 555. In that case the plaintiffs, who were agents for a foreign ship, the owners of which were indebted to them for advances for her necessary disbursements, effected a policy "on disbursements" for a voyage of the ship to this country. It was admitted that the plaintiffs' interest, if insurable, was sufficiently described, and Walton, J., held that as the plaintiffs had a right to enforce their claim for advances by an action *in rem* and the arrest of the ship, they had an insurable interest and could recover to the extent of the advances. On the other hand, where the managing owner of a British ship, who had no lien on her, insured the amount of the company's indebtedness to him by policies or disbursements, Lord Shaw said that any payments made under these insurances would not be payments made to indemnify him for loss, but would be of the nature of presents: Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529, 542. In Price *v.* Maritime Ins. Co., [1901] 2 K. B. 412, the

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stated by Bigham, J., that the term is used at Lloyd's in a sense which in some respects is undoubtedly wider, and in other respects is probably narrower, than the meaning now suggested. The learned Judge said that it was a "compendious term commonly used to describe any interest which is outside the ordinary and well-known interests of 'hull,' 'machinery,' 'cargo,' and 'freight,'" and that it would cover the commission and brokerage which the managing owners and insurance brokers of a ship expected to earn in the future (*d*). Expected commission and brokerage, however, can clearly in no sense be said to be expenditures; therefore, if the learned Judge be correct, disbursements must in this case be used in a wider sense than the ordinary meaning of the word. On the other hand, the learned Judge intimated that the term does not include all expenditures, but only such as are not covered ordinarily by insurances on hull, machinery, cargo, and freight. In this respect the meaning of the word is limited by the learned Judge to something less than its ordinary meaning.

according to Bigham, J.

Object of disbursement policies.

247. As a matter of fact, however, policies on disbursements are largely used in practice to insure that the shipowner may recover additional sums in respect of his adventure beyond the amount covered by his insurances on ship and freight; and irrespective of any particular items of expenditure or obligation (*e*). Such insurances are probably always made against total loss only. Thus the object of the assured is in reality to increase the insurance on the ship without increasing the valuation in

plaintiffs who had advanced money to the master of the ship on the security of the ship and freight, effected a policy "on advances in the ship or vessel C."

(*d*) Buchanan *v.* Faber (1899), 4 Com. Cas. 223.

(*e*) See Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529; Gow, Mar. Ins. 232. In the case of steamship, according to Mr. Gow, the policies are usually on time, and, as he points out, a time policy on disbursements can scarcely be intended to insure any real interest in disbursements.

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the policies (*f*). The question has been raised—What is the real subject-matter of insurance in a disbursement policy? The answer to this inquiry is attended with some difficulty, especially when it is sought to give a special or customary meaning to the word. It can only be proved that a word has an extraordinary or technical meaning in a particular trade or business by calling experts engaged in such trade or business to give evidence that such peculiar meaning has become well recognized and established by general usage. But inasmuch as nearly all disbursement policies are valued, and contain the "p. p. i." clause, whereby the underwriter agrees that he will not contend that the assured has no interest in the thing insured (in effect that he will pay the amount at which the disbursements are valued without any inquiry as to the nature of the claim), it is difficult to see that there can be scope for sufficient controversy on the subject in business circles to establish a technical meaning which our Courts would recognize.

Difficulty in establishing a technical meaning of "disbursements."

Usually policies on disbursements are expressed to be free of average or against total loss only. In the case of Lawther *v.* Black (*g*), the question, what is covered by a policy on disbursements "warranted free from all average," was considered by Mathew, J. The assured maintained that he intended by such a policy on a voyage to South America to insure the profits which he expected to realize from the homeward voyage of the ship. The underwriter maintained that a policy on disbursements, warranted free from all average, is, by custom, an extra insurance on the ship against total loss only, and he called witnesses to prove the alleged custom. As regards the contention of the assured, the learned judge said that it would be a straining

Policy on disbursements against total loss only.

Lawther v. Black.

(*f*) The club insurances on freight are partly of a similar nature. It is commonly provided that in the event of the loss of the ship the amount insured shall be deemed the shipowner's interest at risk, and that he shall be paid such amount whether the ship be laden, in ballast, or under a time charter. Such an insurance seems to be a wager policy: see *ante*, § 81, note.

(*g*) (1900), 6 Com. Cas. 5; affirmed on appeal, *ibid.* 196.

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of language to say that the policy covered the expectation of profit to be earned on the homeward voyage, though he was not prepared to say that such an interest could not be protected by a properly worded policy. He also declined to find that the meaning which the underwriters said the term disbursements had acquired by custom had been proved by the evidence. He then proceeded to consider a list of disbursements which the assured had produced, covering stores, port dues, dry dock and painting expenses, rope-maker's accounts, and the cost of insurance. A part of this expenditure, as the learned Judge pointed out, was represented either by stores or by the enhanced value of the ship. The ship had not been lost, and there was no clear evidence as to what had become of the stores and outfit. He therefore held that there had not been a total loss of the items mentioned in the list of disbursements, and that the assured could not recover.

Shipowner's policy on disbursements.

The decision is thus, to some extent, an authority for the proposition that a policy on disbursements by a shipowner covers all expenditures of money incurred in equipping the ship, or for other purposes of the voyage. On this point it agrees with the view expressed in a later case by Walton, J. In the case of an ordinary shipowner's policy, said the learned Judge, "the disbursements represent expenditure by the shipowner either on his ship, or for the purpose of earning his freight, and such policies are in the nature of insurances of the shipowner, either upon his ship or upon his freight" (*h*). If this be the proper construction of a policy on disbursements, there are some peculiarities of the insurance which deserve notice. An expenditure on repairs or permanent fittings is represented by some part of the value of the ship at the beginning of the voyage; an expenditure on stores may be represented by stores on board at the time of the loss, which are covered in a policy on the body, tackle, &c. of the ship in the common form, but perhaps not

(*h*) Moran *v.* Uzielli, [1905] 2 K. B. 555, 558.

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in a policy on hull and machinery only (*i*). Other items, again—such as payments in respect of port charges—will be ultimately defrayed out of freight; and therefore, if there be some freight at risk which is covered by insurance, these items are also indirectly covered by the policies on freight. The result is, that there may often be in fact, though not in form, a double insurance—*i.e.*, where the ship and freight are already fully covered by the ordinary policies on ship and freight (*k*). This was said to be the result in the case

(*i*) See *ante*, § 220.

(*k*) A difficult question which arises on these disbursement policies against total loss only is as to the meaning of the term "total loss." The question does not admit of a satisfactory answer, because it is at present quite uncertain what is covered by the term "disbursements." Underwriters maintain that by total loss is meant "total loss of the ship," and the loss under a policy on disbursements is frequently expressed to be payable only in case of the actual or constructive total loss of ship. *Primâ facie*, total loss must mean total loss of the thing insured. If the thing insured be not the ship as a whole, but that part of the value of the ship to its owner which represents the expenditure, this construction seems to be inadmissible, unless it be proved that the words "total loss" in a policy on disbursements have acquired a well-known technical meaning which limits the right of the assured to recover to cases where the ship itself has been lost. If the intention of the parties (assuming that it can be carried out by a policy on disbursements) is to effect an extra insurance on the ship, "total loss" may well mean total loss of the ship. In Lawther *v.* Black, as we have seen, the underwriter brought forward evidence of a custom under which a disbursement policy, when against total loss only, is understood to be on the ship; but Mathew, J., did not find it necessary to decide whether the evidence established the alleged custom. Sometimes, as in Moran *v.* Uzielli, *supra*, the policy is expressed to be on disbursements against the risk of total loss of ship only. For a clause providing that a total loss paid by underwriters on hull and machinery should constitute a total loss under a policy on disbursements, see Andersen *v.* Marten, [1907] 2 K. B. 248. The question, what is covered by a disbursement policy against total loss only, arose in the United States, in International Nav. Co. *v.* Atlantic Mut. Ins. Co. (1900), 100 Fed. R. 304. Brown, D. J., after hearing evidence on this question, held that such a disbursement policy was not "another insurance upon the premises aforesaid" within the meaning of a policy on the ship against partial, as well as total, loss: affirmed on appeal (1901), 108 Fed. R. 988. Cf. Brown *v.* Merchants' Mar. Ins. Co. (1907), 152 Fed. R. 411, in which the Circuit Court of Appeals held that the underwriters of a policy against total loss only on "disbursement $\frac{\text{and}}{\text{or}}$ increased value," who had paid for a total loss, were

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of The Gunford (*l*), where the vessel was insured on a valuation on ship, largely in excess of the amount which could have been recovered on an open policy, and the freight was insured on a valuation exceeding its gross amount. The owners had in addition effected a valued honour policy on disbursements for 4,600*l.*, and they produced a list of the payments on account of which they sought to justify this insurance. "So far as these payments consisted of current working expenses necessary to earn freight," said Lord Robson, "they were covered by the insurance on the gross freight, and so far as they consisted of repairs, outfit, and insurance premium on hull, they would ordinarily be included in the policy on ship and materials. This policy was therefore an over-insurance by double insurance. The plaintiffs could not legally avail themselves of it to enforce recovery of any sum in excess of the indemnity allowed by law" (*m*).

Miscellaneous subjects of insurance.

248. There is sometimes a difficulty in accurately describing the subject of the insurance, and yet substantial accuracy is requisite in every case where a specific description is necessary.

A policy on "bills of exchange" will not cover instruments not legally bills.

The case of Palmer *v.* Pratt is an extreme illustration of the degree of accuracy at one time required in this respect. The policy was effected "upon any kind of goods and merchandise," &c. in the common printed form, for a voyage from London to Calcutta, and the insurance, by a memorandum on the face of the policy, was declared to be "on two bills of exchange": as, however, it appeared that the supposed bills were drawn on a contingency, being made payable at thirty days after the ship's arrival at Calcutta,

entitled to share with the insurers on ship in a fund recovered in a collision suit.

(*l*) Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529.

(*m*) [1911] A. C. at p. 549. See also Lord Alverstone's judgment, *ibid.* pp. 535, 536. Lord Shaw condemned disbursement policies which are duplications of insurances on freight as "a gamble, discountenanced by sound principle and not enforceable by law": *ibid.* p. 545.

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the Court held that such instruments, being mere waste paper, were improperly described as bills of exchange, and that therefore, on this ground, their value, in case of loss, could not be recovered under such a policy (*n*).

As Phillips well remarks, "this construction was very strict on the assured," and, as a precedent, would probably not now be followed. Lord Campbell, in delivering judgment in the case of Hall *v.* Janson, appears to lay down a far more sensible rule. "Great latitude," he says, "is allowed in describing the interest on a policy of insurance, provided that the nature of it is intelligibly disclosed" (*o*).

A policy "on specie and returns" will not cover an advance by charterer.

The ship "Leonidas" was chartered for a voyage from Buenos Ayres to Canton and back, at a gross sum payable, not as freight properly so called, but as the price of the hire of the ship for the voyage. Part of this sum was paid, as stipulated by the charter-party, by the charterer's agents at Canton, to cover the port charges and incidental expenses of the ship there. The charterers, who had shipped on board the vessel at Buenos Ayres a large sum of dollars to be invested in produce at Canton, being desirous of securing their interest in the adventure, caused a policy to be effected, in the common form, for the proposed voyage, "on specie, &c. shipped on board the 'Leonidas' in the River Plate, and on the same or the returns thereof, as interest might appear, in any description of merchandise," &c. The Court of King's Bench held, that under a policy so framed the assured could not recover, in addition to what is usually recoverable as the value of goods in an open policy, the sum paid at Canton, under the charter-party, for the port charges, &c. (*p*). Lord Tenterden, however, in the course of the argument, intimated that, although such sum could not be recovered under a mere policy on merchandise, yet it might have been insured as

(*n*) Palmer *v.* Pratt (1824), 2 Bing. 185. A strong decision, for the underwriter was fully informed of the real facts as to the drawing and payment of the bills.

(*o*) Hall *v.* Janson (1855), 4 E. & B. 500, 509; 24 L. J. Q. B. 97, 101.

(*p*) Winter *v.* Haldimand (1831), 2 B. & Ad. 649.

money paid for shipment of goods to be transported to Buenos Ayres (*q*); and in delivering the judgment of the Court he said: "We have no doubt that these payments might have been made the subject of a special and distinct insurance" (*r*). Sect. 248.

A policy "on money advanced on account of freight" will cover advances for necessary repairs abroad,

In a case where the policy described the insurance to be "on money advanced on account of freight," the shipowner was allowed to recover in respect of advances made for necessary expenses incurred by the master at a foreign port for repairs, and loading and unloading cargo, on the terms that the loan should be deducted from the freight or repaid if the freight were not ultimately earned. Lord Campbell, delivering the judgment of the Court, said: "There seems no reason why the money advanced may not be insured as freight, as well as the money to grow due on the charter, which is undoubtedly insurable as freight, although not properly freight, and rather the price of the hire of the ship. Nor do we see how we can be called upon to infer that the expression 'money advanced on account of freight' necessarily indicates that the insurance is effected by the shipper, and that the freight paid in advance is at his risk, not at the risk of the shipowner" (*s*). A similar policy will cover bills drawn abroad against freight by captains and accepted by agents here. The agents in this country of foreign principals having accepted bills drawn abroad by the captain of a ship, taken up by their principals for a general cargo, against freight, it was held that they had an insurable interest in respect thereof, and that such interest was well described in the policy as "an advance on account of freight" (*t*).

and bills drawn abroad against freight.

249. A shareholder in the Atlantic Telegraph Company effected a policy to secure himself against loss in the laying down and working of a cable between the Irish and American coasts; and in the valuation clause (the policy being in the

Share in company uninsurable.

(*q*) *Ibid.* 654.

(*r*) *Ibid.* 658. There can be little doubt, as we have seen, that the advance might have been insured as freight. *Ante*, § 233.

(*s*) Hall *v.* Janson (1855), 4 E. & B. 500; 24 L. J. Q. B. 97.

(*t*) Wilson *v.* Martin (1856), 11 Exch. 684; 25 L. J. Ex. 217.

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form usual at Lloyd's) occurred the only specification of the subject of insurance in these words: "The said ship, &c. goods and merchandise, &c. . . . . are, and shall be, valued as on one 1,000*l.* share in the Atlantic Telegraph Company, said share valued at 1,100*l.*" Stopping here, the policy would have been construed as being on a subject—a share in a company—incapable of exposure to, and consequently not covered by a policy against, maritime risks. But this other sentence followed: "In case of loss, the part saved to be sold or appraised for the benefit of the underwriters." The Court, regarding the whole in the light of these latter words, held that it was a policy on the cable, and that the assured under the circumstances was entitled to recover for an average loss if above 3 per cent. (*u*).

As shares in an incorporated company cannot be exposed to maritime perils, it seems to follow that they cannot be the subject of maritime insurance (*x*); and as the shareholder in such a company has no property in the estate or chattels of the company, such a chattel as the Atlantic Cable, though exposed to maritime perils, cannot for him be the subject of a valid policy (*y*). But it has been held that his right to a share of the profits of such a company gives him an insurable interest in an adventure such as that of laying the Atlantic Cable, which interest, by the use of suitable language, may be covered by a policy of insurance (*z*).

In Wilson *v.* Jones (*a*), a shareholder in the Atlantic Telegraph Company, before the cable had been laid, effected a

(*u*) Paterson *v.* Harris (1861), 1 B. & S. 336; 30 L. J. Q. B. 354. There was no plea on the record to the insurable interest of the claimant.

(*x*) See *per cur.* Paterson *v.* Harris (1861), 1 B. & S. 354, 355; 30 L. J. Q. B. 361.

(*y*) See *post*, § 307.

(*z*) Cf. Mar. Ins. Act, 1906, s. 3, which declares (sub-s. 1) that every lawful marine adventure may be the subject of a contract of marine insurance, and (sub-s. 2 (b)) that there is a marine adventure where the earning of any pecuniary benefit is endangered by the exposure of insurable property to maritime perils.

(*a*) (1866), L. R. 1 Exch. 193; in error (1867), L. R. 2 Exch. 139.

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policy to cover his interest in the concern, describing the subject of insurance in a cloud of ambiguous words, as follows:—"The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers, on this policy, are and shall be valued at 200*l.* on the Atlantic Cable, value say on twenty shares, valued at 10*l.* per share." Then on the margin, over against the statement of perils insured against, were written these words: "It is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." Having regard to these latter words, both the Court of Exchequer and the Court of Exchequer Chamber held that the subject intended to be insured was the plaintiff's interest in the adventure, and that this might be the subject of a valid policy of marine insurance (*b*).

Share in company owning ship.

A ship is now frequently the property, not of individuals (each holding severally one or more of the sixty-four shares into which the property is legally divided), but of a limited company. From what has just been said, it appears that a shareholder in the company cannot insure his shares in it against maritime risks. Moreover he cannot, apparently, effect a valid insurance on the ship itself, for want of an insurable interest (*c*). Yet the company may be a "single-ship company," whose only asset is the ship; she may not be insured or may be inadequately insured by the company, and her loss may therefore either render the shares valueless or greatly depreciate their value. The decision in Wilson *v.* Jones suggests that by a properly worded policy a share-

(*b*) Reference was made by Blackburn, J., to the language of Lawrence, J., in Barclay *v.* Cousins (1802), 2 East, 544; and in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 301. For an instance where an insurance was held to be on the goods, as distinct from any adventure, see Moore *v.* Evans, [1917] 1 K. B. 458; [1918] A. C. 185, distinguishing Mitsui *v.* Mumford, [1915] 2 K. B. 27; both, however, being cases of non-marine insurance.

(*c*) *Post*, § 307.

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Shipowner's liability for loss of life, injury and damage.

250. A shipowner may become liable to pay large sums in consequence of loss of life, injury to person, or damage to property caused by the improper navigation of his vessel. Sect. 506 of the Merchant Shipping Act, 1894, expressly recognizes the validity of insurances by shipowners against their liability to pay damages for such loss of life, injury or damage, in the cases enumerated in sect. 503 of the Act (*d*), and sect. 3 (2) (c) (*e*) of the Marine Insurance Act, 1906, recognizes in general terms the right of a person interested in insurable property to protect himself against his liabilities in respect thereof.

In policies on "ship" it is now usual for the shipowner to insure himself in part or in whole by the collision clause against the liability to pay damages in consequence of a collision between his ship and any other vessel, and against the costs of litigation arising out of such a collision (*f*).

The shipowner's liability to pay damages, so far as it is not covered by policies in the ordinary form, is usually insured with mutual associations, called Protection and Indemnity Associations; and there are some other risks and liabilities, not within the scope of the ordinary insurances, which are also undertaken by such associations (*g*).

Designation of subject-

251. With regard to the designation of the subject-matter

(*d*) *Ante*, § 7.

(*e*) *Ante*, § 1.

(*f*) *Ante*, § 10. Sometimes the collision clause also covers liability for damage caused by the ship insured to buoys, moorings, piers, bridges, &c. See, *e.g.*, Shelbourne *v.* Law Investment and Insurance Corporation (1898), 3 Com. Cas. 304.

(*g*) The Workmen's Compensation Act, 1906, has imposed upon shipowners large liabilities for injuries sustained by seamen in their employment; but they are seldom insured by policies effected against the ordinary marine risks. The protecting and indemnity associations undertake to indemnify their members against claims for compensation under the Act, which it is beyond the scope of this work to discuss.

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of the insurance in the policy, sect. 26 of the Marine Insurance Act, 1906, lays down the following rules:—

(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

The manner in which the various subject-matters of insurance are described had already been sufficiently indicated.

The nature of the interest of the assured need not generally be described.

That the nature of the interest of the assured need not be specified is well established (*h*). Thus, where a policy expressed to be "5,000*l.* on cotton" was a re-insurance, but it was not so expressed on the face of it, nor was any notice of this fact given to the underwriter, the Court of Appeal held that the interest of the assured did not need to be described. "The assured here had a direct interest in the safe arrival of the cotton, not in any way a collateral interest in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against" (*i*).

(*h*) See per Lord Tenterden in Crowley *v.* Cohen (1832), 3 B. & Ad. 478, 485.

(*i*) Mackenzie *v.* Whitworth (1875), 1 Ex. D. 36, 44; below, L. R. 10 Ex. 142.

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The extent of the interest need not be specified.

So, also, it is a well-established rule that a party interested only to a certain extent in property, which he owns in common with others, may effect insurance generally without specifying his interest, and will recover for such interest as he has (*k*). Thus, a mortgagee may recover under a policy on ship to the extent of his mortgage (*l*); or one of several part-owners of a ship may insure the freight generally without specifying what share he has in the ship, and he may declare generally and recover for such interest as he has (*m*).

Interest in ship and freight.

Cases on rule that interest need not be specified.

252. The above positions have received abundant illustration in the jurisprudence of this country and the United States (*n*). Thus, with regard to the nature of the interest, Lord Mansfield, in the case of Glover *v.* Black, after deciding, solely on the ground of the usage of merchants, that the interest of the lender on bottomry and respondentia must be specifically described in the policy, adds: "But we by no means say that, under an insurance on goods at large, a man may not be permitted to give in evidence a mortgage or other special lien" (*o*). "I admit," says Park, J., "that a party who has only a special interest in goods may recover, in respect of that interest, on a general insurance" (*p*).

In Carruthers *v.* Shedden a general insurance "on coffee" had been effected by a London broker, "by order and for account of N. D. & Co.," a London mercantile firm, who were themselves beneficially interested in seven-sixteenths of the coffee, but who had also an insurable interest in the whole of it as consignees of the cargo, and as having a lien on the whole for advances. The Court held that, under the general form of policy, N. D. & Co. might protect all these different species of interest; that the nature of the several

(*k*) The principle is laid down, 1 Emerigon, c. x. s. 1, p. 299.
(*l*) Irving *v.* Richardson (1831), 1 Mood. & Rob. 153; 2 B. & Ad. 193.
(*m*) Rising *v.* Burnett (1798), 2 Marshall, Ins. 738.
(*n*) See 1 Phillips, §§ 421 *et seq.*, for the cases in the United States.
(*o*) Glover *v.* Black (1763), 1 W. Bl. 423; see also 3 Burr. 1401. As to bottomry and respondentia, see *ante*, § 243.
(*p*) Palmer *v.* Pratt (1824), 2 Bing. 192.

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interests need not be expressed in the policy; and that the assured were not bound to elect on which they would proceed (*q*).

Upon the same principle, a general policy "on goods" (*r*) has been held sufficient to cover the interest of carriers on goods entrusted to their care, so as to protect them against loss arising from damage done to such property by the perils insured against, whereby they were obliged to make compensation to the owners, and were, besides, put to other expenses (*s*). It was objected that such a policy could not cover such an interest, since it merely purported to protect goods against the usual risks to which the owners of goods are liable; whereas the loss alleged was one arising out of a risk to which carriers are liable. But the Court, although Lord Tenterden admitted that it might have been better if the policy had expressly shown that the object was to indem-

(*q*) Carruthers *v.* Sheddon (1815), 6 Taunt. 14; *S. C.*, 1 Marshall, R. 416.

(*r*) The policy, which was intended to cover the interest of plaintiffs, as barge-owners, in the property carried to and fro for hire in their barges for a year, was a common printed form of policy on ship and goods, filled up and altered in a very clumsy manner so as to adapt it to the object in view. By it the plaintiffs were insured for twelve months "by canal navigation boats, containing goods, at work between London, Wolverhampton and Birmingham, &c., backwards and forwards, and in any rotation, upon goods, and on the body and tackle, &c., on thirty boats, as per margin." In the valuation clause it was declared that the subject of insurance was agreed between the parties to be "twelve thousand pounds on goods as interest shall appear hereafter."

(*s*) Crowley *v.* Cohen (1832), 3 B. & Ad. 478; *S. P.*, Joyce *v.* Kennard (1871), L. R. 7 Q. B. 78. Cf. Cunard SS. Co. *v.* Marten, [1902] 2 K. B. 624; [1903] 2 K. B. 511, in which Bigham, J., and the Court of Appeal held that an insurance by shipowners "against liability of any kind to owners of cargo up to 20,000*l.*" was not an insurance on the cargo, but a contract to indemnify them in full to the amount of 20,000*l.* in respect of their liability as carriers. These cases were distinguished by Sankey, J., in Holman *v.* Merchants' Mar. Ins. Co., [1919] 1 K. B. 383, where a policy on "increased value" effected with the object of protecting the shipowner against claims for salvage, general average, &c., based on a value of his vessel in excess of that declared in his hull and machinery policies, was held to be a policy on the ship itself and not against the shipowner's liability.

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nify the plaintiffs as carriers, were yet unanimously of opinion that it was sufficient in its present form, on the ground that it is only necessary to state accurately the subject-matter, not the interest which the assured has in it (*t*).

The rule in the United States is to the same effect.

The decisions upon this subject in the United States go to the full extent of the English law (*u*).

The nature of the interest need not be described though it affects the risk.

252a. There is some authority for saying that where the peculiar nature of the interest increases or alters the character of the risk, the nature of the interest should be specified in the policy (*v*); and the rule that bottomry and respondentia loans must be specifically described has, as we have seen, been explained on the ground that the risk is peculiar (*x*).

In view of the unqualified statement in sect. 26 (2) (*y*), that the interest of the assured need not be specified, the principle that the peculiar nature of the interest may require to be stated in the policy cannot now be accepted as law. Nevertheless, it is apprehended that where the risk is of an exceptional kind, the insurer may be entitled to avoid the insurance, if the nature of the interest has not been disclosed to him (*z*).

Except by usage, as

On the ground of usage it will apparently still be neces-

(*t*) In Joyce *v.* Kennard, *supra*, the fact that the insurance was of a carrier's interest was specifically stated in the policy.

(*u*) See the cases collected, 1 Phillips, Ins. ss. 419 *et seq.*

(*v*) See per Blackburn, J., in Mackenzie *v.* Whitworth (1875), 1 Ex. D. 36, 42. See also per Lord Ellenborough in Routh *v.* Thompson (1809), 11 East, 428, 433.

(*x*) See *ante*, § 243. When the Marine Insurance Bill left the House of Lords, sub-sect. 2 of sect. 26 contained a proviso that when an insurance is effected by a lender on bottomry or respondentia, the nature of his interest must be specified. The sub-section was amended in the House of Commons by omitting the proviso, and adding the words "but when the interest is of such a kind as to affect the character of the risk it must be stated; and in particular a loan on bottomry or respondentia is not effectually insured by a policy on ship or goods, unless the nature of the interest is stated." The amendment was not accepted by the House of Lords, but the proviso was not restored.

(*y*) Ante, § 251.

(*z*) See *post*, Part II., Chap. II., "Concealment."

sary, by reason of sect. 26 (4), to insure bottomry and respondentia loans specifically (*a*).

Sect. 252a. in policies on bottomry and respondentia loans.

Policy applies to interest intended by assured to be covered. Mar. Ins. Act, s. 26 (3).

252b. There is a difficulty in construing sect. 26 (3) of the Marine Insurance Act, 1906, which says that "where the policy designates the subject-matter insured in general terms, it must be construed to apply to the interest intended by the assured to be covered." The difficulty is to give a precise meaning to the word "interest" in this vague proposition. It may be suggested that "interest" is in this sub-section equivalent to "subject-matter." To construe "interest" as simply denoting "subject-matter" is, however, to give a forced meaning to the word, to suppose that Parliament, though using in the same sub-section two different expressions, yet meant the same thing by both of them (*b*), and involves a proposition which could not formerly have been maintained. For instance, where the assured simply insured "freight," and did not earn the freight which he intended to insure, but completed the voyage and earned freight under another contract of affreightment, it was held that the policy applied to the freight which had been earned, although he had not intended to insure it (*c*). The sub-section is founded on a passage in the opinion of Brett, J., in Allison *v.* Bristol Marine Insurance Co. (*d*), and when read in the light of that passage may be construed

(*a*) See Glover *v.* Black (1763), 3 Burr. 1394; 1 Wm. Bl. 399, *ante*, § 243.

(*b*) Dunlop Brothers & Co. *v.* Townend, [1919] 2 K. B. 127. The learned judge (Bailhache, J.) said that "interest" was used in the sub-section in its strict and proper sense, so that where the interest covered might be that of an owner, or of a consignee, or any other person pecuniarily interested, it was a question in each case what interest it was actually intended to cover.

(*c*) See Everth *v.* Smith, *post*, § 1166.

(*d*) (1875), 1 App. Cas. 209, at p. 216. See Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 40. "Wherever the subject-matter of a policy is described in it in general terms," said Brett, J., "it is to be taken to cover the interest which is within its terms, which the assured has at risk, unless the contrary appears to have been the intention of the assured from other parts of the policy, or other proof."

Sect. 252b. to bear the following meaning:—Where the policy designates the subject-matter insured in general terms, it must be construed to apply to the subject-matter described in the policy, so far as the assured has an interest therein which he intended to cover. For such a proposition there is no doubt authority (*e*), but it could not before the Act have been accepted without qualification. Thus, it has been held that a valued policy on freight must be construed as referring to the freight of a full cargo, although the assured intended (but without communicating his intention to the insurers) only to insure the freight of a smaller shipment of goods (*f*). The question may arise whether, by reason of the wide language of the sub-section, the assured will in future be entitled in a similar case to recover the full amount of his valuation (*g*).

In order that this may not be so, it might be necessary to hold that the words "it must be construed to apply to the interest intended by the assured to be covered" do not necessarily mean that the policy is to apply exclusively to such interest, and therefore do not oust the rule that a valuation of freight refers to a full cargo unless the contrary intention is communicated to the insurer.

Another interpretation, based on the context, was recently suggested by Kennedy, L. J. (*h*), viz., that the principal object of the sub-section is to prevent an assured, who has only a limited interest in the subject-matter which is designated by the policy in general terms, from being prejudiced by such generality of designation, provided that the designation is not inappropriate (*i*). The learned Lord Justice

(*e*) See Feise *v.* Aguilar (1811), 3 Taunt. 506; Forbes v. Aspinall (1811), 13 East, 323; Allison *v.* Bristol Mar. Ins. Co. (1875), 1 App. Cas. 209; Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757.

(*f*) Denoon *v.* Home & Colonial Ass. Co. (1872), L. R. 7 C. P. 341.

(*g*) See per Kennedy, L. J., in Reliance Mar. Ins. Co. *v.* Duder, [1913] 1 K. B. 265, 275.

(*h*) The purpose of the section, as appears by the marginal note, said the Lord Justice, is to deal with "designation of subject-matter": *ibid.*

(*i*) *Ibid.* See also Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 42, where it is stated that the sub-section was intended to protect the assured against technical objections to the description of the interest insured.

added that, having regard to the words "interest intended by the assured to be covered," those who introduced the sub-section into the Act may also have had in view the one class of cases in which the "intention" of one of the parties to the contract—*i.e.*, the assured—is under the very terms of the contract matter of inquiry in regard to rights under the contract, viz., the class in which (the insurance having been effected in the common form by insurance brokers "for and in the name and names of all and every other person or persons, &c.") the persons for whose benefit the policy is available have to be ascertained (*j*).

However this may be, a majority in the Court of Appeal have expressed the view that the sub-section does not mean that an insurer is entitled to exclude the assured from the benefit of the insurance of any of the risks which are within the terms expressed in the written policy, by showing that at the time when the insurance was effected, the assured "intended" in his own mind to cover only some of them.

In the case which elicited this opinion, a ship was insured by two policies for a voyage from New South Wales "to port or ports . . . . on the West Coast of South America," and by a later policy, subscribed by the same underwriters for a voyage "at and from Valparaiso and/or port or ports . . . . on the West Coast of South America" to Europe, the "risk to commence from expiration of previous policy." The underwriters effected a policy of re-insurance in which the voyage was described exactly as in the later policy, viz., "at and from Valparaiso and/or port or ports . . . . on the West Coast of South America" to Europe. The ship was chartered to carry a cargo from New South Wales to the West Coast, to be discharged at Valparaiso or at a safe port

(*j*) See *ante*, § 172. An objection to this interpretation is that the sub-section states a general rule, not a rule for the construction of a particular clause in the policy, the appropriate place for which would have been the First Schedule of the Act.

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as ordered. She discharged a portion at Valparaiso, and then, by arrangement with the charterers, proceeded with the rest of the cargo on board towards Tocopilla, another West Coast port, where she was to complete her discharge and load a cargo under another charter-party for a European port. She was lost on the way to Tocopilla, and it was held that the shipowners were entitled to recover for the loss on the policies for the voyage from New South Wales (*k*). The underwriters then sued on the policy of re-insurance, and were met by the defence that they only intended to re-insure their risk under the policy from the West Coast to Europe, and could not recover by reason of sect. 26 (3) of the Act. Bray, J., held on the evidence that the defendants had not proved that the intention of the plaintiffs was only to re-insure their liability under the later policy, and that, as the loss had occurred on the voyage described in the policy of re-insurance, the plaintiffs were entitled to recover (*l*). His decision was affirmed on the same grounds by the Court of Appeal (*m*). It was therefore unnecessary for the Court to decide the point of law, with regard to which the meaning of sect. 26 (3) was material; but as this point had been fully discussed, Kennedy, L. J. (in a judgment in which Cozens-Hardy, M. R., concurred), gave his reasons for thinking that the defendants' contention was unsound. The learned Lord Justice referred to the fundamental rule that where a contract has a plain natural meaning, it is not permissible to alter its effect according

(*k*) Kynance SS. Co. *v.* Young (1911), 16 Com. Cas. 123. This action was on another but similar policy for the voyage from New South Wales to the West Coast. The point was taken by the underwriters that at the time when the policy was effected the shipowners only contemplated a discharge at one port, and that the general words in the policy describing the voyage must be limited by their intention at such time (p. 130). Scrutton, J., held that the assured did not mean to shut himself out from varying the charter-party in its mode of performance. See his remarks (p. 131) as to the suggested limitation of general words in the policy by the intention of the parties.

(*l*) Reliance Marine Ins. Co. *v.* Duder (1911), 17 Com. Cas. 24.

(*m*) *Ibid.* p. 227; [1913] 1 K. B. 265 (Buckley, L. J., doubting).

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to the intention of one of the two contracting parties, or to adduce evidence in order to show such intention; and, as we have already said, his view was that the sub-section does not enable the underwriter to assert that the assured did not intend to cover a risk which is within the terms of the policy. In another action, however, which was subsequently brought in respect of the same voyage, where the re-insurance policy sued upon made it clear that the intention was in fact to cover the homeward voyage from Valparaiso and not the cross-voyage from New South Wales, it was held by Sankey, J., that the re-insurer was not liable, also that evidence extrinsic to the policy was admissible to identify the policy which was being re-insured and to show that the intention was to re-insure the homeward voyage, such intention having been communicated to the defendant (*n*).

(*n*) Janson *v.* Poole (1915), 84 L. J. K. B. 1573.

CHAPTER XII.

OF THE INTEREST THAT GIVES A TITLE TO INSURE; *i.e.*, INSURABLE INTEREST.

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Of insurable interest generally.

253. THE definition of the contract of marine insurance in sect. 1 of the Marine Insurance Act, 1906, viz., a contract whereby the insurer undertakes to indemnify the assured against marine losses (*a*), embodies the principle that it is a contract of indemnity. It is obvious that a contract which purports to provide an indemnity for the assured against loss becomes, when perverted to the purposes of one who has no interest in the subject insured in respect of which he can suffer loss, nothing better than a bet or wager upon the event of the voyage or adventure described in the policy. Such policies, with no interest to justify the assured in

(*a*) See *ante*, § 1.

making them, came into frequent use in the reign of Charles the Second, and in the time of Queen Anne our Courts of Justice unfortunately pronounced them to be valid and legal. An Act of Parliament (19 Geo. 2, c. 37) afterwards declared them illegal in respect of British ships and their cargoes, and thus reduced the policy once more to a contract of indemnity; and now by sect. 4 of the Marine Insurance Act, 1906, a contract of marine insurance is void where the assured has no insurable interest, and enters into the contract without any expectation of acquiring one (*b*).

Description of insurable interest.

254. It is very difficult to give any definition of an insurable interest, and the Marine Insurance Act, 1906, does not purport to do so exhaustively. Sect. 5 deals with it in the following terms:—

> (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure (*c*).
>
> (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

Therefore, in order to have an insurable interest, it is not necessary to have an absolute vested ownership or property in that which is insured: it is sufficient to have a right in the thing insured, or to have a right or be under a liability arising out of some contract relating to the thing insured, of such a nature that the party insuring may have benefit from its preservation, or prejudice from its destruction (*d*).

(*b*) See *post*, § 314. By sect. 92 of the Act, the statute of 19 Geo. 2 is repealed.

(*c*) For the meaning of "marine adventure," see s. 3 of the Act, *ante*, § 1.

(*d*) See the *dicta* of Lawrence, J., in Lucena *v.* Craufurd (1806),

Sect. 254. Lawrence, J., in Lucena v. Craufurd.

An insurable interest is thus described by a Judge of the highest legal reputation:—"A man," says Lawrence, J., "is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest derivable from it may be very different. Of the first the price is generally the measure; but by interest in a thing, every benefit and advantage arising out of or depending on such thing may be considered as being comprehended" (*e*).

Ownership of a thing may

255. The plainest instance of an insurable interest is the

2 B. & P. N. R. 302; and of Lord Eldon, *ibid.* 321; Crowley *v.* Cohen (1832), 3 B. & Ad. 478. For a possible exception in the case of captors to the rule that an insurable interest depends on some right relating to the thing insured, see *post*, §§ 301—303.

(*e*) Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 269, 302; see also the same learned Judge's decision in Barclay *v.* Cousins (1802), 2 East, 544; also 1 Marshall, Ins. 101, 102; 1 Phillips, Ins. ss. 172 *et seq.*; 3 Kent, Com. 276, 277. It may be remarked that some of these observations of Lawrence, J., are more applicable to insurances on tangible objects than to insurances on such subjects as disbursements or commissions. It may also be remarked that the statement, that benefit from the existence of a thing, or prejudice from its destruction, gives an insurable interest, can probably only be accepted with the limitation that there must be some legal relation between the assured and the thing insured. See *post*, §§ 257, 257a.

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ownership of a chattel. The variety of ways in which this ownership may be modified suggests, again, the various questions, some of them of considerable nicety, by which the inquiry as to the insurable interest of the assured may be perplexed. The chattel owned may be held in trust; or may be subjected to incumbrances, such as mortgages and liens; or to rights in other persons, as by deed of demise or contract of charter-party; or it may be sold under a reservation of rights or liabilities in the vendor; or may be possessed so conditionally (*f*) as to be liable to defeasance at the will of another; or to seizure for a forfeiture incurred before the voyage described in the policy (*g*). In all these instances an insurable interest undoubtedly exists, and independent insurable interests may co-exist in several persons at the same time; but whether under certain circumstances an insurable interest does exist in a particular person may be a somewhat difficult question.

Defeasible or contingent interest is insurable. Mar. Ins. Act, s. 7.

255a. Sect. 7 of the Marine Insurance Act, 1906, declares that—

> (1) A defeasible interest is insurable, as also is a contingent interest.
>
> (2) In particular where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise (*h*).

Sub-sect. (2) is an example of an interest defeasible by the act of the assured (*i*). Another instance of a defeasible

(*f*) Per Lord Ellenborough, Stirling *v.* Vaughan (1809), 11 East, 619, 629.

(*g*) Wilkes *v.* People's Fire Ins. Co. (1859), 19 N. Y. 184; 1 Phillips, s. 195; per Lord Eldon, Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 319, 320.

(*h*) See Sparkes *v.* Marshall (1836), 2 Bing. N. C. 761, and the remarks of Lord Chelmsford and Lord Hatherley on this case in Anderson *v.* Morice (1876), 1 App. Cas. 713, 727, 735; Colonial Ins. Co. of New Zealand *v.* Adelaide Mar. Ins. Co. (1886), 12 App. Cas. 128, 140.

(*i*) See Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 16.

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interest is the right of captors to their prize under the Prize Acts, which was held to be an insurable interest before condemnation, though defeasible before that event by the release of the Crown, or by sentence of restoration (*k*). It is difficult to say precisely what is covered by the term "contingent interest." The expression occurs in the opinion of seven judges in Lucena *v.* Craufurd, and they seem, from a preceding remark, to have considered the interest of a captor a contingent one (*l*). It may be suggested that a liability gives rise to a contingent interest (*m*), and that such expectancies and inchoate rights as are insurable (*n*) may also be regarded as contingent interests.

Vested interest in possession not necessary.

256. A vested interest in possession is not necessary to give the right of insuring. An expectancy, coupled with a present existing title to that out of which the expectancy arises, is an insurable interest. Inchoate rights founded on titles subsisting at the time of loss are insurable interests: thus freight, payable either on the arrival of the goods or under a charter-party, is insurable by the shipowner, provided his title to the freight has accrued, so that only the intervention of the maritime perils will in the ordinary course prevent him from earning it. Thus, again, profits expected to arise out of the sale or disposal of the goods on their arrival are insurable by the owner of the goods, provided that but for the perils of the voyage a profit will be made

(*k*) See Lucena *v.* Craufurd (1806), 2 B. & P. N. R. at p. 295; Stirling *v.* Vaughan (1809), 11 East, 619, 628. The insurable interest which Walton, J., held in Moran *v.* Uzielli, [1905] 2 K. B. 555, to result from the right to bring an action *in rem* against a ship, is defeasible by the sale of the ship; see The Henrich Björn (1886), 11 App. Cas. 270.

(*l*) See Lucena *v.* Craufurd, *ubi sup.*

(*m*) See Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 16, where it is said that re-insurance is a good example of a contingent interest. It seems, however, unnecessary, in view of s. 5 (2) of the Mar. Ins. Act (*ante*, § 254), to consider whether the interest arising from a liability is a contingent one, and re-insurance is specifically dealt with in s. 9 of the Act (*post*, § 322).

(*n*) *See infra*, § 256.

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on them. Again, commissions the earning of which will be prevented only by the perils of the voyage are insurable, though there is generally a total absence of ownership of the chattel from which the commissions are derivable. In fact, every kind of interest that may subsist in, and be dependent upon, things exposed to the dangers to which mercantile adventures are subjected may be protected by a policy of insurance effected on account and for the benefit of those who are so far interested in the things thus exposed to sea risks as to have a benefit from their preservation, or damage from their destruction (*o*).

The expectation of an expectation is not an insurable interest.

257. But although a vested interest in possession is not necessary to entitle a party to insure on his own account, yet where the interest insured is the expectancy of benefit to arise out of the safe arrival of some subject of insurance, a title to such subject must be subsisting in the assured at the time of loss to enable him to recover (*p*). The expectation of benefit to arise from some subject in which the party insuring is not actually interested, but only expects to be interested, is the mere expectation of an expectation, and is not an insurable interest. Such would be the expectation of commissions to arise out of the sale and disposal of a homeward cargo not contracted for at the time of the ship's loss (*q*). So also the expectation of profit to arise out of the sale of goods which have neither vested nor will vest on arrival in the party insuring, under any legal contract, is not an insurable interest (*r*).

Expectation of profit on goods.

Insurable interest

A liability in case of the loss of a thing gives an insurable interest in the thing to the person on whom the liability

(*o*) See the opinions of the Judges generally, and of Lawrence, J., in particular, on the fifth question submitted to them by the House of Lords in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 289—310.

(*p*) This is the original text; but it would be more correct to say "yet where the interest insured is the expectancy of benefit to arise out of the safe arrival of some insurable property, some legal right in relation to such property must be subsisting," &c. For a possible exception to this principle, see *post*, §§ 301—303. See also Moran *v.* Uzielli, [1905] 2 K. B. 555, and the remarks on that case, *infra*, § 257a.

(*q*) See Buchanan *v.* Faber (1899), 4 Com. Cas. 223.

(*r*) Stockdale *v.* Dunlop (1840), 6 M. & W. 224.

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rests (*s*). Thus, the liability of carriers or of insurers to compensate or indemnify in respect of losses affecting property carried or insured by them is an interest in the property which is insurable (*t*).

Does the right to arrest insurable property give an interest?

257a. There is a decision of Walton, J. (*u*), which does not agree with the statement that when the interest insured is the expectancy of benefit to arise out of the safe arrival of some subject of insurance, the assured, in order to recover, must have a title to such subject at the time of loss, or some legal right in relation thereto. The agents in the United Kingdom of a foreign ship effected an insurance for a voyage of the ship from Vancouver to any ports in the United Kingdom "on disbursements." At the date of the policy the owners of the ship were largely indebted to them for advances in respect of necessary ship's disbursements; and the learned Judge held that the agents, having an existing right to enforce their claim for such advances in respect of necessaries supplied to the ship, by an action *in rem*, and in such an action to arrest the ship (*x*), had an insurable interest in the ship to the extent of such advances. It is clear that if the assured had gained a lien on the ship they would, to the extent thereof, have had an insurable interest. It is, however, submitted that the circumstance that a person will, if he takes legal proceedings, obtain a lien on insurable property does not give an insurable interest. If it did, the result would seem to be that every judgment creditor would have an insurable interest in all the property of his debtor which was capable of being taken in execution. The decision of the learned Judge does not obtain

(*s*) Mar. Ins. Act, 1906, s. 3, (2) (c), *ante*, § 1; s. 5 (2), *ante*, § 254.

(*t*) Crowley *v.* Cohen (1832), 3 B. & Ad. 478; Mackenzie *v.* Whitworth (1875), 1 Ex. D. 36. So the liability of captors to pay costs and charges if they had taken possession improperly, and also their liability to render back property which should turn out to be neutral: per Lord Eldon in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 323.

(*u*) Moran *v.* Uzielli, [1905] 2 K. B. 555.

(*x*) This "existing right" would cease if the ship were sold to a *bonâ fide* purchaser: see The Henrich Björn (1886), 11 App. Cas. 270.

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any support from the definition of an insurable interest in sect. 5 of the Marine Insurance Act, 1906 (*y*); for it can hardly be maintained that a person who, if he begins an action *in rem*, will have a right to arrest insurable property, stands thereby in any "legal or equitable relation" to the property. It is true that the definition in sect. 5 does not profess to be exhaustive; but the proposition that the possibility of obtaining a lien upon property is a right which gives an insurable interest, seems to the editors unduly to extend the legal conception of an insurable interest (*z*).

When the interest must attach.

258. With regard to the time when the interest must attach, sect. 6 of the Marine Insurance Act, 1906, lays down the following rules:—

> (1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:
>
> Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss and the insurer was not.
>
> (2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss (*a*).

The interest must be

Formerly the rule was laid down to be that the assured,

(*y*) *Ante*, § 254.

(*z*) The learned judge adopts the view that the definition of insurable interest has been continually expanding: [1905] 2 K. B. 563, citing Chalmers & Owen, Mar. Ins. Dig. 2nd ed. p. 11. In the United States it has been decided that advances for repairs of a ship give no insurable interest, unless when secured by a lien: see *post*, § 310. It has also been held there that a general creditor has no insurable interest in the property of his debtor: Vancouver Nat. Bank. *v.* Law, &c. Ins. Co. (1907), 153 Fed. R. 440.

(*a*) Anderson *v.* Morice (1875—6), L. R. 10 C. P. 609, 620, 623; 1 App. Cas. 713, 726, 733, 749. In this case the assured bought a cargo of rice under a contract by which the property did not pass until the whole cargo was shipped. The ship was lost with part of the cargo on board, and it was held that the assured, who afterwards paid for the lost cargo, could not recover from the underwriters: see *post*, § 283.

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subsisting at the time of loss.

besides being interested at the time of the loss, must also be interested at the time of effecting the policy (*b*); but it is now established that an insurable interest subsisting at the time of loss is sufficient (*c*); indeed, it is every day's practice to effect insurances in which the allegation of interest at the time of effecting the policy could not be made with any degree of truth, as, for instance, where goods are insured on a return voyage long before they are bought (*d*).

It must, however, be proved in all cases, that the party for whose benefit the policy was made was interested in the subject of insurance at the time of loss. Where, therefore, interest being averred in three part owners of a ship, it appeared that one of them had, before the loss, parted with his share to one of the other part owners, it was held that there was no right of action in the three jointly (*e*). If, however, the party in whom interest is averred has parted with his interest after the loss, the underwriter cannot, on that ground, resist his claim on the policy (*f*).

Loss before interest acquired may be recoverable.

259. As the proviso to sect. 6 (1) of the Marine Insurance Act, 1906, shows, the rule that the party insuring must be interested at the time of loss does not apply to a policy containing the "lost or not lost" clause, so as to preclude a party who has become interested after the loss from recovering for loss which occurred before his interest commenced, when the loss in question falls on him (*g*). If, however, the assured effects an insurance with knowledge of a loss and without

(*b*) Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 295; see also Marsh *v.* Robinson (1804), 4 Esp. 98.

(*c*) Arnould stated that the interest must also be subsisting "during the risk," but the editors submitted in the seventh edition that the words "during the risk" were superfluous; for, to enable the assured to recover, the loss must have been during the risk—*i.e.*, within the limits of place or time prescribed in the policy; and it is surely immaterial whether the interest came into existence at the moment of the loss or at some time before. Their view is confirmed by the language of sect. 6 (1).

(*d*) Rhind *v.* Wilkinson (1810), 2 Taunt. 237.

(*e*) Powles *v.* Innes (1843), 11 M. & W. 10.

(*f*) Sparkes *v.* Marshall (1836), 2 Bing. N. C. 776.

(*g*) Sutherland *v.* Pratt (1843), 11 M. & W. 296.

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disclosing his information to the underwriter, the latter, if at that time ignorant of the loss, can avoid the policy (*h*).

A partial interest may be insured.

259a. Sect. 8 of the Marine Insurance Act, 1906, declares that—"A partial interest of any nature is insurable."

The term "partial interest" may be construed as meaning an undivided or "hotchpot" interest in the subject-matter insured (*i*), *e.g.*, the interest of a part owner (whether joint tenant or tenant in common) of insurable property (*k*), or the interest of one of a body of adventurers in their common adventure (*l*). It may also be construed more widely so as to cover other interests which do not extend to the full value of the subject-matter insured, *e.g.*, the interest of a party having a mortgage or lien on insurable property, in respect of the amount of his lien (*m*).

The power to abandon, a suggested test of insurable interest.

260. The power to abandon has been suggested as a test of an insurable interest; but it is not a certain criterion, as there are insurable interests in things which from their nature are incapable of abandonment, as profits, disbursements, bottomry, and respondentia (*n*). If, however, the nature of the subject admits of abandonment, an incapacity to abandon certainly shows a want of insurable interest in the subject of insurance at the time of the loss; for an abandonment is nothing else than a divesting out of the assured of all the interest he had in the thing insured at the moment of the loss, on condition of his being paid by the underwriters the whole amount of the insurance (*o*).

(*h*) See *post*, §§ 575, 609.

(*i*) See Robertson *v.* Hamilton (1811), 14 East, 522; Inglis *v.* Stock (1885), 10 App. Cas. 263, 274, *post*, § 284.

(*k*) Thus, the registered owner of one or more sixty-fourth shares in a ship, who is a tenant in common of the ship with the owners of the other shares, can protect his interest by a separate insurance.

(*l*) Wilson *v.* Jones (1867), L. R. 2 Ex. 139.

(*m*) See *post*, §§ 292, 298.

(*n*) See the opinions of the judges generally, and of Lawrence, J., in particular, on the fifth question submitted to them by the House of Lords in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 289—310; see also the opinion of Lord Eldon, *ibid.* 315—327.

(*o*) See the observations of Lawrence, J., in Lucena *v.* Craufurd

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Interest must be directly liable to the perils insured against.

An interest, in order to be insurable against particular perils, must be such as to be immediately, and not only by way of consequence, affected by those perils. Thus, if profits, by evidence of the state of the market, would have been secured but for the loss of the goods on the voyage, commissions but for the same calamity, freight but for the disabling of the ship by the perils of the sea, they are insurable. A person, however, who advances money in this country to a British shipowner for the repair of his ship acquires thereby no insurable interest, unless the money be secured by some such legal interest in the vessel as a mortgage, or bottomry lien, and yet the loss of the ship may by way of consequence involve the loss of the money (*p*).

Insurable interest of shipowner and charterer in ship.

261. The owner has in all cases an insurable interest in the ship. Even where he lets her out under a contract of affreightment to a charterer who covenants, in case of loss, to pay him her full value, he has a right to insure to the full amount; for he is not bound to trust exclusively to the credit of the charterer (*q*). The charterer also has, in such case, an insurable interest in the ship to the full extent of his liability. Thus, in the United States, where the owner of one-half of a schooner hired the other half, with a covenant that, in case of her being lost within the terms of the charter-party, he would pay the other part owner the value of his moiety, he was held to have an insurable interest to the full value of the ship (*r*).

Shipowner's interest in freight.

262. Generally speaking, the shipowner alone has an insurable interest in freight, whether by that word be meant

(1806), 2 B. & P. N. R. 312; and Conway *v.* Gray (1809), 10 East, 536, where the want of power to abandon, and the absence of insurable interest in goods, are apparently treated as resting on the same ground.

(*p*) For a further illustration of the principle under consideration, see Wilson *v.* Jones (1863), L. R. 1 Ex. 193; in the Ex. Ch. (1867), L. R. 2 Ex. 139; *post*, § 307. As regards advances to the owner of a foreign ship, see Moran *v.* Uzielli, [1905] 2 K. B. 555, *ante*, § 257a.

(*q*) Hobbs *v.* Hannam (1811), 3 Camp. 93.

(*r*) Oliver *v.* Greene (1807), 3 Mass. R. 133; cited 1 Phillips, s. 325.

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freight properly so called, or the chartered hire of his ship (*s*).

Charterer's interest in freight.

In some cases, however, the charterer may have an insurable interest in freight. Where he relets the ship, or puts her up as a general ship for the transport of other people's goods on freight, there seems no doubt that, as he stands, *pro hâc vice*, in the position of a shipowner, he has an insurable interest in the freight (*t*) he so expects to earn (*u*). Moreover, as the shipowner has an insurable interest in the benefit which he expects to derive, or the profit he expects to make, by carrying his own goods in his own ship, and may protect this interest by an insurance on freight (*x*), there is no reason why the charterer, when he stands in the same position, may not do the same (*y*).

(*s*) As to insurances by cargo-owners on "contingency freight," see *ante*, § 232.

(*t*) The American case of Mellen *v.* National Ins. Co. (1829), 1 Hall, 452, cited 1 Phillips, Ins. ss. 337, 480, decided that a charterer could not insure his interest under the description of freight; but it appears wrongly decided. See the observations of Phillips, vol. i. s. 480. In United States Shipping Co. *v.* Empress Ass. Co., [1907] 1 K. B. 259, it was not disputed that the charterer could insure his interest as freight.

(*u*) Arnould added (2nd ed. vol. i. p. 311): "At all events, for the surplus by which such freight exceeds the sum he has engaged to pay the shipowner as charter-money." This qualification agrees with Phillips' opinion, if it means that where by the operation of the same peril the charterer loses the freight which he would otherwise receive, and is discharged from his liability to pay freight to the shipowner, he is, on the principle of indemnity, only entitled to recover such surplus. See 1 Phillips, s. 337; see also 1 Parsons, 175. In U. S. Shipping Co. *v.* Empress Ass. Co., *supra*, Channell, J., held, however, that a charterer was entitled on a policy on freight to recover the gross freight which he would have received under a sub-charter, without deducting the hire which he would have had to pay to the shipowner. The decision was affirmed on a question of fact, [1908] 1 K. B. 115. See also Mar. Ins. Act, 1906, s. 16 (2), *infra*, § 365, where it is stated in general terms that in insurance on freight the insurable value is the gross amount of the freight at the risk of the assured.

(*x*) Flint *v.* Flemyng (1830), 1 B. & Ad. 45; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519. See Mar. Ins. Act, 1906, Sched. I. rule 16, *ante*, § 229.

(*y*) The contrary was held in the American case of Mellen *v.* National Ins. Co. (1829), above cited: but the case of Flint *v.* Flemyng was not adverted to.

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A charterer who wishes only to insure the surplus of the freight which he expects to receive over the freight which he will have to pay, can do so by a policy on "profits on charter," or "difference of freight" (*z*).

Owner who sells his ship, reserving right to the freight.

The vendor of a ship who reserves his right to the freight being earned at the time is in a similar situation to a charterer who takes goods on freight, and ought, therefore, to have an insurable interest in such freight (*a*).

Charterer's interest in dead freight.

A charterer who agrees to pay dead freight, in case the ship be prevented by political or other circumstances from discharging her outward, or shipping her return, cargo, has an insurable interest to the same extent, and may protect himself by a policy properly framed to cover his liability under the terms of the charter-party (*b*). The risk insured against in this case was the contingent determination of the adventure by the foreign government at the port of discharge, and it was insured for the charterer; the shipowner might also have insured his interest in the freight under a common policy against ordinary risks (*c*).

Advance freight.

263. Sect. 12 of the Marine Insurance Act, 1906, declares that—

> "In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss."

Charterer's interest in advances on freight.

A charterer who advances money under the terms of the charter-party in part payment of the freight has, therefore, an insurable interest in the money so advanced; for as such money cannot, in case of the loss of the ship or cargo, be recovered back, the loss of the ship or cargo involves the loss

(*z*) See *ante*, § 239.

(*a*) The contrary has been decided in the United States (Riley *v.* Delafield (1811), 7 Johns R. 522); but this decision, as Phillips has ably pointed out, does not rest on satisfactory grounds. See 1 Phillips, Ins. s. 480.

(*b*) Puller *v.* Staniforth (1809), 11 East, 232; see also Puller *v.* Glover (1810), 12 East, 124; Puller *v.* Halliday (1810), 12 East, 494.

(*c*) See the observations in 1 Phillips, Ins. s. 336.

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of the benefit which the charterer expected to derive from the payment (*d*). But in order to give him such an insurable interest it must appear, by fair and reasonable inference from the words in the charter-party, that the money advanced is an advance in part payment of the freight.

When, as is usually the case, the advance is made under a stipulation in the charter-party, the question whether the advance is a mere loan to the shipowner to be repaid in any event, and therefore not insurable by the charterer, or whether it is an advance in part payment of freight, which the charterer therefore can insure, depends on the construction of the charter-party alone. An advance which is not stipulated for in a charter-party will be treated as made on account of freight if it clearly appears, from the transaction between the parties, that this was their intention (*e*).

As soon as the advance freight becomes due, the charterer's insurable interest therein commences; for even though a loss should take place before any payment has been made, the charterer is liable to pay the advance freight (*f*).

When an advance is part payment of freight.

264. No rule can be laid down to determine generally when an advance is a part payment of freight. When the question is one of the construction of the charter-party, such construction should not depend "on strict grammatical form, or on the apparent meaning of any one phrase in (the charter-party) taken by itself, but on the apparent expressed meaning, as to practical results, of the whole. It should be construed by considering the terms of it, and the decisions in former cases of terms similar, though perhaps not identical" (*g*).

(*d*) Anonymous case, 2 Shower, 283; De Silvale *v.* Kendall (1815), 4 M. & S. 37; per Bayley, J., in Manfield *v.* Maitland (1821), 4 B. & Ald. 582, 585; and the discussion in Allison *v.* Bristol Mar. Ins. Co. (1876), 1 App. Cas. 209.

(*e*) Per Brett, J., Allison *v.* Bristol Marine Ins. Co. (1876), 1 App. Cas. 209, 217; Wilson *v.* Martin (1856), 11 Exch. 684; 25 L. J. Ex. 217; The Karnak (1869), L. R. 2 P. C. 505, 514.

(*f*) See per Lord Esher in Smith *v.* Pyman, [1891] 1 Q. B. 742, 744; Oriental SS. Co. *v.* Tyler, [1893] 2 Q. B. 518 (C. A.).

(*g*) Per Brett, J., *ubi supra*. On the question, when an advance

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The following cases are instructive examples:—

Cases on the point.

De Silvale v. Kendall.

The covenant as to payment of freight in a charter-party on a ship bound from Liverpool to Maranham and back, was to the following effect:—"Such freight to be paid as follows, viz., 120*l*. British sterling for freight of the outward cargo to Maranham, and as much cash as may be found necessary for the ship's disbursements at Maranham, to be advanced by the charterer or his agents to the master when required, free from interest or commission, &c., and the residue of such freight to be paid on the delivery of the cargo in Liverpool," &c.: Lord Ellenborough and the Court of King's Bench held, that under the special terms of this charter-party the money advanced must be held to have been advanced specifically on account of freight, and therefore, upon the loss of the ship before any freight earned, could not be recovered back by the charterer from the owner as money had and received (*h*). "In this case," as Lord Tenterden remarks, "the instrument was studiously framed so as to make the freighter lose the money advanced by him unless the owner reaped the benefit by the ship's coming home safe" (*i*).

Manfield v. Maitland.

Where, however, the charter-party did not on the face of it clearly and distinctly import that the sum advanced was a payment on account of freight, but merely contained the words, "The captain to be supplied with cash for the ship's use," the Court held, that the charterer had no insurable interest in bills of exchange drawn on him by the master in respect of cash so supplied, it not appearing by the charter-

is held to be on account of freight, see, in addition to the cases cited *supra*, Hicks *v.* Shield (1857), 7 E. & B. 633; 26 L. J. Q. B. 205; Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757; Byrne *v.* Schiller (1870, 1871), L. R. 6 Ex. 20, 319; 40 L. J. Ex. 177; Watson *v.* Shankland (1873), L. R. 2 H. L. (Sc.) 304; The Red Sea, C. A., [1896] P. 20; Weir *v.* Girvin, [1900] 1 K. B. 45; Carver, ss. 564—566.

(*h*) De Silvale *v.* Kendall (1815), 4 M. & S. 37. Lord Ellenborough and Dampier, J., lay some stress upon the words "free from interest and commission," as showing that the money advanced was not intended to be a loan.

(*i*) Per Abbott, C. J., in 4 B. & Ald. 585.

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party to be advanced as a part payment of freight (*j*). But where the freighters of a general ship paid her disbursements abroad, and by the request of the owners took the captain's bill, drawn against freight, on the consignees of the cargo in this country, in discharge of such disbursements, it was held, that as the freighters had agreed to advance on credit of the freight, which was distinctly pledged by the captain's bill, they had an insurable interest in freight, and might recover on a policy describing their interest as "an advance on account of freight" (*k*).

Wilson v. Martin.

By a charter-party the freighters were to pay, for the use of the ship "for the voyage, 10,000 dollars in manner following:—viz., in China, all the sums that might be necessary for the payment of port charges and other incidental expenses (the latter not to exceed 2,000 dollars), and the balance at thirty days after the ship's return to the port at Buenos Ayres": and Lord Tenterden admitted that the freighters had an insurable interest in payments made under this stipulation by their agents at Canton in respect of port charges and incidental expenses, and that they might insure such payments as "money paid for shipment of goods to be transported to Buenos Ayres" (*l*).

Winter v. Haldimand.

Effect of term "subject to insurance."

A stipulation in the charter-party that an advance is "subject to insurance," or subject to a deduction on account of insurance, is sufficient to show that it is a payment on account of freight, and not a mere loan (*m*). The term "subject to insurance" does not imply any liability on the part of the shipowner to insure on behalf of the charterer,

(*j*) Manfield *v.* Maitland (1821), 4 B. & Ald. 582; see also Saunders *v.* Drew (1832), 3 B. & Ad. 445.

(*k*) Wilson *v.* Martin (1856), 11 Exch. 684; *S. C.*, 25 L. J. Exch. 217.

(*l*) Winter *v.* Haldimand (1831), 2 B. & Ad. 649. The dicta of Lord Tenterden above referred to are in pp. 653, 658 of the report. See, however, *ante*, § 233.

(*m*) Hicks *v.* Shield (1857), 7 E. & B. 633; 26 L. J. Q. B. 205; accord. The Karnak (1869), L. R. 2 P. C. 505, 514; Allison *v.* Bristol Marine Ins. Co. (1876), 1 App. Cas. 209, 222, 229, 234.

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but only that a sum equal to the premium is to be allowed to the latter, who can insure if he chooses (*n*).

Where advance freight was only payable "if required," it was considered by the Court of Appeal that the charterer could have no insurable interest therein until he should become liable to pay it, and that there could be no such liability until after a requirement had been made (*o*).

Insurable interest in freight usually confounded with duration of risk.

265. We will now consider when the insurable interest of the shipowner (or of the charterer who is in the position of a shipowner) in the freight begins. The question whether the assured on freight has at the time of the loss an insurable interest in the freight is one which is often treated in the cases and text-books in a way which causes a difficulty in distinguishing it from the question of the duration of the risk under a policy on freight. Yet these questions are different ones. Whether there be an insurable interest is a matter independent of the policy. In the absence of an insurable interest, the assured cannot maintain an action, however the policy be worded. If, on the other hand, he had an insurable interest, the question arises whether the loss occurred within the limits of place or time fixed by the policy. Arnould confined himself in this chapter to a statement of general principles, and afterwards discussed at length the question of insurable interest in freight in connection with that of the duration of the risk. The present editors have thought it advisable to deal fully with the question of insurable interest in its proper place, especially as in their opinion the author's statement of the law on the subject was not altogether supported by the authorities.

Arnould's doctrine as to insurable interest in freight.

266. Arnould, in the second edition of this work (*p*), stated the law as to insurable interest in freight in the following terms:—"In order to give an insurable interest on freight, there must be, 1. A title, either legal or equitable, in the party insuring, subsisting at the time of loss, in the subject out of the ownership of which the right to freight accrues, *i.e.*, the ship. 2. There must be, at the time of loss, an inchoate right to the freight; in other words, the position of things must be this, that but for the intervention of the loss freight would have been realized by the party insuring.

(*n*) Watson *v.* Shankland (1873), L. R. 2 H. L. (Sc.) 304; per Manisty, J., Rodocanachi *v.* Milburn (1886), 17 Q. B. D. 316, 321.
(*o*) Smith *v.* Pyman, [1891] 1 Q. B. 742.
(*p*) Vol. i. pp. 287—289.

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"First, then, the party effecting an insurance on freight must have a title in the ship, either legal or equitable, subsisting at the time of loss; 'for the right to freight results from the right of ownership, and if the assured have no title to the ship they have no interest in the freight' (*q*).

"Secondly, at the time of the loss there must be an inchoate right to the freight in the party insuring; in other words, he must be so situated with respect to it as that he would certainly have earned freight but for the intervention of the loss. The principle here is, that where nothing intervenes between the subject insured and the possession of it but the perils insured against, the person so situated may insure the safety of such subject of insurance, for he has an interest to avert the perils insured against (*r*). . . . .

"The word freight, in policies of insurance, means, as we have already had occasion to observe, either, 1. Freight properly so called, *i.e.*, the sum paid to the shipowner for the transport of goods in his ship; or, 2nd. The price agreed to be paid by charter-party for the hire of the ship, which is, strictly speaking, rather to be called charter-money than freight.

"The shipowner's right to freight in the former case does not accrue—in other words, he has no inchoate right to freight—and therefore no insurable interest thereon, unless the goods or a part of them are actually loaded on board the ship before

(*q*) Camden *v.* Anderson (1794), 5 T. R. 709; and see *S. C.* (1796), 6 T. R. 723; (1798), 1 B. & P. 272; see also Marsh *v.* Robinson (1802), 4 Esp. 98.
(*r*) Lucena *v.* Craufurd (in error) (1802), 3 B. & P. 95.

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the loss; 'or are so situated with respect to the ship as to create a well-grounded expectation of freight being realized' (*s*).

"The true proposition, in fact, as far as regards freight properly so called, is this: that, in order to give the shipowner an insurable interest in such freight, he must prove that but for the intervention of the perils insured against some freight would have been earned, either by showing that some of the goods for the transport of which it was to be paid were actually put on board, or that there was some contract for putting them on board, that the ship was ready to receive the goods, and the goods ready to be shipped under such contract, before the loss (*t*).

"On the other hand, where the freight intended to be insured is the price of the hire of the ship under a charter-party, the cases show that the inchoate right to such freight vests in the shipowner directly the ship has broken ground on the voyage described in the charter-party; from that moment nothing can intercept the earning of freight under the terms of the charter-party, except the breaking-up of the voyage by the perils insured against; and, consequently, from that moment the shipowner has an insurable interest in the freight which but for the intervention of such perils he has thus put himself in a position to earn (*u*).

"The shipowner has an insurable interest in the profit he expects to make by carrying his own goods in his own ship, and this interest he may protect by a general policy on freight (*x*).

"The charterer, as we shall see more at large hereafter, has an insurable interest in protecting himself against the liability of having to pay dead freight, under the covenants of a charter-party, to the full amount of the sum he has covenanted so to pay" (*y*).

(*s*) Dictum of Eyre, C. J., in Curling *v.* Long (1797), 1 B. & P. 636.

(*t*) Montgomery *v.* Eggington (1789), 3 T. R. 362; Truscott *v.* Christie (1820), 2 Brod. & B. 320; Parke *v.* Hebson (*circa* 1820), *ibid.* 326; Forbes *v.* Aspinall (1811), 13 East, 331; Flint *v.* Flemyng (1830), 1 B. & Ad. 45; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519.

(*u*) Thompson *v.* Taylor (1795), 6 T. R. 478; Horncastle *v.* Suart (1806), 7 East, 400; Atty *v.* Lindo (1805), 1 B. & P. N. R. 236; Davidson *v.* Willasey (1813), 1 M. & S. 313.

(*x*) Flint *v.* Flemyng (1830), 1 B. & Ad. 45; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519.

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Misleading expressions in relation to insurable interest in freight.

267. We propose to consider in detail the cases cited by Arnould (*z*) on the question when the insurable interest commences. Before doing so, however, we think it advisable to draw attention to certain expressions which have been generally used both by Judges and text-writers, but which in their literal sense bear a meaning which it is safe to say they could not be intended to convey. We refer to such expressions as that the assured must prove that he "would certainly have earned freight but for the intervention of the loss," or that "but for the perils insured against some freight would have been earned," or that "nothing could intercept the earning of the freight under the terms of the charter-party except the breaking-up of the voyage by the perils insured against" (*a*). There need not be a *certainty* that but for the loss freight would have been earned. All that can be required is, that in the ordinary course of things, each party performing his contract, some freight would have been earned (*b*). Thus, if a ship be lost while sailing under the terms of a charter-party to her port of loading, the shipowner

Not necessary that earning of freight would have been certain but for loss.

(*y*) Puller *v.* Staniforth (1809), 11 East, 232.

(*z*) 2nd ed. vol. i. pp. 522—532.

(*a*) *Supra.*

(*b*) Thus, Lawrence, J., says that an insurance may be to protect men against the loss by uncertain events of the advantage or profit which but for such events they would acquire *according to the ordinary and probable course of things.* Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 269, 301. So also, in Davidson *v.* Willasey (1813), 1 M. & S. 313, 317, Le Blanc, J., speaks of "a contract for freight, under which, except for the wrongful act of the party with whom he has contracted, he (the assured) would be in a condition to earn his freight if the voyage were not stopped by a peril insured against." See also per Richardson, J., in Truscott *v.* Christie (1820), 2 Brod. & B. 320, 532. In Rankin *v.* Potter (1873), L. R. 6 H. L. 83, where the claim was for a total loss of freight by perils of the sea, it appeared that the charterer became insolvent after the ship was damaged, but before she was abandoned, and had actually failed to supply a cargo: the House of Lords held, that this did not prevent the assured from recovering. See L. R. 6 H. L. 154, 160, 167.

Sect. 267. has, as will presently appear, an insurable interest in the freight to be earned under the contract; and he can, therefore, recover the consequent loss of freight under a properly worded policy, although if the loss had not taken place he might still have lost the freight through the subsequent insolvency of the charterer, and the latter's inability to provide a cargo or pay dead freight (*e*). Again, the use of the words "perils insured against" in the expressions cited above is obviously incorrect. A more accurate term would be "perils insured against or other perils incident to the voyage." Thus, if the insurance were against capture only, it could not be said that nothing but a capture could intercept the earning of the freight. Yet a loss by capture would none the less be recoverable under the policy.

Insurable interest in freight proper.

268. The insurable interest in freight properly so called (*i.e.*, the price to be paid to the shipowner by the owner of goods on their arrival for their carriage in the ship) will first be considered.

Earliest case, Tonge *v.* Watts.

In the earliest reported case, it was decided by Lee, C. J., that the assured could not recover for the freight of goods ready to be shipped, but not yet loaded on board, at the time of the loss (*d*); but a more liberal rule was established by the later cases.

Montgomery *v.* Eggington.

The first case which extended the rule laid down by Lee, C. J., was Montgomery *v.* Eggington, which established that, where part of the goods were actually on board at the time of the loss, and all were ready to be shipped, the policy attached on the whole freight. The insurance was on freight valued at 1,500*l.*: when only 500*l.* worth of freight was on board, the ship was driven from her moorings and lost, but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose, at the time of the loss. The jury, under the direction of Lord Kenyon, found a verdict for the whole sum, which the

(*c*) Rankin *v.* Potter (1873), L. R. 6 H. L. 83.
(*d*) Tonge *v.* Watts (1746), 2 Str. 1251.

Court of King's Bench, on motion for a new trial, refused to disturb (*e*). Sect. 268.

Parke *v.* Hebson.

The same principle was applied in other cases. Thus, an insurance was effected on the freight of a general ship, which was to complete her lading at a number of different ports, and to be paid freight for the same according to the terms usual in the colonial trade. The ship, after having taken on board part only of her return cargo, was lost at Jamaica, while passing from port to port in that island in order to complete it. It appeared, however, that, although only part of the cargo was shipped at the time of the loss, yet contracts had previously been made for the whole of the residue: upon this evidence plaintiff was allowed to recover for the whole freight (*f*).

Truscott *v.* Christie.

A shipowner insured freight and passage money for a homeward voyage "at and from Madras and all ports and places in the East Indies to the United Kingdom." He had agreed with the government of Madras to carry goods for them on board his ship at certain freight, and also to fit her up with an extra deck, and make other alterations for the purpose of accommodating 200 invalids, whom the company engaged to send home in his ship at a fixed rate of passage money. He had commenced making the alterations, had received on board the greater part of the cargo, and had shipped water for 100 invalids, when, before the alterations were completed, or any of the invalids embarked, the ship was driven from her moorings and totally disabled. The Court held that he was entitled to recover the whole freight for all the goods that were to be shipped under the contract,

(*e*) Montgomery *v.* Eggington (1789), 3 T. R. 362. Lord Kenyon, in Thompson *v.* Taylor (1795), 6 T. R. 482, thus distinguishes this case from that of Tonge *v.* Watts: "In the case in Strange, the inception of the contract would have been the taking of the goods on board; but as the loss happened before the goods were put on board, there was no inception of the contract, and the plaintiff was nonsuited: but in the case of Montgomery *v.* Eggington there was an inception of the contract, because part of the goods had been put on board."

(*f*) Parke *v.* Hebson (*circa* 1820), cited 2 Brod. & B. 326.

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and passage money for as many invalids as his ship would have carried, on the ground that he had a contract for both the freight and the passage money, and that he had begun to execute his part of the contract, the completion of which would have entitled him to his money, and had been prevented by perils of the sea (*g*).

Cases in which the assured recovered though no goods had been shipped.

In these cases some portion of the goods from the carriage of which freight was to arise had been actually shipped on board at the time of the loss; in later cases the assured recovered for the freight for the whole cargo though no part had been shipped, but the whole had been purchased or contracted for at the time of the loss. Thus, where freight was insured for a homeward voyage "at and from the Island of Granada to London," and the ship was lost while she was proceeding from one port of Granada to another, before she had discharged all her outward cargo, and before any of the homeward cargo had been actually shipped on board, but it appeared that a full homeward cargo had been contracted for at the time of the loss, it was not disputed that the risk had attached on the whole freight for the homeward voyage (*h*).

Warre *v.* Miller.

Flint *v.* Flemyng.

So, where freight was insured on a homeward voyage "at and from Madras to London," and the day after the ship had finished discharging her outward cargo at Madras she was totally lost by the perils of the sea, and no part of the homeward cargo was then shipped, but the captain had purchased for the ship a quantity of red wood to be laden on board, and a mercantile house at Madras had also engaged to ship a quantity of saltpetre, the Court held, that the plaintiff was entitled to his full freight for the red wood and saltpetre (*i*).

Devaux *v.* J'Anson.

An insurance was effected on freight "from Calcutta or any port or place on the Coromandel Coast to Bourbon;" the ship, on arrival at Coringa, on the Coromandel Coast, was taken into dry dock for repairs: during which the supercargo purchased, on behalf of the owners, a return cargo to

(*g*) Truscott *v.* Christie (1820), 2 Brod. & B. 320.
(*h*) Warre *v.* Miller (1825), 4 B. & Cr. 538.
(*i*) Flint *v.* Flemyng (1830), 1 B. & Ad. 45. See *post*, § 269.

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Bourbon, which was warehoused at a place seven miles from Coringa, and was there lying ready to be conveyed on board the ship on the day when she was reported ready for sea. On that day she was still in the dock, but on being floated into the river would have been ready to receive her cargo; but in attempting to leave the dock she was so much damaged that she was obliged to be broken up and sold. Under these circumstances, the Court of Common Pleas held, that as the whole of the return cargo was purchased and ready to be put on board at the time of the ship's loss, and as that loss was occasioned by a peril within the policy, the plaintiffs were entitled to recover the full freight on the whole of the return cargo (*k*).

It must be observed that in this case the intended cargo was the property of the shipowners. There could not, therefore, be any contract for its shipment or for the payment of freight for its carriage. Under such circumstances, all that the Court deemed it necessary to determine with regard to the cargo was, that it must have become the property of the parties insured (*l*) by a contract made with a view to its being sent on board, and must actually be in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board when the ship arrived at the place of loading (*m*).

The form of the contract of affreightment is immaterial,

269. As to the contract under which the cargo is to be shipped on board, all that is required is, that it should be valid and binding at law; its form is not material (*n*).

provided there is a binding contract.

It is, however, essential, where the plaintiff seeks to recover the whole freight for a cargo only part of which, or none of which, has been actually loaded on board, that he should prove the existence of some actual binding contract for shipping such cargo.

(*k*) Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519.
(*l*) "Freighters" must be substituted for "parties insured," to make this statement applicable where the shipowner is not the cargo-owner.
(*m*) Devaux *v.* J'Anson (1839), 5 Bing. N. C. 539.
(*n*) Per Lord Ellenborough in Patrick *v.* Eames (1813), 3 Camp. 441.

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Patrick v. Eames.

Thus, under a policy on freight, the ship had sailed from Sierra Leone with the intention of taking in a complete cargo of orchella weed from the Cape de Verd Islands, and was lost when only 150 bags had been shipped on board, and it did not appear that any more orchella weed was then ready to be loaded (*o*), or that any binding contract, whether verbal or otherwise, had been made for supplying it; Lord Ellenborough held, that the plaintiff was only entitled to the freight on the 150 bags actually shipped (*p*). So in the case of Flint *v.* Flemyng, in addition to the red wood which the captain had purchased, and the saltpetre which the mercantile house had formally contracted to put on board, it was proved that a partner in that house had also engaged verbally to ship on board ninety tons of light goods. With regard to these ninety tons, the Court ordered a new trial, because the question was not distinctly submitted to the jury, whether there was any binding contract for shipping those goods (*q*).

Flint v. Flemyng.

Two other cases were cited by Arnould to establish the proposition that the assured cannot recover for a loss of freight unless the ship was at the time of the loss ready to receive the cargo and the cargo ready to be shipped. One was Forbes *v.* Aspinall, in which the facts were as follow.

Forbes v. Aspinall.

A policy was effected on freight valued at 6,500*l.*, for a homeward voyage "at and from any port or ports in Hayti to Liverpool, or the ship's port of discharge in the United

(*o*) It was proved that persons were actually engaged in the different islands in picking and preparing it. See the report.

(*p*) Patrick *v.* Eames (1813), 3 Camp. 441.

(*q*) Flint *v.* Flemyng (1830), 1 B. & Ad. 45. The principle of these cases was applied by Hamilton, J., in Scottish Shire Line, Ld. *v.* London & Provincial Mar. Ins. Co., [1912] 3 K. B. 51. This was an insurance on freight "chartered or as if chartered," and the plaintiffs contended that under the words "as if chartered" they were entitled to recover for a loss of the freight of cargo which the ship was expected to load, but for which there was not a binding contract. "I cannot find," said the learned judge (p. 65), "that the words 'freight, or chartered freight, or freight as if chartered' have ever been applied to the expectation, however well founded, that a ship's agent will procure a cargo for her, where there is no actual binding engagement to that effect."

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Kingdom." There was no charter-party; and the ship, which was a general or seeking ship, sailed from Liverpool to Hayti with a cargo intended for barter. At Jacmel, in Hayti, she bartered away part of her outward cargo, and took in exchange fifty-five bales of cotton as part of her homeward lading. She was proceeding from Jacmel to Aux Cayes, another port in Hayti, to barter away the rest of her outward cargo and complete her lading home, when, with the great bulk of her outward cargo still on board, she was totally lost by the perils of the sea. It did not appear that any goods were ready, or had been contracted for, at Aux Cayes, to be loaded on board the ship at the time of the loss; and the Court held, that the plaintiffs could only recover for a part of the agreed value of the freight in the same proportion as the fifty-five bales bore to a full cargo (*r*). Lord Ellenborough— after distinguishing the case from those in which the freight was secured under a charter-party, and in which, consequently, the risk on the whole freight commenced by the inception of the voyage—went on to show in what the case before the Court differed from Montgomery *v.* Eggington and the other decisions by which that case was supported and confirmed. "There," said his Lordship, "a full cargo was ready to be laden, and the ship in a state ready to receive it; and nothing but the perils insured against did or (as it appears) could prevent its being received; here it was uncertain whether any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed. So that the ship was not ever in a condition to receive her homeward cargo, even if the cargo had been ready, which it never was, to have been put on board."

Lord Ellenborough's judgment.

Arnould, after citing this passage, states (*s*) that the grounds upon which this decision proceeds are:—

1. That, as in this case there was no entire contract for

(*r*) Forbes *v.* Aspinall (1811), 13 East, 323. Forbes *v.* Cowie (1808), 1 Camp. 520, was the same case, only on an open instead of on a valued policy, and the result was the same.

(*s*) 2nd ed. vol. i. p. 531.

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freight under a charter-party for the whole voyage out and home, the right to the whole freight did not accrue by the inception of the outward voyage. 2. That none of the cargo in respect of which freight was claimed was ever ready for the ship. 3. That, even had it been so, the ship at the time of the loss was not in a state of readiness to receive the cargo (*t*).

The real ground of the decision seems, however, to be that, except as to the fifty-five bales on board, there was no contract at the time of the loss under which the shipowner could claim freight. "In a case, therefore, circumstanced as this is," Lord Ellenborough said in conclusion, "where the valuation was with reference to freight upon a *complete* cargo; where a complete cargo, or anything like a complete cargo, never was in fact obtained, and for all that appears never might have been obtained; where there was no contract by any person to load a complete cargo or pay dead freight, but the ship was a mere seeking ship; we cannot feel ourselves warranted in saying that there has been a total loss by any peril insured against of that which the insurance was intended to cover" (*u*).

Williamson *v.* Innes.

The following were the facts in the remaining case. A policy was effected on freight for a homeward voyage "at and from Algoa Bay to London." There was a charter-party. The ship, after she had arrived at Algoa Bay, and had unloaded there all the outward cargo destined for that place that she safely could, was just about commencing to load on board her homeward cargo, which was there lying ready for her, when she was lost by a hurricane. The report of Lord Lyndhurst's ruling merely states that he told the jury that if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover; if not, then the verdict ought to be for the defendants; and the jury found for the plaintiff (*x*).

(*t*) See, as to the ship, per Tindal, C. J., in Devaux *v.* J'Anson (1839), 5 Bing. N. C. 538.

(*u*) 13 East, 331.

(*x*) Williamson *v.* Innes (1831), cited in 8 Bing. 81; see also Warre *v.* Miller (1825), 4 B. & Cr. 538.

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Result of the cases on insurable interest in freight proper.

270. The question must now be considered, whether these cases establish the proposition that the assured on freight, in order to show an insurable interest, must prove that "the ship was ready to receive the goods, and the goods ready to be shipped under the contract" (*y*).

Must the ship be ready to receive the cargo?

First, must the ship be ready to receive the goods? In Parke *v.* Hebson (*z*), the ship, having taken on board part of her cargo, was lost while proceeding to another port to load other goods which had been contracted for. She was certainly not ready to receive those goods, yet the shipowner recovered the freight on them. In Truscott *v.* Christie (*a*), the ship at the time of the loss was being altered to make her able to accommodate 200 invalids. The alterations were not completed, and the point was taken that at the time of the loss the ship was not ready to receive the invalids. The Court, however, held that the assured could recover on a policy on the passage money, to which obviously the same principles must apply as to a policy on freight. The ground of the decision was, that there was a contract for the passage money, and that something was done under the contract. In Warre *v.* Miller (*b*), the ship had not unloaded all her outward cargo; but as it was not disputed at the trial that the risk had attached, the Court would not allow the point to be taken that the ship was not ready, and therefore the case cannot be relied on as an authority. In Devaux *v.* J'Anson (*c*), again, the loss took place while the ship was still in the dry dock in which she had been repaired. It is true that Tindal, C. J., did say that the ship was ready to receive her cargo; but it is difficult to reconcile this statement with the fact that she was not yet at the actual place where she was to take the cargo on board (*d*).

(*y*) *Ante*, § 266.

(*z*) Cited 2 Brod. & B. 326.

(*a*) (1820), 2 Brod. & B. 320.

(*b*) (1825), 4 B. & Cr. 538.

(*c*) (1839), 5 Bing. N. C. 519.

(*d*) It may, however, be argued that the term "ready" is used in a somewhat different sense, which does not require that the vessel

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Against these decisions there are only a passage in Lord Ellenborough's judgment in Forbes *v.* Aspinall (*e*) (the true *ratio decidendi* of which case seems to have been that there was no contract for the return cargo) and the reported ruling of Lord Lyndhurst in Williamson *v.* Innes (*f*). As to the latter, it may be remarked, it was only a *nisi prius* ruling. The freight was chartered freight, and the ruling, as reported, is opposed to the cases on chartered freight, such as Barber *v.* Fleming (*g*) and Foley *v.* United Fire and Marine Insurance Co. (*h*), as well as to the cases already considered (*i*).

Must the cargo be ready to be shipped?

271. Again, must the cargo be ready to be shipped before the insurable interest commences, or is it enough that there is a binding contract for freight? It was unnecessary to decide this point in Forbes *v.* Aspinall (*k*), as the cargo was not contracted for. In Parke *v.* Hebson (*l*) and Flint *v.* Flemyng (*m*), only the question whether there was a contract seems to have been considered. In Devaux *v.* J'Anson (*n*), the point whether the cargo was ready to be shipped was discussed; but that was the case of a shipowner insuring the freight of his own goods, to which, as has already been suggested and as will be shown hereafter, different considerations apply (*o*). The case is therefore not a true authority to prove that where the shipowner does not carry his own

should be at the precise spot where the loading will commence: see Leonis SS. Co., Ltd. *v.* Rank, Ltd., [1908] 1 K. B. 499.

(*e*) (1818), 13 East, 323, 331. See the remarks of Tindal, C. J., in Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519, 538, as to the bearing upon the case of the fact that the ship was not ready to load.

(*f*) (1831), cited 8 Bing. 81.

(*g*) (1869), L. R. 5 Q. B. 59. See *post*, § 275.

(*h*) (1870), L. R. 5 C. P. 155, 160, 164. See *post*, § 273.

(*i*) Mr. Arthur Cohen agrees with the editors' opinion that those cases are opposed to the view that the ship must be ready to receive the cargo: see Halsbury's Laws of England, vol. xvii. § 775. See *infra*, § 511, n. (*z*).

(*k*) (1811), 13 East, 323.

(*l*) Cited 2 Brod. & B. 326.

(*m*) (1830), 1 B. & Ad. 45.

(*n*) (1839), 5 Bing. N. C. 519.

(*o*) *Post*, § 277.

goods the cargo must be actually ready. All that the cases really establish on the point is that there must, at the time of the loss, be a valid contract under which goods are to be loaded, and on principle this seems all that should be necessary (*p*). The shipowner is entitled to assume that the goods contracted for will be ready at the proper time (*q*). Sect. 271.

It is submitted that these cases do not establish the rule that the insurable interest in freight proper only begins when the ship is ready to receive the goods, and the goods are ready to be shipped. They show that there is at any rate an insurable interest when the assured, having a valid contract for freight, has taken steps towards the earning of the freight. The view that under these circumstances there is an insurable interest is supported by the decision of the Court of Queen's Bench in Barber *v.* Fleming (*r*). That was a case of chartered freight, but the decision is of general application, as it did not depend on the question whether there had been an inception of the charter-party contract. Whether it may not be possible to state the rule even more broadly will be considered presently (*s*).

Insurable interest in chartered freight.

272. We have now to consider insurable interest in chartered freight, *i.e.*, in a fixed sum stipulated to be paid to the shipowner by the terms of a charter-party for the use of his ship, or part of it, on an entire voyage therein described.

Under such a contract the ship may earn freight though no goods may ever be put on board, and the question whether, at the time of loss, she had taken any goods on board for the voyage insured, or whether any were contracted to be shipped, does not arise.

Result of the cases.

A series of cases shows that there is an inchoate right to such freight, and therefore an insurable interest from the inception of the voyage described in the charter-party (*t*).

(*p*) See 1 Parsons, pp. 169, 178.

(*q*) See Rankin *v.* Potter (1873), L. R. 6 H. L. 83; and *ante*, § 267.

(*r*) (1869), L. R. 5 Q. B. 59. See particularly the judgment of Blackburn, J., pp. 71, 73.

(*s*) See *post*, § 279.

(*t*) Thompson *v.* Taylor (1795), 6 T. R. 478; Horncastle *v.* Suart

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On this principle, when by the terms of the charter-party the ship is to proceed from A. to B., and at B. load a cargo for C., there has been held to be an insurable interest in the freight of this cargo, as soon as the ship breaks ground at A. to proceed to B.

Thompson v. Taylor.

In the first of this series of cases the facts were as follow: A shipowner who insured half the freight of his ship on a voyage "at and from London to Teneriffe, and at and from thence to the Bay of Honduras," has chartered the ship to sail from London to Teneriffe, where she was to take wine on board and carry it out to the West Indies; freight for the whole voyage to be paid at the rate of 35*s.* per pipe. The ship sailed from London on her voyage under the charter-party; and before her arrival at Teneriffe, and, of course, before any of the wine was taken on board, she was captured by the French. The Court held that the insurable interest and the risk upon the freight had commenced directly the ship sailed from London on her voyage by which the freight was to be earned. Lord Kenyon said: "As the plaintiff had begun to perform his part of the contract, as he had done something under it which, if matured, would have entitled him to his freight, I think he may recover under this policy, which was an insurance on that freight" (*u*).

Previous voyage incorporated by the charter-party.

273. A previous voyage may be incorporated into the charter-party, so that there is an inception of the voyage described in the charter-party during the performance of the prior voyage.

Rankin v. Potter.

By charter-party it was agreed that the "Sir William Eyre," then on a voyage from the Clyde to New Zealand, should proceed to New Zealand with a cargo for owners'

(1806), 7 East, 400; Atty *v.* Lindo (1805), 1 B. & P. N. R. 236; Mackenzie *v* Shedden (1810), 2 Camp. 431; Davidson *v.* Willasey (1813), 1 M. & S. 312; Ellis *v.* Lafone (1853), 8 Exch. 546; 22 L. J. Ex. 124; Foley *v.* United Fire and Marine Ins. Co. of Sydney (Ex. Ch.) (1870), L. R. 5 C. P. 155; Rankin *v.* Potter (1873), L. R. 6 H. L. 83.

(*u*) Thompson *v.* Taylor (1795), 6 T. R. 478; *S. P.*, Atty *v.* Lindo (1805), 1 B. & P. N. R. 236.

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benefit, and thence to Calcutta, and there load a cargo for Liverpool for the freighter. The owners of the ship effected a policy on homeward chartered freight from Calcutta to Liverpool, at and from the Clyde to Otago, New Zealand, and for thirty days in port there after arrival. At New Zealand the vessel grounded, and received such damage by sea perils as to become a constructive total loss, and in the result she was not repaired, and the homeward freight was not earned. It was not disputed that there was an insurable interest in such freight, and the House of Lords decided that the plaintiff was entitled to recover under the policy (*x*).

Foley v. United Fire and Marine Ins. Co.

A vessel when about to sail with cargo from Calcutta to Mauritius was chartered to carry a cargo of rice from Akyab to the United Kingdom. The charter-party stipulated that she should "with all convenient speed sail on her present voyage to Mauritius, and having discharged her cargo there," should proceed to Akyab and there load the rice. She arrived at Mauritius in good safety, and when about two-fifths of her cargo were discharged, she was wrecked with the residue on board. Upon a policy on chartered freight "at and from Mauritius to rice ports," the Exchequer Chamber held that the shipowner could recover. "It is the express condition in the charter-party," said Kelly, C. B., "that the voyage shall commence at Calcutta, and the inchoate right to freight attached when the voyage from Calcutta commenced." There being thus an insurable interest, it followed that the risk under the policy began upon the arrival of the ship at Mauritius (*y*).

Contract may be entire though there be separate payments of freight.

274. When a ship is chartered for a double voyage, as from A. to B., and from B. to C., or back to A., the contract is none the less an entire one because separate sums are to be paid as freight for the different parts of the voyage (*z*). Therefore the shipowner's interest in the whole

(*x*) Rankin *v.* Potter (1873), L. R. 6 H. L. 83.

(*y*) Foley *v.* United Fire and Marine Ins. Co. of Sydney (Ex. Ch.) (1870), L. R. 5 C. P. 155.

(*z*) Horncastle *v.* Suart (1806), 7 East, 400; Davidson *v.* Willasey

Sect. 274. freight commences at the inception of the first part of the voyage.

Horncastle v. Suart. A shipowner effected an insurance on the freight of his ship for a voyage at and from Dominica to London. He had previously chartered the ship for a voyage from London to the Island of Dominica and back to London, on the terms of being paid half the net freight of the outward voyage, if it exceeded 1,000*l.*, but if not, then he should be paid 500*l.*; and, as to the homeward freight, the charterers covenanted to load a full cargo at the current freight, or, if the cargo should not be full, to pay dead freight for the deficiency. The ship was captured at Dominica before she had unloaded all her outward cargo. A full cargo of produce had been procured by the charterer's agents at Dominica, and was ready to be loaded on board the ship there. The Court held that as the voyage had commenced under which the freight was to be earned according to the terms of the charter-party, which made it one entire contract, the assured was entitled to recover for the homeward freight (*a*).

Davidson v. Willasey. Upon the same principle, where an insurance was effected on the homeward freight of a West Indian ship, chartered for a voyage out and home, on the terms of taking in a full cargo of produce for the homeward voyage, and the ship, after arriving at her out-port of discharge in the West Indies, was lost there, when she had taken on board only half her homeward cargo; the Court held that as there had been, at the time of loss, an inception of the entire voyage out and home, the risk had attached on the homeward freight, and the whole was recoverable (*b*).

Atty v. Lindo. A shipowner insured the outward freight of a West Indian ship "at and from London to Jamaica, with liberty to touch at Madeira, and discharge and take on board goods there." Under her charter-party, the ship was to sail from London,

(1813), 1 M. & S. 312. See also Ellis *v.* Lafone (1853), 8 Exch. 546; 22 L. J. Ex. 124.

(*a*) Horncastle *v.* Suart (1806), 7 East, 400.

(*b*) Davidson *v.* Willasey (1813), 1 M. & S. 312.

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The assured recovered the whole amount insured, on the ground that as soon as the ship broke ground from London on the voyage, an inchoate right to the whole freight attached, which was defeated only by the intervention of a peril insured against (*c*).

Ellis v. Lafone. The principle is illustrated by the following case. A ship, then at Monte Video, was chartered to proceed to the Falkland Islands, to sail thence to Santa Cruz and there load part of her cargo, and then to proceed to Monte Video and complete her cargo, and with it to proceed to Havre. Freight was to be paid at the rate of 250*l.* a month, the first payment of 250*l.* to be made when the ship sailed from the Falkland Islands (*d*). The charterer accordingly paid this sum of 250*l.* The ship took her cargo on board at Santa Cruz and Monte Video, and was afterwards lost on the voyage to Havre. The charterer had effected a policy on advance freight from Monte Video to Havre, on which he claimed this sum of 250*l.* It was contended that this was a separate sum paid for the voyage to the Falkland Islands; but the Exchequer Chamber held, that it was part of an entire sum payable for the whole voyage insured, and therefore remained at risk until the ship arrived at Havre (*e*).

Insurable interest before

275. In the cases that have been considered there had

(*c*) Atty *v.* Lindo (1805), 1 B. & P. N. R. 236.

(*d*) This was not the original charter-party, but it is a sufficiently correct statement, for the purpose of the text, of the contract as altered by agreement between the parties.

(*e*) Ellis *v.* Lafone (1853), 8 Exch. 546; 22 L. J. Ex. 124.

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commencement of charter-party voyage.

been an inception of the voyage described in terms in the charter-party. The next case to be mentioned shows that there may be an insurable interest in freight, although the ship is not yet on the voyage so described.

Barber v. Fleming.

A ship, stated to be lying at Bombay, was chartered for a voyage from Howland's Island to the United Kingdom with a cargo of guano. A policy was effected "on freight chartered or otherwise" at and from Bombay to Howland's Island, while there and thence to the United Kingdom. The ship sailed in ballast from Bombay to Howland's Island, and was lost on the voyage thither. The charter-party had been entered into on the 7th of August, and the ship was required to be at Howland's Island on or before the 1st June of the following year; but it was not stipulated that she should said direct or by any particular route. On this ground the underwriter contended that nothing had been done under the charter-party to make the freight an inchoate interest. The Court of Queen's Bench, however, held, that as the ship had sailed from Bombay to Howland's Island in order to earn the freight under the charter from there to the United Kingdom, the interest in the chartered freight had commenced, and that the plaintiff could recover under the policy for its loss (*f*).

Cockburn, C. J., treated the voyage from Bombay to Howland's Island as part of the whole voyage necessary to earn the freight.

"From the moment," he says, "that a vessel is chartered to go from port A. to port B., and at port B. to take a cargo and bring it home to England, or to take it to any port, which I will call port C., for freight, the shipowner having got such a contract, has an interest unquestionably in earning the freight secured to him by the charter; and having such an interest it is manifest that that interest is insurable; and he loses the freight and benefit of his charter just as much by the ship being disabled on her voyage to the

(*f*) Barber *v.* Fleming (1867), L. R. 5 Q. B. 59.

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port at which the cargo is to be loaded, and from which it is to be brought, as he would lose it by the disaster arising from the perils insured against between the port of loading and the port of discharge. It is therefore an appreciable tangible interest, and I entertain no doubt that it can be insured" (*g*).

Blackburn, J., said: "There is a policy of insurance made upon a voyage 'from Bombay to Howland's Island and from thence to England.' That is the description of the voyage. The nature of the thing insured is 'freight chartered or otherwise.' So that upon the face of the policy there is a bargain between the assured and the underwriters by which, if during that voyage, by one of the perils insured against, freight is lost, the underwriters should pay. We have, therefore, to see whether there was freight lost during the voyage, which involves the question whether this chartered freight had come into existence at the time the accident happened which caused the alleged loss; whether at that time the interest had commenced. When there is an insurance upon freight, so long as the matter remains merely contingent, so long as the shipowners have only a good hope of getting freight, no freight is in existence; and if the ship is lost there would be no loss of freight, inasmuch as the freight had never come into existence, and all that the shipowners have lost is the hope of earning the freight. But on the other hand, the law seems perfectly settled by a variety of cases, as I find it laid down by Mr. Phillips, in his book on Insurance, at s. 328, where he says: 'In regard to the commencement of this interest (on freight), it is a general rule that it commences, not only by the vessel sailing with the cargo on board, but also when the owner or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning the freight.' I think that is the accurate rule. When a shipowner has got a contract with

(*g*) Barber *v.* Fleming (1867), L. R. 5 Q. B. 67.

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another person under which he will earn freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which, if afterwards destroyed by one of the perils insured against, is lost, and ought to be paid for by the underwriters."

In answer to the argument that the interest had not commenced because the charter-party did not require the ship to stail at once or direct to Howland's Island, the learned judge said: "The spirit and reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to show it is no longer speculative, but he had actually begun to do something which makes the inchoate interest attach, and makes it a real thing; and it seems to me that as soon as the ship, although not bound to go direct from Bombay to (Howland's Island), had begun to sail there, the interest had sufficiently attached" (*h*).

Cockburn, C. J., and Blackburn, J., both referred to the following passage in Phillips on Insurance, s. 335: "A vessel being chartered from A. to B., the interest in the freight commences under the charter-party on the vessel's sailing for A., either in ballast or with a small quantity only of goods for B." Phillips does not consider the case of a ship sailing for A. with a full cargo; and in Barber *v.* Fleming it was not necessary to decide whether, if the ship had been carrying a cargo to Howland's Island, there would have been an insurable interest in the freight from Howland's Island to the United Kingdom. It is submitted that this would have made no difference, for there is authority for saying that an act done for the purpose of one voyage may also be an act of preparation for the next voyage (*i*). In such a case, however, it would have been advisable to insure the freight from

(*h*) L. R. 5 Q. B. at p. 73.

(*i*) Warre *v.* Miller (1825), 4 B. & Cr. 538; Foley *v.* United Fire and Marine Ins. Co. of Sydney (1870), L. R. 5 C. P. 155, 160, 164.

Howland's Island specifically (*k*). Under an insurance on freight simply, it might have been argued that only the freight of the cargo carried from Bombay to Howland's Island was recoverable in case of a loss on that part of the insured voyage (*l*).

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Insurable interest when ship let on time charter.

276. When a ship is let on a time charter, the usual stipulation is that she shall be placed at the disposal of the charterer at a given port. Barber *v.* Fleming (*m*) shows that under such a charter-party the shipowner has an insurable interest in the chartered hire or freight when he sends the ship to such port for the purpose of placing her at the charterer's disposal. The charter-party generally provides for monthly payments of the freight at a given rate. The contract is, however, usually an entire one, and, therefore, when the insurable interest has begun, there can be no doubt that it extends to the freight for the whole agreed period, or such part of it as still remains at risk (*n*). The general practice is to insure this chartered hire or freight by a time policy on freight with a "diminishing clause," *i.e.*, a clause by which the amount insured is reduced monthly as each payment becomes due (*o*).

Insurable interest in freight of shipowner's own goods.

277. When the shipowner wishes to insure as freight the benefit to be derived from the carriage of his own goods, the case is obviously very different from that of an insurance on the goods of others. There is no contract, and therefore no cargo-owner's obligation to provide a cargo, or shipowner's to load one. As the shipowner cannot call upon someone else to supply cargo he would be insuring a mere expectation, unless he has goods of his own which he is in a position to

(*k*) In Rankin *v.* Potter (1873), L. R. 6 H. L. 83, the ship carried a cargo on the outward voyage, and the insurance was on "homeward chartered freight."

(*l*) See post, § 358.

(*m*) (1869), L. R. 5 Q. B. 59; *ante*, § 275.

(*n*) See Horncastle *v.* Suart (1806), 7 East, 400; Ellis *v.* Lafone (1853), 8 Exch. 546; 22 L. J. Ex. 124; *ante*, § 274.

(*o*) See Gow, Mar. Ins., p. 233.

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ship. The cases show that to give him an insurable interest he must have goods definitely intended for shipment, which are so far ready that he will be able to ship them in the ordinary course when the ship reaches her loading place (*p*). In Devaux *v.* J'Anson (*q*), the ship was not actually ready to take the goods on board, as the casualty which caused the loss of freight, for which the assured recovered, occurred while she was preparing to leave a dry dock (*r*). In answer, however, to the objection that the ship was not ready, the Court held that she was "quite ready to go to sea and to receive the cargo on board, that nothing remained to prevent her sailing, but the getting her out of dock" (*s*). The Court did not, however, actually determine that readiness of the ship was essential.

Rule 3 (d) in the first schedule of the Marine Insurance Act, 1906 (*t*) provides that when the freight of goods belonging to the shipowner is insured by the ordinary English policy "at and from" a particular place, the risk attaches as soon as the cargo is in readiness and the ship is ready to receive the cargo. This rule supports the view that the insurable interest does not begin until the ship is ready to take the goods on board, but the editors submit that it is not necessarily conclusive on the question of insurable interest (*u*).

Result of the authorities.

278. In conclusion, it is submitted that the following propositions are supported by the authorities:—

(1.) In respect of freight in the strict sense of the word, the shipowner has an insurable interest when,

(*p*) Flint *v.* Flemyng (1830), 1 B. & Ad. 45; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519. The facts of the latter case are set out *ante*, § 268.

(*q*) *Supra.*

(*r*) See, however, *ante*, § 270, note (*d*).

(*s*) In Flint *v.* Flemyng, *supra*, the ship had finished discharging her outward cargo the day before the loss. Whether she was in other respects ready to receive her homeward cargo does not appear.

(*t*) See *infra*, § 279a.

(*u*) See their remarks, *ibid.*

having a valid contract for the carriage of goods, he takes steps towards the earning of the freight. Sect. 278.

(2.) In respect of chartered freight, he has an insurable interest when there is an inception of the voyage described in the charter-party, or when he does something for the purpose of performing his contract, as by sending the ship to the port of loading to ship the cargo.

Is there an insurable interest in freight as soon as the contract is made? Tendency of the decisions.

279. The further question may be raised, whether an insurable interest in freight may not commence at an earlier period. The series of cases on the subject began in 1746 with Tonge *v.* Watts, in which the Court held that the insurable interest did not begin until the goods were actually loaded. The cases on freight proper show how the Courts, wherever there was an actual contract for freight, invariably relaxed the rule laid down in Tonge *v.* Watts sufficiently to enable the assured to recover. As regards charter-party freight, the principle first applied in 1795, in Thompson *v.* Taylor, that there is an insurable interest in the whole freight as soon as the chartered voyage has begun, enabled the Courts to decide every case before Barber *v.* Fleming in favour of the assured. In Barber *v.* Fleming, where the voyage described in the charter-party had not begun, the Court went beyond this principle and declared that the shipowner had an insurable interest when the ship was on her way to her loading port for the purpose of fulfilling her charter (*x*).

It may be urged that when a shipowner has made a contract under which he will in the ordinary course earn freight, he ought at once to be entitled to protect himself against a loss of that freight by the maritime risks to which his ship is exposed (*y*). If, for instance, a shipowner has

(*x*) In Ward *v.* Weir (1899), 4 Com. Cas. 222, Mathew, J., said: "There is abundant authority that during the pendency of the outward voyage the homeward freight may be insured."

(*y*) Cockburn, C. J., meant, perhaps, to state as broad a principle as this when he said, in Barber *v.* Fleming: "From the moment that a vessel is chartered to go from port A. to port B., and at port B. to take

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entered into a very lucrative charter-party, by which his ship is let for six months, there being only a stipulation that she shall be placed at the charterer's disposal on or before a given day, the shipowner, however, being left free to employ her as he thinks fit in the meanwhile, he may be prevented from earning freight under this charter-party by the loss of or damage to his ship in the course of an interim voyage. If he has effected a policy so worded as to cover a loss of this freight by the perils of the interim voyage, ought he not to be able to recover under the policy?

Principle of indemnity relaxed in insurances on freight.

Against this contention there is, no doubt, the weighty argument that freight is not altogether a profit, but is only earned by the expenditure of money, and that to allow a shipowner to recover for a loss of freight, when he has, perhaps, incurred no expense for the purpose of earning it, is to depart from the principle that insurance is a contract of indemnity (*z*). Blackburn, J., in Barber *v.* Fleming, and Phillips, whom he quotes with approval, make the insurable interest in freight commence when expense is incurred to earn the freight (*a*). Yet the principle of indemnity was long ago departed from in insurances on freight, when the right of the assured to recover in all cases the gross freight was recognized, and it is now clearly possible to recover for a loss of freight when little or no expense has been incurred

a cargo and bring home that cargo to England, or to take it to any port, which I will call port C., for freight, the shipowner, having got such a contract, has an interest unquestionably in earning the freight secured to him by the charter; and having such an interest, it is manifest that that interest is insurable": L. R. 5 Q. B. at p. 67. The context, however, makes it doubtful whether the learned Chief Justice did not intend his remarks to refer only to a ship already at A. or on the way from A. to B. This passage from the judgment of Cockburn, C. J., was quoted with approval by Martin, B., in Foley *v.* United Fire, &c. Ins. Co. (1870), L. R. 5 C. P. 163. See also per Lord Esher, M. R., in The Copernicus, [1896] P. at p. 239: "No doubt as soon as a shipowner has got a binding contract with somebody to put goods on board his ship, he has an insurable interest."

(*z*) This argument could not be used in the case of a policy on profits of charter.

(*a*) See Barber *v.* Fleming (1869), L. R. 5 Q. B. 59, 71; 1 Phillips, s. 328.

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by the assured. Thus, if a ship on an outward voyage from A. to B. be chartered to complete that voyage, and then take a homeward cargo from B. to A., the homeward freight can at once be insured and recovered if the ship be lost the next day (*b*).

As we have already pointed out, all the cases on insurable interest, in which there has been an actual contract for freight, have been decided in favour of the assured. The legal conception of insurable interest has been continuously expanding (*c*), and possibly the Courts may on some future occasion continue this process of expansion, and hold that the existence of a contract for freight in itself gives an insurable interest in the freight. But the existing authorities do not support this extension of the rule.

If, however, it should be considered that the wide principle cannot be supported, there are strong grounds for thinking that the profits which a shipowner expects to make on a contract of affreightment may be insurable as soon as the contract has been made (*d*).

The Marine Insurance Act and insurable interest in freight.

279a. It is now necessary to consider the bearing of the Marine Insurance Act, 1906, upon the subject of this discussion. In Rule 3 of the rules for the construction of the policy in Schedule I., which must be applied unless the context otherwise requires, the following rules are laid down with reference to the attachment of the risk on freight:—

> (c) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches

(*b*) It may, however, be said that the expenses of the outward voyage are in every case incurred partly or in whole for the homeward voyage. See per Cockburn, C. J., in Barber *v.* Fleming (1869), L. R. 5 Q. B. 67.

(*c*) See per Walton, J., in Moran *v.* Uzielli, [1905] 2 K. B. 563.

(*d*) In Manchester Liners *v.* British and Foreign Mar. Ins. Co. (1901), 7 Com. Cas. 26, 33, Walton, J., expressed the view that a shipowner has an insurable interest in the use of his ship, independent of any particular contract of affreightment; but was seemingly of opinion that such interest is not insurable as freight. See, further, *infra*, § 288.

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immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(d) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro ratâ* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

There is nothing in Rule 3 (c) which conflicts with the principles relating to the commencement of the insurable interest in chartered freight which the editors have deduced from the decisions. As regards the insurable interest in freight, other than chartered freight, however, Rule 3 (d) must not be overlooked. The question whether the assured had at the time of the loss an insurable interest, and the question whether the risk has attached under the policy, have usually been treated together (*e*). If, as was Arnould's view, the *ratio decidendi* of the cases was that the risk under a policy "at and from" the place of loading attached when the ship was at such place as soon as there was an insurable interest in the freight, it may be argued that Rule 3 (d) is based on the view that, as regards freight proper and the freight of the shipowner's goods, the insurable interest does not begin until the cargo is in readiness, and the ship is ready to receive it, and that the rule disregards the decisions which, in the opinion of the editors, extended the principle laid down by Arnould. Inasmuch, however, as the Act nowhere lays down any rule in relation to the commencement of the insurable interest in freight, it is submitted that Rule 3 (d) does not affect these decisions so far as they determine the question of insurable interest. If this be correct, and the insurable interest do commence before the ship and cargo are ready, it will be possible, notwithstanding

(*e*) See, for instance, Arnould, 2nd ed. pp. 287—289, 522 *et seq.*, and the remarks, *ante*, § 265.

Rule 3 (d), to recover under a properly worded policy for any loss of freight which has occurred after the commencement of such interest. Sect. 279a.

280. A shipowner who has entered into recognizances in the Admiralty Court to pay the salvors of ship and cargo has a lien on, and therefore an insurable interest in, the cargo for the average contribution due to him from its owners (*f*). He may also protect himself by insurance against charges imposed by the Merchant Shipping Act in respect of the carriage of passengers (*g*). He has, besides, an insurable interest in respect of liabilities consequent on the casualties enumerated in Part VIII. of the Merchant Shipping Act, 1894 (*h*), and of other liabilities resulting from casualties happening in the course of the navigation of his ship.

Shipowner's insurable interest in average contribution.

In liabilities under Passenger Acts, &c.

281. A party seeking to recover on a policy must, as we have already seen, have been interested in the subject of insurance at the time of loss (*i*). If, therefore, the insurable interest depends upon a sale, the vendee must have acquired a complete title to the thing insured before the loss, or it must be at his risk under the contract of sale, otherwise he can recover nothing on his policy; and, on the same grounds, the vendor, if he have not absolutely parted with all his interest before the loss, may still recover in respect of such interest as remains in him at that time.

Insurable interest of vendor and vendee.

Thus, where the owner of a ship had sold her under an agreement that he would pay the purchaser 500*l.* if a loss happened within three months, the Court held that to this

Vendor retaining interest in chattel.

(*f*) Briggs *v.* Merchant Traders' Association (1849), 13 Q. B. 167. It was held that the interest was sufficiently described as "average expenses." Cf. Dodwell *v.* Munich Ass. Co. (1903), 123 Fed. R. 841; affd. (1904), 128 Fed. R. 835.

(*g*) Merchant Shipping Act, 1894, ss. 328—335. See Gibson *v.* Bradford (1855), 4 E. & B. 586; Willis *v.* Cooke (1855), 5 E. & B. 641.

(*h*) Merchant Shipping Act, 1894, s. 506.

(*i*) See *ante*, §§ 254, 258. The statement in the text is subject to the proviso in sect. 6 (1) of the Mar. Ins. Act, 1906.

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extent he still had an interest in the safety of the ship, and therefore might recover against the members of a mutual insurance society, to which he belonged, for such amount of contribution as, by the rules of the society, he was entitled to receive (*k*).

Insurable interest in goods usually depends on property.

282. When the buyer and seller of goods do not live in the same place, it is generally necessary, in order to determine who has an insurable interest during the transit, to ascertain when the property passes to the buyer. This question belongs to the law relating to the sale of goods, and only a few leading principles will be stated here, in the terms of the Sale of Goods Act, 1893 (*l*).

Rules in Sale of Goods Act as to transfer of property.

Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such times as the parties intend it to be transferred (*m*). Where the contract is unconditional and the goods are specific goods in a deliverable state, the property passes when the contract is made (*n*).

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent express or implied of the buyer, or by the buyer with the assent of the seller, the property passes to the buyer (*o*). Such unconditional appropriation takes place when, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, and does not reserve the right of disposal (*p*).

(*k*) Reed *v.* Cole (1764), 3 Burr. 1512.

(*l*) See generally the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 18—26, as to the transfer of property in goods and as to the title to goods; also Benjamin on Sale, bk. ii. cc. 2—6, pp. 313—401, 5th ed.

(*m*) Sale of Goods Act, s. 17. See Anderson *v.* Morice (1876), 1 App. Cas. 713; Reid *v.* Macbeth, [1904] A. C. 223.

(*n*) Sale of Goods Act, s. 18, r. 1.

(*o*) Sale of Goods Act, s. 18, r. 5 (1); see Sparkes *v.* Marshall (1836), 2 Bing. N. C. 761; Healy *v.* Howlett, [1917] 1 K. B. 337; Pignataro *v.* Gilroy, [1919] 1 K. B. 459.

(*p*) *Ibid.* r. 5 (2). See Fragano *v.* Long (1825), 4 B. & Cr. 210;

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If the seller of goods by the terms of the contract or appropriation reserves the right of disposal of the goods until certain conditions are fulfilled, then, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for transmission, the property does not pass to the buyer until the condition is fulfilled (*q*). When goods shipped are by the bill of lading deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal (*r*).

Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to him, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange; and if he wrongfully retains the bill of lading the property in the goods does not pass to him (*s*).

Mitchel *v.* Ede (1840), 11 A. & E. 888; 9 L. J. Q. B. 187; Tregellas *v.* Sewell (1826), 7 H. & N. 574; Joyce *v.* Swann (1864), 17 C. B. N. S. 84; Castle *v.* Playford (Ex. Ch.) (1872), L. R. 7 Ex. 98; Mirabita *v.* Imperial Ottoman Bank (C. A.) (1878), 3 Ex. D. 164; Colonial Ins. Co. of New Zealand *v.* Adelaide Marine Ins. Co. (1886), 12 App. Cas. 128.

(*q*) Sale of Goods Act, s. 19 (2). See Mitchel *v.* Ede (1840), 11 A. & E. 888; 9 L. J. Q. B. 187, and the cases in the next note.

(*r*) *Ibid.* s. 19 (2). See Wait *v.* Baker (1848), 2 Ex. 1; 17 L. J. Ex. 307; Ogg *v.* Shuter (C. A.) (1875), 1 C. P. D. 47. In Joyce *v.* Swann (1864), 17 C. B. N. S. 84, the *primâ facie* inference was negatived by the jury, and their finding that the seller had taken the bills of lading in his own name only as agent for the buyer was upheld. See Seagrave *v.* Union Marine Ins. Co. (1866), L. R. 1 C. P. 305, another action on a policy in respect of the same loss, in which the evidence was somewhat different. The *primâ facie* inference is not negatived by the mere fact that the ship belongs to or is chartered by the buyer. Turner *v.* Trustees of Liverpool Docks (Ex. Ch.) (1851), 6 Ex. 543; 20 L. J. Ex. 393; Gabarron *v.* Kreeft (1875), L. R. 10 Ex. 274, 280, 285. When the property has already passed by an unconditional appropriation, the fact that the bills of lading afterwards make the goods deliverable to the order of the seller does not destroy the effect of the appropriation. Sparkes *v.* Marshall (1836), 2 Bing. N. C. 761; and see Coxe *v.* Harden (1803), 4 East, 211.

(*s*) Sale of Goods Act, s. 19 (3); Shepherd *v.* Harrison (1871), L. R. 5 H. L. 116. The buyer may, however, by transfer of the bill of lading give a good title to an innocent transferee. S. 25 (2); see Cahn *v.* Pockett's Bristol Channel Co. (C. A.), [1899] 1 Q. B. 643.

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Cases on insurable interest in goods. Anderson *v.* Morice.

283. The following cases illustrate the application of these rules to questions of insurable interest:—

A. entered into a contract for the purchase of a cargo of Rangoon rice. The bought note, as far as is material, was in these terms: "Bought . . . . the cargo of . . . . rice, per 'Sunbeam' . . . . Payment by sellers' draft on purchaser at six months' sight, with documents attached." A. insured the cargo "at and from Rangoon." The "Sunbeam" was loading the agreed cargo in the Irrawaddy River, off Rangoon, and had received on board the larger portion thereof, when she was lost with the rice then on board. In the Common Pleas it was held that, when the rice was appropriated to the contract by putting it on board, an insurable interest therein passed to the buyer, the plaintiff. In the Exchequer Chamber it was held that the contract, being for the cargo of rice per the "Sunbeam," and the time for making out the shipping documents (which were to be attached to the sellers' draft) not having arrived at the time of the loss, no interest had passed to the buyer, or would pass until the complete cargo was loaded on board. In the House of Lords the law lords were equally divided, and therefore the judgment of the Exchequer Chamber was affirmed, and A. did not recover on the policy (*t*).

Colonial Ins. Co. of New Zealand *v.* Adelaide Marine Ins. Co.

M. & G. agreed to purchase a cargo of wheat, free on board at Timaru, at 4*s.* 7*d.* per sack. They chartered a steamer, which began to load at Timaru, and before the loading was completed the ship and cargo were there lost. The Privy Council held that delivery from time to time to the master of the ship vested the property in the wheat as it was delivered in the buyers, and consequently that the latter had an insurable interest in the cargo on board at the time of the loss. They distinguished Anderson *v.* Morice (*u*) on the ground that there the vendors sold a particular cargo on a ship chartered by them. "The cargo to be purchased in

(*t*) Anderson *v.* Morice (1874), L. R. 10 C. P. 58; in the Ex. Ch. (1875), *ibid.* 609; (1876), 1 App. Cas. 713.

(*u*) *Supra.*

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that case was an entire thing . . . . and would not be in existence until the whole cargo should be put on board." "The master of the 'Sunbeam' received it on their account, and not on account of the purchasers. The purchasers' right was to depend on the shipping documents, which were to be under the direction of the sellers. In the present case . . . . the contractors were delivering it (the wheat) to the purchasers in pursuance of their contract to put it free on board, the master of the vessel which had been chartered by them being their agent to receive it on their account" (*x*).

In general goods are at risk of owner.

284. Unless otherwise agreed, goods are at the seller's risk until the property is transferred to the buyer, and from the time of such transfer they are at the buyer's risk, whether delivery has been made or not (*y*). Therefore, in general, if under a contract of sale the property in sea-borne goods does not vest in the buyer until arrival, he has no insurable interest in them during the transit. If, however, by the contract, the goods are to be at his risk during the voyage, he has an insurable interest in them during the same (*z*).

In contract of sale the parties may agree otherwise.

Similarly, the parties may agree that the property in goods shall vest in the buyer at the time of shipment; but that the goods shall be at the seller's risk during the transit, or that the price shall not be paid unless they arrive safely. Obviously the seller has an insurable interest in this case (*a*).

Inglis *v.* Stock.

D. & Co. sold to the plaintiff, Stock, 200 tons of sugar, f. o. b. at Hamburg; payment to be by cash in London in exchange for bills of lading. D. & Co. had already sold to B. 200 tons of the same quality of sugar on the same terms, and the plaintiff ultimately became the purchaser from B.

(*x*) Colonial Ins. Co. of New Zealand *v.* Adelaide Marine Ins. Co. (1886), 12 App. Cas. 128.

(*y*) Sale of Goods Act, 1893, s. 20.

(*z*) Inglis *v.* Stock (1885), 10 App. Cas. 263; 53 L. J. Q. B. 356; see also Castle *v.* Playford (1872), L. R. 7 Ex. 98; Healy *v.* Howlett, [1917] 1 K. B. 337.

(*a*) Per Blackburn, J., Calcutta and Burmah Steam Navigation Co. *v.* De Matthos (1863), 32 L. J. Q. B. 322, 328.

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of this parcel also, with no other change of terms except a slight increase of price. The plaintiff engaged room for both parcels of sugar on board a steamer trading from Hamburg to Bristol, and D. & Co. by their agent at Hamburg shipped sugar for both contracts in bags, without allocating the bags to the respective contracts. They intended, according to their usual practice, of which the plaintiff had knowledge, to make such appropriation on the arrival of the sugar in England. The sugar was totally lost on the voyage to England, and D. & Co., in England, after hearing of the loss, allocated the various bags to the two contracts. The plaintiff declared for both parcels under a floating policy, and in an action on the policy the underwriters contended that he had no insurable interest. In the Court of Appeal, Brett, M. R., held that, as no appropriation of a specific portion of the goods had been made at the time of the loss, the property had not passed; but that, under such a course of dealing as existed between the parties, when part of a cargo in bulk had been sold "free on board," the goods were at the risk of the buyer, and therefore the plaintiff had an insurable interest. Baggallay, L. J., thought this correct; but he and Lindley, L. J., decided the case on the ground that, apart from the effect of the "f. o. b." condition, the goods were at the buyer's risk (*b*).

The House of Lords affirmed the judgment of the Court of Appeal, also on the ground that the goods when shipped were at the buyer's risk (*c*). Lord Selborne's decision seems to be based on the "f. o. b." condition; while Lord Blackburn said that whether the sugar arrived or not the plaintiff was bound by his contract to pay for it on presentation of the bills of lading. In answer to the argument that there was no insurable interest because there had been no allocation of bags to the two contracts, Lord Blackburn said he could see no reason why an undivided interest in a parcel of goods might not be described as an interest in goods just as much

(*b*) Stock *v.* Inglis (1884), 12 Q. B. D. 564; 53 L. J. Q. B. 356.
(*c*) Inglis *v.* Stock (1885), 10 App. Cas. 263.

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as if it were an interest in every portion of the goods (*d*). Sect. 8 of the Marine Insurance Act, 1906, which declares that "partial interest of any nature is insurable," seems to affirm Lord Blackburn's view on this point (*e*).

Agreement to take risk may be implied from acts of parties.

285. An arrangement by which the buyer undertakes the risk before the property in the goods passes to him may be implied from the acts of the parties, when not inconsistent with the express terms of their agreement (*f*); but these acts, said Lord Chelmsford, must manifest the intention of the parties without ambiguity (*g*). In Anderson *v.* Morice (*h*), the sellers having sent a telegram advising the buyers as to insuring, and the latter having effected an insurance "at and from Rangoon," it was contended that thereby the intention of the buyer to take the risk as soon as any rice was shipped was established. Lord O'Hagan and Lord Selborne thought that such an intention was proved, while Lord Chelmsford and Lord Hatherley were of a contrary opinion.

It is submitted, adopting the construction of the contract which prevailed (viz., that what was sold was a complete cargo, and therefore the property did not vest until the whole cargo was on board), that the decision of Lord Chelmsford and Lord Hatherley is sound. While the ship remained at Rangoon, after the loading was complete, the cargo would have been at the buyer's risk. Therefore the fact that, after being warned, he insured the cargo "at Rangoon" does not necessarily show that the parties had intended the risk to be his during the time of loading. And the principle laid down by Lord Chelmsford that where the acts, and not the express contract of the parties, are relied on to prove that goods are not at the owner's risk, the acts must be free from ambiguity,

(*d*) *Ibid.*
(*e*) See *ante*, § 259a.
(*f*) Anderson *v.* Morice (1876), 1 App. Cas. 713; 46 L. J. C. P. 11; per Lord Hatherley, 1 App. Cas. 729; Lord O'Hagan, *ibid.* 743; Lord Selborne, *ibid.* 746.
(*g*) Anderson *v.* Morice (1876), 1 App. Cas. 713, at p. 723.
(*h*) *Supra.* See the facts stated, *ante*, § 283.

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is essentially a reasonable one, though in this case it may have led to a hard result.

Effect of stoppage *in transitu*.

286. When an unpaid seller of goods exercises the right of stoppage *in transitu*, his act does not amount to a rescission of the contract, so as to deprive the buyer of the property which he has acquired in the goods; but it gives the seller a lien on the goods for the price (*i*). It follows that the exercise of the right of stoppage *in transitu* does not put an end to the insurable interest of the buyer; for he remains the owner of the goods subject to the lien, and is in the same position as a mortgagor who has an insurable interest to the full value of the property (*k*).

The seller who has exercised the right of stoppage *in transitu* has obviously an insurable interest, to the extent at least of his lien.

Parsons is of opinion that an unpaid seller of goods has an insurable interest in them until they reach the buyer, on the ground that he has a lien until this takes place (*l*). It seems clear, however, that an unpaid seller who has parted both with the possession of the goods and the property in them, has in general no insurable interest until he exercises his right of stoppage. He has no right to stop the goods unless the buyer is insolvent, and not even then if the buyer has sold them and transferred the bill of lading or other document of title (*m*). It would be contrary to the principles on which an insurable interest depends if a seller who had parted with the property and possession could insure the goods and, if they were lost and the buyer afterwards became insolvent, recover their value, since at the time of the loss he had no right to take possession. Even if the buyer became insolvent and the goods were afterwards lost, the vendor not having exercised the right of stoppage, the latter, it is submitted, could not recover on an insurance; he had not gained a lien, and the loss made it impossible for him ever to acquire one (*n*).

(*i*) Sale of Goods Act, 1893, ss. 44, 48; cf. Booth SS. Co., Ltd. *v.* Cargo Fleet Iron Co., Ltd., [1919] 2 K. B. 570. For the duration of the transit, see s. 45 of the Act.

(*k*) *Post*, § 299. Arnould seems to have limited his right or that of his assignees to recover, to losses occurring before the right of stoppage was exercised (2nd ed. vol. i. p. 310). The principle stated in the text seems to the editors, however, to be clear.

(*l*) 1 Parsons, Ins. 232.

(*m*) Sale of Goods Act, 1893, s. 47.

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Insurable interest in profits.

287. An insurable interest in profits, it has been said, is constituted by "an expectancy coupled with a present existing title" (*o*). If the term "a present existing title" implies that the property in the goods from which profits are expected to arise must at the time of the loss be in the assured, the use of this term is not accurate (*p*). It is in general, however, true that the existence of an insurable interest depends on ownership in this sense, that unless the assured is or has been the owner of the goods, he must have entered into a binding contract for the purchase of them (*q*).

A vague possibility of realizing profits, which may or may not be made, will not suffice (*r*). In this country the right to recover on the policy is dependent on proof that profits would have been made if the goods had arrived. In the earliest cases, indeed, such as Grant *v.* Parkinson, and Barclay *v.* Cousins, the Court was satisfied with evidence of a general probability of the profitable issue of the adventure founded on the course and character of the trade in which it was made (*s*); but in subsequent cases the Courts adopted a stricter rule.

Thus in Hodgson *v.* Glover, where the policy was on "profits" upon an adventure from Liverpool to the African

(*n*) See, however, Moran *v.* Uzielli, [1905] 2 K. B. 555, *ante*, § 257a.

(*o*) 2nd ed. of this work, p. 290.

(*p*) See Mar. Ins. Act, 1906, s. 5 (2), *ante*, § 254.

(*q*) See Stockdale *v.* Dunlop (1840), 6 M. & W. 224; and the remarks on this case, 1 Parsons, Ins. 193.

(*r*) Sparkes *v.* Marshall (1836), 2 Bing. N. C. 761.

(*s*) Grant *v.* Parkinson (1781), 3 Dougl. 16 (see also Lucena *v.* Craufurd (1802), 3 B. & P. 85, where a report of the case is given from Mr. Dunning's brief and a MS. note; 1 Marshall, Ins. 95; 2 Park, Ins. 561); Barclay *v.* Cousins (1802), 2 East, 544. See the observations of Lawrence, J., *ibid.*, p. 550.

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coast, the outward cargo to be bartered for slaves, and the slaves to be carried on in the ship to the West Indies for sale, the Court nonsuited the plaintiff, because he did not show that, if no loss had intervened and the slaves had all got to a market, any profit would have been produced (*t*).

Accordingly, in the next case of a similar kind which came before the Court, and in which the profit insured was upon sale of a homeward cargo of flax shipped at Riga for Hull, care was taken to allege in the declaration, and to prove at the trial, that the flax, had it arrived sound, would have realized a profit to the amount insured (*u*). This case accordingly gives the rule which should be observed in pleading and in preparing the evidence.

In the United States.

In America the rule is different, and several cases there decided establish the doctrine, which has been adopted by the Supreme Court of the United States, that it is a conclusive presumption arising on proof of ownership of the goods shipped that they would have realized a profit in the foreign market (*x*). Thus, where three-eighths of the goods were lost, the Court held it to be a loss of that proportion of the profits, without inquiring whether there would have been any profits had the goods arrived (*y*).

Insurable interest in profits, when the goods are not the property of the assured.

288. It has been said that the assured must have not only an expectancy of profit, but, coupled therewith, a present existing title to the subject-matter out of which the profits are expected to arise (*z*). "The doctrine," says Mr. Justice

(*t*) Hodgson *v.* Glover (1805), 6 East, 316. In this case Lawrence, J., differing from what he had said in Barclay *v.* Cousins, where the adventure was exactly similar, agreed with the rest of the Court, and said: "The case is defective in not showing that if there had been no shipwreck there would have been some profit."

(*u*) Eyre *v.* Glover (1812), 16 East, 218.

(*x*) Patapsco Ins. Co. *v.* Coulter (1830), 3 Peters' Sup. Court R. 222; 1 Phillips, Ins. s. 318; 1 Parsons, Ins. 195.

(*y*) Loomis *v.* Shaw (1800), 2 Johns. Cas. 36.

(*z*) "I admit," says Parke, B., "that profits may be insured, but that is on the ground that they form an additional part of the value of the goods in which the plaintiff has already an interest": see Stockdale *v.* Dunlop (1840), 6 M. & W. 224, 232.

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afterwards Chancellor) Kent, "that runs through all the cases, is, that the assured must have an interest in the subject-matter from which the profits are to proceed, in order to prevent the policy from being considered a wager" (*a*).

There can, however, be no doubt that an insurable interest in profits on goods may exist, although the goods are not, at the time of the loss, the property of the assured (*b*). Thus, where a purchaser of goods "to arrive" sold them before shipment on the same terms, but at a higher price, the Exchequer Chamber had no doubt that he had an insurable interest in his profit; yet the property in the goods would at no time be in him (*c*). *A fortiori*, the assured in profits has an insurable interest, when there is a contract under which the goods will, on arrival, become his property (*d*). We have seen, however, that unless the goods, out of which such profit is to arise, were actually shipped on board at time of loss, he cannot protect such interest under a policy in the common form with the clause "beginning the adventure in the said goods from the loading thereof on board" (*e*).

Insurable interest of shipowner in use of his ship.

Whether a shipowner has an insurable interest in the profit which he expects to make by the use of his ship on a voyage or during a period for which he has not entered into a contract for freight is a question which has not been determined. There is some authority for the view that he has an insurable interest in the use of his ship (*f*); but if this view be correct,

(*a*) Per Kent, J., in Abbott *v.* Sebor (1802), 3 John. Cas. (N. Y.) 39.

(*b*) See Mar. Ins. Act, 1906, s. 5 (2); *ante*, § 254.

(*c*) McSwiney *v.* Royal Exchange Ass. Co. (1850), 14 Q. B. 646, 659; see also 1 Parsons, Ins. 191—194.

(*d*) It is, in fact, in cases of this kind that insurances on profits are usually effected. A buyer of goods to whom the property has already passed, and who wishes to insure his profits, usually takes out a valued policy on goods, and includes the profits in his valuation.

(*e*) McSwiney *v.* Royal Exchange Ass. Co. (1849), 14 Q. B. 634; in error (1850), *ibid.* 646; *S. C.*, 18 L. J. Q. B. 193; *S. P.*, Halhead *v.* Young (1856), 6 E. & B. 312; 25 L. J. Q. B. 290; *ante*, § 238; where the facts of these cases are set out; see also per Willes, J., in Wilson *v.* Jones (1867), L. R. 2 Ex. 139, 146.

(*f*) Per Walton, J., Manchester Liners *v.* British and Foreign Marine Ins. Co. (1907), 7 Com. Cas. 26, 33; *ante*, § 239.

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it is apprehended that he could only recover in an exceptional case, in which there is definite proof that the profit would have been realized if perils of the sea had not intervened; *e.g.*, where the vessel is lost on her way to a port, where the shipowner intends to put her "on the berth" to load a general cargo, and there is evidence that a remunerative cargo would in the ordinary course have been obtained.

Insurable interest of lender on bottomry and respondentia.

289. Sect. 10 of the Marine Insurance Act, 1906, declares that—"The lender of money on bottomry or respondentia has an insurable interest in respect of the loan."

By the contract of bottomry, if the ship be lost, the lender loses all his money; but if the ship arrive in safety, then he receives back his principal, and also the premium or maritime interest agreed upon. The lender on bottomry has a lien on the ship, and an insurable interest in her safety, and accordingly money lent on bottomry may, when so described, be the subject of marine insurance (*g*).

The insurable interest of the lender in these cases will depend upon the validity of the bottomry bond. In order to give an insurable interest the money secured by the instrument of hypothecation must, upon a fair construction of its terms, be made to depend on the arrival of the ship (*h*).

Simonds v. Hodgson.

Where the words of the instrument were, "I bind myself, my ship and tackle, &c., to pay the sum borrowed . . . after my arrival at the port of London"; . . . "and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of London": it was contended that, as the master had thus bound himself personally, the payment of the sum borrowed never depended on the arrival of the ship; and, consequently, that the lender had no such interest in the risk of the voyage as to entitle him to insure the money lent. The Court of King's Bench, however, reversing the judgment of the Court

(*g*) *Ante*, §§ 242, 243.

(*h*) In The Haabet, [1899] P. 295, Bucknill, J., held that an instrument was a valid bottomry bond, although the loan became payable if the vessel put into a port of refuge.

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of Common Pleas, held that the words "my arrival" must be taken to mean, not the personal arrival of the master, but his arrival in the ship; and the clause "whether she do or do not arrive in the port of London," to mean not "whether she be lost or not," but "whether she arrives in the port of London or some other port"; they were of opinion, therefore, that the loss of the ship involved the loss of the money lent, and therefore that the lender might insure his interest by a policy on "bottomry" (*i*).

Stainbank v. Fenning.

The master of a ship which had put into a foreign port of distress to refit, borrowed money of a merchant there for necessary repairs, to secure which he drew bills on his owner, and executed what purported to be hypothecation of ship, cargo and freight. But this instrument made the money payable at all events, and it was, therefore, held that the lender had no insurable interest (*k*).

Insurable interest of lender on respondentia.

Respondentia is a loan upon the goods, to be repaid to the lender, together with the marine interest, if the goods arrive; not to be paid if they are lost; the insurable interest, therefore, of the lender on respondentia, stands on the same ground with that of the lender on bottomry, viz., that he has a direct interest in the arrival of the goods.

Insurable interest of borrower on bottomry and respondentia.

290. "The borrower on bottomry and respondentia," said Arnould, "has no insurable interest in the property pledged, except in as far as the value of such property exceeds the amount for which it is pledged. If pledged to its full value, it is obvious that the borrower can have no insurable interest in its safety; for in such case, if the property arrives, it goes

(*i*) Simonds *v.* Hodgson (1829), 6 Bing. 114; in error (1832), 3 B. & Ad. 50; cf. Price *v.* Maritime Ins. Co., [1901] 2 K. B. 412, C. A.

(*k*) Stainbank *v.* Fenning (1851), 11 C. B. 51; Stainbank *v.* Shepard (1853), 13 C. B. 418. The description of the subject of insurance in the policy ran thus: "The said ship, goods and merchandizes, &c., for so much as concerns the assured by agreement between the assured and assurers in that policy, are and shall be 1,500*l.* advances for repairs and disbursements; the whole valued at 1,675*l.*, including premiums of insurance."

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to satisfy the debt; if lost by the risks within the hypothecation, the borrower is discharged" (*l*).

Mr. Arthur Cohen, in discussing this passage, has, however, pointed out that the soundness of the principle stated therein may be questioned (*m*). This follows from the fact that if the bottomry bond be in the ordinary form, the money lent on bottomry is due in every case except that of an absolute total loss (*n*). If the shipowner is himself the borrower, and has made himself personally liable on the bond in case of the ship's arrival, it follows that in the case of any damage or loss not amounting to such a loss, he may, in the result, suffer to the extent of the damage which his ship has sustained; and on this ground he ought to have an insurable interest in his ship in respect of such damage. When, as is the usual case, the master is the borrower, and has made himself personally liable to pay the amount due under the bond, the shipowner may, if the ship arrives damaged, have to indemnify the master against any claim that may be made against him. In this case also the shipowner may be a loser to the extent of the damage which his ship has suffered, and ought to be able to protect himself against loss in consequence of such damage.

It may also be argued that, apart from any question of the shipowner's personal liability on the bond, or his liability to indemnify the master, the shipowner has an insurable interest on the following ground in respect of damage which the ship may sustain on the voyage: he has the right to redeem his ship by discharging the bond, and should therefore be entitled to protect himself against the loss which he will suffer in the exercise of this right if the ship should suffer damage.

Insurable interest of consignees,

291. "There are different sorts of consignees: some have a power to sell, manage, and dispose of the property, subject

(*l*) 2nd ed. vol. i. p. 299.
(*m*) Law Quarterly Review, April, 1895, vol. ii. p. 120.
(*n*) Stephens *v.* Broomfield (1869), L. R. 2 P. C. 516; Broomfield *v.* Southern Ins. Co. (1870), L. R. 5 Ex. 192.

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only to the rights of the consignor; others have a mere naked right to take possession" (*o*); others, again, it may be added, though not entrusted to sell, are yet interested in the property, as having a lien or claim upon it for their advances. It is obvious that the rights of these different kinds of consignees to effect an insurance must vary with the various relations in which they stand to the property and to the consignor.

factors or agents.

Different kinds of consignees.

With regard to consignees who have a mere naked right to take possession, without being either entrusted to sell on commission, or having a lien for their advances, Lord Eldon says, "I will not say that they may not insure if they state the interest to be in their principal"; and they may do so, under sect. 23 (1) of the Marine Insurance Act, 1906, in their own names on account of the consignors, who will be bound by the policy so effected if they have already authorized it, or, if they subsequently adopt it, after notice (*p*).

Naked consignees.

But such mere naked consignees have no insurable interest so as to enable them to effect the policy in their own names, and on their own account, and to recover upon it, averring the interest to be in themselves. They have no legal property in the subject-matter of the insurance; they are not beneficially interested in it; and they can therefore only effect the insurance on account of those who are so interested and so entitled; and must aver the interest to be in those on whose account the insurance was made (*q*).

Consignees having a lien or charge.

292. Sect. 14 (2) of the Marine Insurance Act, 1906, declares that "a mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit."

(*o*) Per Lord Eldon, Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 324.
(*p*) Wolff *v.* Horncastle (1798), 1 B. & P. 316.
(*q*) See the admirable remarks of Lawrence, J., in his celebrated judgment in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 307; per Willes, J., in Seagrave *v.* Union Marine Ins. Co. (1866), L. R. 1 C. P. 307, 319, 320; and see a very able note of Judge Duer, 2 Ins. n. 2 to s. 10, pp. 160—174.

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Thus, consignees who have a lien or claim on the property in respect of advances, or commission agents to whom it is entrusted for the purposes of sale, or indorsees of the bill of lading to whom a general balance is due, can effect an insurance on their own account and recover, averring the interest to be in themselves, to the amount of their lien, claim, or balance (*r*). They can also, by the same insurance, protect both their own interest and the interests of other parties in the property (*s*).

What they can recover on an averment of interest in themselves.

It is not settled whether an equitable mortgagee, or a consignee of goods to whom the legal property in goods has not passed, but who is beneficially interested in the whole of them, can recover the full value on such an averment, or whether he must also aver the interest of the other parties. On this point the Court of Common Pleas were equally divided in the latest case, in which the question was fully discussed and all the authorities considered (*t*).

Indorsee of bill of lading.

The effect of the assignment of a bill of lading depends on the intention of the parties (*u*).

Primâ facie, the indorsement and delivery of a bill of lading vests the whole property and interest in the goods in the indorsee (*x*), and gives him, from the moment of indorsement, an insurable interest in them to the full extent of their value. If, however, it be established that the assignment of the bill of lading is only intended to have a limited effect, as, *e.g.*, to be a pledge of the goods, the whole property does not pass (*y*), and the assignor still has an insurable interest in the goods. Thus where the purpose of the transfer of a bill of lading was to bind the net proceeds of the consignment in

(*r*) Ebsworth *v.* Alliance Marine Ins. Co. (1873), L. R. 8 C. P. 596; Godin *v.* London Ass. Co. (1758), 1 Burr. 489; 1 W. Bl. 103.

(*s*) See per Bowen, L. J., Castellain *v.* Preston (1883), 11 Q. B. D. 380, 398.

(*t*) Ebsworth *v.* Alliance Marine Ins. Co., *supra*.

(*u*) Sewell *v.* Burdick (1884), 10 App. Cas. 74.

(*x*) M'Andrew *v.* Bell (1795), 1 Esp. 373; Hibbert *v.* Carter (1787), 1 T. R. 745.

(*y*) Sewell *v.* Burdick (1884), 10 App. Cas. 74.

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the hands of the consignor's agents, the consignor, notwithstanding such transfer, recovered for their loss (*z*).

It has been held in the United States, that where one takes a bill of lading to secure advances of money on a shipment of goods, and makes out the invoice in his own name, the shipper of the goods has still an insurable interest in them to their full value (*a*).

From the principle that a creditor who has a lien on the subject of insurance has an interest to the extent of his lien, it follows that any creditor to whom goods are consigned as a collateral security has an insurable interest in them to the amount of his debt (*b*).

Pledgee of consignee.

So where the bill of lading is pledged by the consignees of the goods as a security for advances to them, the pledgee has an insurable interest in the goods; and may sue in his own name on a policy effected by the consignees, under his instructions, in their own names "for account of whom it may concern," and deposited with him as an additional security (*c*).

Cases on insurable interest of consignee, commission agent, or indorsee of bill of lading.

293. That a consignee of goods who is entrusted as a commission agent to sell them, or who has accepted bills on them, or has a general balance against the consignor, has an insurable interest in such goods, at all events to the extent of his claim, is a position which has received frequent illustration in our jurisprudence.

Wolff *v.* Horncastle.

Thus, where the general agents of the consignor, on the

(*z*) Hibbert *v.* Carter (1787), 1 T. R. 745.

(*a*) Locke *v.* North American Ins. Co. (1816), 13 Mass. R. 61; 1 Phillips, s. 286.

(*b*) Wells *v.* Philadelphia Ins. Co. (1822), 9 Serg. & Rawle, 103; 1 Phillips, s. 292.

(*c*) Sutherland *v.* Pratt (1843), 12 M. & W. 16. Where an action was brought on a policy on goods by a bank claiming as pledgees from an alien enemy, the Court of Appeal, while agreeing that the plaintiffs as pledgees had an insurable interest, held that under the circumstances they could not recover either as originally assured, for want of proof that the policy had ever been intended to cover their interest, or as assignees, because they were affected by the infirmity of the title of the pledgors, under sect. 50 (2) of the Mar. Ins. Act: Bank of New South Wales *v.* South British Ins. Co. (1920), 4 Lloyd's List L. R. 266, 384.

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refusal of the consignees to accept the goods, retained the bills of lading in their own hands, and accepted bills on account of the consignment to the amount of 300*l*., they were held to have an insurable interest to the amount of their acceptances, on the ground, as stated by Buller, J., that "a debt which arises in consequence of the article insured, and which would have given a lien upon it, does give an insurable interest" (*d*).

Hill *v.* Secretan.

The house of De la Torre, in Spain, consigned a cargo of wool, with the bill of lading indorsed, to Du Bois & Son in London, directing them to hold part of it for Hill & Co. of Exeter. Hill & Co. had given no orders for the wool, but De la Torre & Co. were indebted to them in the sum of 500*l*. The Court held that, under these circumstances, Hill & Co. had clearly an insurable interest in that part of the wool which was held by Du Bois & Son as trustees for their benefit, and might recover under a count averring the interest to be in themselves (*e*).

Where, however, the consignor directed the consignees to hold, not the goods, but the proceeds of the goods, to the use of his creditor, this was held, in the United States, not to give such creditor an insurable interest in the goods (*f*).

Robertson *v.* Hamilton.

294. Two British ships, the "Ross" and the "Atlantic," having, with their cargoes, been captured by the Spaniards, the plaintiffs (who were owners of the "Ross"), the owners of the "Atlantic," and the proprietors of the cargoes gave a joint authority to one Cowan to endeavour to obtain restitution. Cowan, by giving up part of the cargoes to the captors, obtained restitution of the rest, together with the two ships, in a mass, for the benefit of all concerned. He

(*d*) Wolff *v.* Horncastle (1798), 1 B. & P. 316, 323.

(*e*) Hill *v.* Secretan (1798), 1 B. & P. 315.

(*f*) Murray *v.* Columbian Ins. Co. (1814), 11 Johnson's R. 302. This was apparently on the assumption that the creditor could not under the circumstances have claimed possession of the goods. Phillips (vol. i. s. 291) says that the creditor has an insurable interest, and cites Hill *v.* Secretan, *supra*.

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drew bills on the plaintiffs for his general expenses, which the plaintiffs accepted and paid; and he also, together with the rest of the property, consigned to them the "Atlantic" (of which they were not owners), in order, as he expressed it, to simplify the concern. Lord Ellenborough and the rest of the Court were of opinion that they had a clear insurable interest in the "Atlantic"; they were the original owners of one of the captured ships, and after the whole of the captured property had been redeemed *en masse* at their expense they became interested in the whole. They were also the consignees of the ship in question from Cowan; and having as such consignees accepted and paid bills for the expenses of restoring this ship, conjointly with the rest of the property, they had on this ground likewise a clear insurable interest. The Court accordingly held that the plaintiffs could recover the whole amount of the insurance; in trust, however, as to the surplus over their advances for those interested with themselves in the whole (*g*).

General principle as to consignees.

295. As a general principle, then, there can be no doubt that consignees of the goods being in advance to the consignors, or under acceptances for them, may insure, in their own name (*h*), to the full value of the goods, and apply the proceeds of the policies to their own benefit to the extent of their claims in respect of such advances or acceptances, holding the residue in trust for the consignors if they intended when effecting the policies to cover the interest of the latter (*i*).

Consignee claiming under policy effected to

It has been held, however, that such a consignee is so far identified in interest and right with his consignor as not to be able to apply with effect to his own interest, which is

(*g*) Robertson *v.* Hamilton (1811), 14 East, 522.

(*h*) Arnould added "and on their own account." See on this point *ante*, § 292.

(*i*) See, in addition to the cases already cited, Carruthers *v.* Sheddon (1815), 6 Taunt. 14. The same position is established in the United States. De Forest *v.* The Fulton Ins. Co. (1828), 1 Hall's R. 84; cited 1 Phillips, Ins. s. 311.

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protect the interest of the consignor.

derived out of that of the consignor, an insurance which was effected in order to cover the interest of the latter, but which, owing to the intervention of some principle of law, cannot be available for such purpose.

Conway v. Gray.

Thus, Townsend, an American merchant, had consigned to Conway & Co., of Liverpool, a cargo of American produce for sale, and assigned to them the bill of lading. Conway & Co. effected an insurance on the cargo, in their own names, "as interest might appear," and debited Townsend with the premiums; they were then, and down to the time of loss, in advance to Townsend on account of the cargo, and had a general balance against him to a greater amount than the sum insured. The goods were detained in the United States under an American embargo; whereupon Conway & Co. gave notice of abandonment, and in an action on the policy averred the interest in the first count of the declaration to be in themselves. Lord Ellenborough and the Court of King's Bench, while admitting that a consignee so circumstanced might insure on his own account, held that, as the consignor himself, being an American citizen, could not insure against acts done by the Government of his own country, so the consignees, though British subjects, were likewise incapacitated from applying the policy to their interests, and enforcing payment, as though it had been made on their account (*k*).

General agents of a purchaser entitled to benefit of insurance.

296. The general agents of a purchaser of goods, who, by his directions and at his cost, have effected an insurance on the goods in order to cover bills drawn on them by him in favour of the seller, need only apply the proceeds of such policy to the payment of such drafts as far as the state of their accounts with the purchaser may enable them to do so without loss to themselves, and are entitled to hold the

(*k*) Conway *v.* Gray (1809), 10 East, 536. As regards the right of the consignor to recover, the case has been overruled by the Exchequer Chamber in Aubert *v.* Gray (1862), 3 B. & S. 163, 169; 32 L. J. Q. B. 50. The decision is, however, not affected as regards the principle for which the case is cited in the text.

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residue to their own benefit (*l*). "It has never been decided," says Bayley, J., "that a person not bound to insure, but who elects to insure in order to cover payments if the goods do not arrive, may not apply the proceeds of the policy to his own use. The premium for the insurance comes out of the general means of the party effecting it, and diminishes the fund applicable to the claims of general creditors. As between them and the seller of the particular goods, they certainly would be entitled to the money secured by the policy" (*m*).

Insurable interest of consignee in his commission.

297. A consignee has an insurable interest in the commission which he expects to earn on goods consigned to him, but must specifically describe his interest (*n*). The mere expectation, however, that goods will be consigned to a person of course gives him no insurable interest in the commission which he hopes to earn (*o*).

Knox v. Wood.

It seems to have been decided by Lord Ellenborough that there is no insurable interest in commissions unless the goods on which they are to be earned are already on board the ship. A merchant effected an insurance at and from Bristol to Jamaica and back to Dublin, on commission to arise upon the sale in Dublin of produce expected to be shipped at Jamaica for the homeward voyage, under an agreement between himself and a Jamaica house. He chartered a ship to load the produce. She was, however, captured on her outward voyage; but being released she proceeded to Jamaica, and found that her cargo had been forwarded by another ship.

(*l*) Neale *v.* Reid (1823), 1 B. & Cr. 657. The text is Arnould's (2nd ed. p. 305), and for that reason is retained here. The editors, however, after a careful perusal of the case, submit that the decision was misunderstood by the learned author; that the case was not one in which the agents were setting up any rights on their own account, and that the question was simply whether the vendor or the creditors of the purchaser were entitled to the benefit of the insurance. See Park, 8th ed. p. 579; Phillips, § 296. (*m*) 1 B. & Cr. 662.

(*n*) Per Lord Kenyon, Flint *v.* Le Mesurier (1796), 2 Park, Ins. 563; Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 315.

(*o*) Knox *v.* Wood (1808), 1 Camp. 543. See per Bigham, J., Buchanan *v.* Faber (1899), 4 Com. Cas. 223.

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Meanwhile she had also lost the season, and had to return home in ballast. In an action to recover the loss of commission, it was held that the plaintiff had no insurable interest in such commission; and Lord Ellenborough said: "It strikes me that this was a mere expectation. The expectation is frustrated by the capture, and the interest was never on board; this is an insurance of the expectation of an expectation." The defendant accordingly had a verdict; and on motion for a new trial the Court were clearly of opinion that the plaintiff had not an insurable interest when the loss happened. Lord Ellenborough on that occasion said: "This case carries us into the land of dreams; and, if supported, would introduce the practice of insuring a 20,000*l.* prize in the lottery without purchasing a ticket" (*p*).

If the case was decided on the ground that the plaintiff had no contract for the consignment to him of a cargo by this ship, its authority cannot be questioned (*q*). If, however, as the report in Campbell implies, there was a binding contract under which the plaintiff was entitled to have the vessel loaded, it would seem on principle that the plaintiff had an insurable interest in the commission which but for the perils of the voyage he would in the ordinary course of things have earned (*r*). He would have been entitled to assume that the cargo would be loaded if the ship arrived at Jamaica (*s*).

(*p*) Knox *v.* Wood (1808), 1 Camp. 543; 2 Park, Ins. 564.

(*q*) The report in Park bears out this view.

(*r*) See per Mathew, J., in Ward *v.* Weir (1899), 4 Com. Cas. 216, 222. Phillips questions the decision in Knox *v.* Wood, 1 Phillips, s. 311. Other points might, however, be raised on this insurance. One (if, as is probable, the policy was in common form) is that the risk only attached on the loading of the goods. This depends on a further question, viz., whether commissions can, like profits, be deemed to be part of the value of the goods so as to make the clause as to the goods applicable. Another is, that the loss was due merely to a retardation of the voyage, and that the policy ought, therefore, to have been specially framed to cover such a risk. See M'Swiney *v.* Royal Exchange Ass. Co. (1850), Ex. Ch. 14 Q. B. 646. The case was, however, clearly not decided on either of these grounds.

(*s*) Rankin *v.* Potter (1873), L. R. 6 H. L. 83.

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Insurable interest of shipbrokers.

A shipbroker to whom by agreement a ship is addressed, so that if she arrives at the port where he carries on his business he will earn brokerage, has an insurable interest in his brokerage during the voyage of the ship to the port (*t*). A mere hope or expectation, however, on the part of the broker that the owner of a ship will continue to employ him gives him no insurable interest in the brokerage, which he hopes to earn on the arrival of the ship (*u*).

Insurable interest of mortgagor and mortgagee.

298. The rule with regard to the insurable interest of mortgagor and mortgagee is thus stated in sect. 14 (1) of the Marine Insurance Act, 1906:—

> Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

From the general principle, that any creditor having a claim on property pledged to him for advances has an insurable interest to the extent of his claim, it follows that a mortgagee of ship or goods has a distinct insurable interest in the mortgaged property, and may recover in an action upon a policy effected for his benefit, averring the interest to be in himself, to the full amount of the mortgage debt. At the same time the equitable title that still remains in the mortgagor is in him an insurable interest which he may protect by a separate insurance.

Thus, a factor resident in this country, to whom goods and freight have been mortgaged by his foreign principal for advances, may, upon consignment to himself of the goods, with the bill of lading indorsed, insure the legal interest in the property on his own account, and the equitable interest remaining in his principal on account of the latter (*x*).

(*t*) Watts *v.* Bacon, *coram* Mathew, J., 18th Jan. 1900.

(*u*) Per Bigham, J., Buchanan *v.* Faber (1899), 4 Com. Cas. 223.

(*x*) Smith *v.* Lascelles (1788), 2 T. R. 187.

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Amount which mortgagee can recover.

Although the ownership of the mortgagee is distinguished in the register from the absolute ownership (*y*), the mortgagee of a ship may protect his interest therein by a general policy on the ship in the common form: and he may insure to the full value of the ship, but can only recover to the extent of his mortgage debt, unless in effecting the policy he intended to cover, not his own interest only, but that of the mortgagor also (*z*).

The amount recoverable under an open policy effected by a mortgagee depends upon his intention in effecting the policy. Sect. 14 (2) of the Marine Insurance Act, 1906 (*a*), declares that a mortgagee "may insure on behalf and for the benefit of other persons interested as well as for his own benefit." If he intended it to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under trust as to the surplus, to held it for the mortgagor; if he intended it only to cover his own interest as mortgagee, and the insurance is for more than the mortgage debt, he can recover to the extent only of his charge (*b*). If, under such circumstances, he have recovered the whole sum in an action on the policy, and retains the surplus, it may be recovered back from him by the underwriters (*c*).

The mortgagor's interest.

299. The mortgagor has an insurable interest in the mortgaged property to its full value, because in case of loss he would not only be deprived of the thing insured, but still remain liable for the mortgage debt: hence the mortgagor of the ship has been held to have an insurable interest, though the ship be mortgaged to her full value (*d*).

(*y*) See now the Merchant Shipping Act, 1894, s. 34.

(*z*) Irving *v.* Richardson (1831), 2 B. & Ad. 193; *S. C.* at N. P., 1 Mood. & R. 153.

(*a*) *Ante*, § 292.

(*b*) So in Carruthers *v.* Sheddon (1815), 6 Taunt. 17, Gibbs, C. J., told the jury to consider what amount of interest the policy was in fact intended to cover by those who caused it to be effected.

(*c*) Irving *v.* Richardson (1831), 2 B. & Ad. 193.

(*d*) See Alston *v.* Campbell (1779), 4 Brown's Parl. Cas. 476; Hutchinson *v.* Wright (1858), 25 Beav. 444; 27 L. J. Ch. 834; Higginson *v.* Dall (1816), 13 Mass. R. 96; cited 1 Phillips, Ins. s. 286. The circumstance that in form the registered deed of mortgage is an absolute transfer of the ship does not affect the mortgagor's insurable interest. Hutchinson *v.* Wright, *supra;* and see Ward *v.* Beck (1863), 32 L. J. C. P. 113. In Ins. Co. *v.* Stimson (1880), 103 U. S. 25, the question of the insurable interest of mortgagor and mortgagee was considered.

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Mortgagor insuring as trustee for mortgagee.

When the mortgagor has covenanted to insure the mortgaged property on account of the mortgagees, he is, of course, a trustee for them of the proceeds of the policy (*e*). The owner, by a duly registered deed to which he and two trustees were the only parties, assigned six ships to the trustees for securing sums of money expressed to be lent by them, but which in fact were lent by the plaintiffs, and covenanted to ensure each vessel in the sum of 1,500*l.* at the least, and on request, to assign the policies to the trustees. He did insure in his own name through a broker who knew of the mortgage, but to whom he misrepresented the object of the insurance. Upon the loss of one of the ships and the bankruptcy of the owner, the plaintiffs obtained a decree in equity declaring their right to the proceeds of the policies, and setting aside the broker's general lien and the claim of the bankrupt's assignees under the reputed ownership section of the statute (*f*).

When the indorser of a bill of lading is in the position of a mortgagor.

The indorser of a bill of lading who did not intend to pass his whole property in the goods by the assignment, but only to give a charge on their net proceeds, stands in the same position as a mortgagor, and retains an insurable interest to their full value, since he continues to be as directly concerned in the safety of the goods as he was before assigning the bill of lading (*g*). A consignee of goods who has a lien on them for a debt is in the position of a mortgagee. The question of the insurable interest of consignees has already been considered (*h*).

(*e*) See as to the right of the mortgagor or the assignees of his interest to sue on the policy, when he has handed it over to the mortgagee, Swan *v.* Maritime Ins. Co., [1907] 1 K. B. 116; 12 Com. Cas. 73.

(*f*) Ladbroke *v.* Lee (1850), 4 De G. & S. 106.

(*g*) Hibbert *v.* Carter (1787), 1 T. R. 745. See *ante*, § 292.

(*h*) *Ante*, §§ 291 *et seq.*

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Insurable interest of a trustee.

300. There is no doubt that a trustee, having the legal interest in the thing insured, may insure, in respect of such interest, to the full value of the goods (*i*).

Insurable interest of captors, prize agents, &c.

301. The insurable interest of captors, prize agents, &c. in captured property has been the subject of very elaborate and refined discussion in the English Courts.

Le Cras *v.* Hughes, or the Omoa case.

The first case in which the question arose was that of Le Cras *v.* Hughes, before Lord Mansfield, generally known in insurance law as the Omoa case. A detachment of the sea and land forces of Great Britain jointly captured the fort of Omoa and two Spanish ships then lying under its protection. One of these ships, together with her cargo, was insured on account of the officers and crews of the British ships "at and from Omoa to London," and was lost on her homeward voyage. An action being brought on the policy, averring the interest to be in the officers and crews of the ships, two questions were made—1. Whether the sea officers had an insurable interest under the then Prize Act (19 Geo. 3, c. 67); 2. Whether possession of the ship would entitle them to insure upon the bare contingency of a future grant from the Crown.

The consideration of the second question became unnecessary, except speculatively, for Lord Mansfield was clearly of opinion that the officers and crew had an insurable interest under the Prize Act. The objection on this point being that the capture was not a sole capture by the sea forces, but a capture by the land and sea forces jointly, Lord Mansfield said: "The Act gives to the officers, seamen, marines and soldiers on board every ship of war the sole property in all ships and goods which they shall take during war, after condemnation. It does not require that the seamen only shall take; where soldiers assist, their right may be doubtful, but that does not lessen the right of the navy" (*k*).

(*i*) Per Lord Eldon, in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 324. See also per Brett, J., in Ebsworth *v.* Alliance Marine Ins. Co. (1873), L. R. 8 C. P. 596, 638.

(*k*) Le Cras *v.* Hughes (1782), 1 Marshall, Ins. 105; 2 Park, Ins. 568; 3 Dougl. 81. See the judgment of Lord Ellenborough in Routh *v.* Thompson (1809), 11 East, 433, 434. That captors of a prize in case of joint capture had an insurable interest in such prize under the 45 Geo. 3, c. 72, was held in Stirling *v.* Vaughan (1809), 11 East, 619.

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"As to the second ground," Lord Mansfield proceeded to say, "the Crown always makes the grant, and there is no instance to the contrary. Here the possession is in the assured, and a certain expectation of receiving the property captured from the Crown, which gives him an interest in its arrival" (*l*).

Query, whether captors have an insurable interest on the ground of an expectation.

302. The position thus advanced by Lord Mansfield, "that possession, coupled with the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounts to an insurable interest," has been considerably shaken by the observations of succeeding and scarcely less eminent judges. "If the Omoa case," says Lord Eldon, in Lucena *v.* Craufurd, "was decided upon the expectation of a grant from the Crown, I never can give my assent to that doctrine. That expectation, though founded on the highest probability, was not interest, and it was equally not interest whatever might have been the chances in favour of the expectation. That which was wholly in the Crown, and which it was in the power of his Majesty to give or withhold, could not belong to the captors so as to create any right in them" (*m*). Lord Ellenborough, in Routh *v.* Thompson (*n*), and Tindal, C. J., in Devaux *v.* Steele (*o*), both seem to consider that, after these observations of Lord Eldon's, the doctrine of Lord Mansfield, if it can still be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances (*p*).

(*l*) Le Cras *v.* Hughes (1782), 1 Marsh. Ins. 105; 2 Park, Ins. 568; 3 Dougl. 81.

(*m*) Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 323.

(*n*) 11 East, 434.

(*o*) 6 Bing. N. C. 358, 370, 371.

(*p*) Sect. 5 of the Mar. Ins. Act, 1906 (*ante*, § 254), in which there is a definition of insurable interest (which, however, does not profess to be exhaustive) does not affect this question. The section contained an

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Result of the authorities.

303. If the law, therefore, on this subject be that possession, coupled with the expectation of a future grant from the Crown, gives an insurable interest, it is so only in cases where a long and uniform course of practice can be shown for the Crown always to make such grant and no instance can be given to the contrary (*q*).

Lord Eldon, however, pointed out other grounds on which the right of the captors to insure might have been put. "The captors," said his Lordship, "not only had the possession, but a possession coupled with the liability to pay costs and charges, if they had taken possession improperly, and also a liability to render back property which should turn out to be neutral" (*r*). It was upon this very ground that Lord Kenyon had previously put the insurable interest of captors in the case of Boehm *v.* Bell (*s*).

Lucena *v.* Craufurd.

304. The next case to be considered is the famous one of the Dutch Commissioners, which, for more than eight years, was litigated in the English Courts of law, and in the House of Lords gave rise to one of the most elaborate and ingenious legal discussions ever raised upon a point of maritime law (*t*).

The facts were:—Holland having been in 1794 occupied by the armies of the French Republic, with whom we were then at war, our Government, by an Order in Council of

additional sub-section which declared that "a prospect or possibility of loss or gain, which is not founded on any right or liability in, or in respect of, the subject-matter insured, is not insurable"; but it was struck out in Committee.

(*q*) See Devaux *v.* Steele (1840), 6 Bing. N. C. 358.

(*r*) 2 B. & P. N. R. 323.

(*s*) Boehm *v.* Bell (1799), 8 T. R. 154. See the judgment of Lord Kenyon, *ibid.* 161.

(*t*) The case first came before the Court of King's Bench under the name of Craufurd *v.* Hunter in 1798, 8 T. R. 13. It came before the Exchequer Chamber as Lucena *v.* Craufurd, in 1802, 3 B. & P. 75; before the House of Lords, under the same name, in 1806, 2 B. & P. N. R. 269. It then came before Lord Ellenborough at the Sittings after Michaelmas Term, 1806, on the *venire de novo*, and was ultimately disposed of by the House of Lords on the 29th June, 1808, as Lucena *v.* Craufurd, 1 Taunt. 325.

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February, 1795, directed that all Dutch ships bound to and from the ports of Holland should be seized for the purpose of being brought into this country and there provisionally detained. With a view to provide for the custody of such ships, an Act was passed empowering his Majesty in Council to appoint commissioners for the care, management, sale, or other disposal, according to his Majesty's instructions, of all Dutch ships or cargoes "which had been, and might be thereafter, detained in or brought into the ports of the United Kingdom"; and on the 15th June, 1795, a commission issued under this Act to Craufurd and others, appointing them to act as commissioners for the purposes specified in the Act. Before this commission was issued, a man-of-war, acting under the Order in Council of February, 1795, had captured a fleet of Dutch merchantmen and carried them into St. Helena for the purpose of being brought into this country. Accordingly, in July, four of these ships sailed from St. Helena with their Dutch cargoes on board for this country; and on the 22nd of August (*u*) Craufurd and his co-commissioners, having received notice to that effect, caused an insurance to be effected on these ships and their cargoes on their own account, under the name and style of "The Honourable Commissioners for the Sale of Dutch Property." All the four ships thus insured, together with their cargoes, were totally lost before arriving in this country; one of them, however, the "Zeelelye," was not so lost till after the 15th of September. This date is important, because on that day a proclamation of reprisals—in other words, an open declaration of war—was made by his Majesty against the United Provinces.

Craufurd and his co-commissioners then brought an action upon the policy, averring the interest, in the first count of the declaration, to be in themselves "as such commissioners"; in the second count, to be in the Crown.

Question in the case.

The main question in the case was, whether the plaintiffs,

(*u*) 1 Taunt. 329.

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under the circumstances, had an insurable interest, under the commission, in the ships and cargoes insured before their arrival in this country. It would be impossible to report at length, and useless to attempt to abridge, the able and ingenious disquisitions to which this question gave rise; the reader is referred to the reports at large, especially to the judgment of Chambre, J., in the Exchequer Chamber (*x*), of the same learned Judge (*y*), of Lawrence, J. (*z*), and of Lord Eldon (*a*), in the House of Lords.

Judgment of the Court of King's Bench.

In the Court of King's Bench, Lord Kenyon and the rest of the Court held that the plaintiffs had an insurable interest sufficient to sustain the first count of the declaration, either as trustees for the Crown or for the parties who should ultimately be entitled, as consignees, or as prize agents; and judgment accordingly was given for the plaintiffs for the whole sum. In the Exchequer Chamber this judgment was affirmed by a majority of the Judges, Chambre, J., however, delivering a very forcible opinion the other way.

Judgment of the majority in the Exchequer Chamber.

The grounds on which the majority founded their judgment were substantially the same as those which had prevailed with the Court of King's Bench; and rested on the principle "that an inchoate interest, though imperfect till a given contingency shall take place, is nevertheless insurable" (*b*).

Chambre, J., on the other hand, rested entirely on the fact that, under the terms of the Act and the commission, the powers of the commissioners were strictly limited to the case of Dutch ships actually brought into the ports of the United Kingdom and provisionally detained there; that, as the ships had never been brought into this country at all, they had never become the objects of the plaintiffs' authority under the commission, and consequently that the plaintiffs had no such interest therein as to entitle them to insure.

Opinion of the majority

Before the House of Lords, eight of the Judges were of

(*x*) 3 B. & P. 99—105.
(*y*) 2 B. & P. N. R. 298—300.
(*z*) *Ibid.* 300—307.
(*a*) *Ibid.* 315—326.
(*b*) 3 B. & P. 98.

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opinion, upon the same grounds as before, that the plaintiffs had an insurable interest sufficient to sustain the first count; "they had a contingent interest, and, supposing the intentions of the Crown to remain unaltered, nothing stood between them and the vesting of that contingent interest but the perils insured against" (*c*).

of the Judges in the House of Lords.

Opinions of Chambre and Lawrence, JJ., and judgment of the House of Lords.

Chambre, J., adhered to his former opinion, which was supported by Lawrence, J., by the great authority of Lord Eldon, by Lord Erskine, and, as is inferred rather from the known course of his subsequent decisions than from anything that fell from him at the time, by Lord Ellenborough (*d*). To these learned persons the plaintiffs' claim of interest seemed to have "no other foundation than a mere naked expectation of acquiring a trust, or charge, respecting the property, without a scintilla of present right, either absolute or contingent" (*e*). By the letter of the commission and the statute, they remarked, the plaintiffs' care was confined to ships which had been detained, or might be brought into the ports of this kingdom; so that, until arrival here, no Dutch property was clothed with those circumstances which designated it to be the object of their commission, and made it their duty to interfere in its preservation (*f*). Under these circumstances, they professed themselves unable to conceive an interest dependent on a thing, with which thing the persons supposed to be interested had nothing to do (*g*); and Lord Eldon, in particular, declared he could "not point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party" (*h*). Notwithstanding this clear declaration of opinion, the House of Lords did not

Venire de novo.

(*c*) 2 B. & P. N. R. 289—298.
(*d*) Chambre, J., 2 B. & P. N. R. 298—300; Lawrence, J., 300—307; Lord Eldon, 315—326; Lord Ellenborough, 397; Lord Erskine, 328.
(*e*) Per Chambre, J., 2 B. & P. N. R. 299.
(*f*) Per Lawrence, J., *ibid.* 305.
(*g*) 2 B. & P. N. R. 306.
(*h*) Per Lord Eldon, *ibid.* 321.

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directly reverse the decision of the majority of the Judges, but, upon the advice of Lord Eldon, sent the case down for a new trial under a *venire de novo* on the following collateral ground.

The declaration of hostilities against the United Provinces took place on the 15th of September, and the "Zeelelye," one of the ships insured, was not lost till the 20th of September. Damages, nevertheless, had been assessed at a total sum in respect of all the ships, including the "Zeelelye." As, however, the House of Lords were clearly of opinion that whatever insurable interest (if any) the plaintiffs, as commissioners, might ever have had, had at all events been taken out of them by this declaration of hostilities, which vested the ownership of all captured property in the Crown *jure belli*, it followed that the plaintiffs had no interest in the "Zeelelye" at the time of her loss, and the finding of the jury, inasmuch as it gave general damages partly made up of the loss on the "Zeelelye," was erroneous.

Final result of the case.

The cause, accordingly, came on for trial before Lord Ellenborough on the *venire de novo*, when a verdict was found for the plaintiffs upon the second count of the declaration, which averred the interest to be in the king (*i*).

Cases since Lucena *v.* Craufurd.

305. Although, however, the House of Lords in this case avoided a decision diametrically opposed to the opinion of a majority of the Judges, yet the subsequent course of our jurisprudence sufficiently shows the influence of this discussion to have been adverse to all claims of interest founded on mere contingent grants from the Crown (*k*).

Routh *v.* Thompson.

Thus: in pursuance of an Order in Council, of September, 1807, by which all Danish ships were directed to "be detained

(*i*) 2 B. & P. N. R. 329. A bill of exceptions was taken to his Lordship's judgment, which was, however, affirmed by the House of Lords without calling upon counsel in reply on 29th June, 1808. Lucena *v.* Craufurd, 1 Taunt. 325.

(*k*) What was determined by this celebrated case, and the application of the rule so determined, was canvassed anew in the case of Ebsworth *v.* Alliance Marine Ins. Co. (1873), L. R. 8 C. P. 596; but the discussion, as the Court was equally divided, ended without result.

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and brought into port," a Danish ship was seized by a British privateer and carried into Lisbon. Thence, after repairs and the sale of her original cargo, she was despatched by the captors with another cargo to London on the 3rd of November, the very day on which a formal declaration of hostilities had been made by Great Britain against Denmark. Subsequently an insurance was effected on account of the captors, and, the ship and cargo being totally lost, an action was brought on the policy. Interest was averred in the captors, which it was contended that they had on two grounds:—(1) Because they had a possession, coupled with a well-grounded expectation of a grant from the Crown; (2) Because such possession rendered them liable, either to the Crown or to the foreign owner, for the safe custody of the ship, and therefore gave them an interest in her safety.

As to the first, it was answered, that the ship was taken, not as a prize of war after a declaration of hostilities, but merely under an Order in Council "to detain and bring into port"; that, even if the ship had arrived in safety, the captors would have had nothing "but the chance of a grant": the Court accordingly held that they had no insurable interest on the short ground, "that a man has no right to an indemnity because he has lost the chance of receiving a gift."

A mere chance not an insurable interest.

As to the second ground, which, it will be recollected, was the foundation of Lord Kenyon's decision in Boehm *v.* Bell, and approved of by Lord Eldon in Lucena *v.* Craufurd, it was held by Lord Ellenborough to be inapplicable; because a formal declaration of hostilities had intervened before the loss, which at once vested the right of ownership in the Crown, put an end to all claim on the part of the foreign owners, and freed the captors, as agents for the Crown, from all liability for acts done within the scope of their authority, which it did not appear that they had in any degree exceeded (*l*). As, however, there was no fraud in the captors in effecting the policy, nor anything illegal in the voyage or

(*l*) Routh *v.* Thompson (1809), 11 East, 428.

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Secus, of a vested right. Stirling *v.* Vaughan.

In the case just cited, the captors had no claim to prize under any Prize Acts, for the ship was taken before the declaration of hostilities. Where they had such claim, they were held to have an insurable interest in ships taken as prize before condemnation, *e.g.*, under the Prize Act (45 Geo. 3, c. 72), s. 3, which vested the property in the captors after condemnation, subject to the right of the Crown to release the prize before condemnation, and to the effect of a sentence of restoration by a Court of Admiralty (*n*).

Policy effected by prize agent may be adopted by the Crown.

306. Whether the insurance and the loss took place before or after open declaration of war or order for reprisals; whether the parties insuring effected the policy under the orders and expressly on account of the captors, or otherwise; the Crown has in all cases an insurable interest in ships lawfully detained and captured under any Order in Council: and if such insurance was made for the benefit of all whom it might concern, the Crown, by a subsequent ratification, may adopt the insurance (*o*).

Express ratification not necessary.

It would seem by what fell from the Court in the case of Stirling *v.* Vaughan, and upon the principle that the law will presume, if nothing appears to the contrary, that every person accepts what is for his benefit, that captors, in every case of legal capture, have an implied authority to insure on behalf of the Crown, and may, therefore, in all such cases, recover on a count averring the interest to be in the Crown, without any express subsequent ratification by it (*p*).

Law in the United States.

The law in the United States as to this subject seems to

(*m*) Routh *v.* Thompson (1809), 11 East, 428.

(*n*) Stirling *v.* Vaughan (1809), 11 East, 619. The Naval Prize Act now in force, 27 & 28 Vict. c. 25, declares (s. 55) that nothing in the Act shall give the captors any right in prize ships or goods, and that they shall continue to take only such interest (if any) as may be granted them by the Crown.

(*o*) Lucena *v.* Craufurd (1808), 1 Taunt. 325; Routh *v.* Thompson (1811), 13 East, 274, 284, 285. See *ante*, § 140.

(*p*) Stirling *v.* Vaughan (1809), 11 East, 623.

be, that an insurable interest in prizes can be acquired only by an actual grant from the government (*q*). **Sect. 306.**

Insurable interest of shareholders.

307. Ships are now usually owned, not by individual shareholders, but by limited liability companies, whose whole property often consists of a single ship. The question whether a shareholder in an incorporated company has an insurable interest in the property owned by the company is therefore not without practical importance. The shareholder in a ship-owning company, to apply the much quoted test of Lawrence, J., is undoubtedly interested in the preservation of the ship, inasmuch as he has "benefit from its existence, prejudice from its destruction." Yet there is no case, except that of a captor, which is considered an exceptional one (*r*), where the validity of an insurance of a chattel has been recognized, unless the assured had some legal or equitable title to or charge upon the actual thing insured, or was under some contractual liability to indemnify another person in case of its loss or of damage to it.

Their relation to the property of the company.

It has been decided that the property of an incorporated company is not the property of its shareholders; for the company is not a mere collection of individuals, but itself a legal personage (*s*). On this ground it has been held, that although an alien is not qualified to own a British ship, either wholly or in part, yet a British company is not disqualified from being the registered owner of a British ship by the fact that one of its shareholders is an alien (*t*).

The consequence seems to be that the insurable interest in a ship or other property belonging to a company is only in

(*q*) See the observations of Story, J., in The Joseph (1813), 1 Gallison, 558; 1 Phillips, ss. 320 *et seq.*

(*r*) The judgment of Walton, J., in Moran *v.* Uzielli, [1905] 2 K. B. 555, seems to create another exception. See as to this case, *ante*, § 257a.

(*s*) R. *v.* Arnaud (1846), 9 Q. B. 806; 16 L. J. Q. B. 50; Myers *v.* Perigal (1852), 2 De G. M. & G. 599; 22 L. J. Ch. 431. See also Salomon *v.* Salomon & Co., [1897] A. C. 22; Janson *v.* Driefontein Consolidated Mines, Ltd., [1902] A. C. 484; Harburg India Rubber Comb Co. *v.* Martin, [1902] 1 K. B. 778.

(*t*) R. *v.* Arnaud, *supra*.

Sect. 307. the company itself, not in the individual shareholders; and this was the view expressed by the Exchequer Chamber in Wilson *v.* Jones, in which the policy was effected to protect the interest of a shareholder in the Atlantic Cable Company (*u*).

The insurable interest of shareholder in the company's adventure.

In that case, however, the Court held that a shareholder in the Atlantic Telegraph Company had an insurable interest in the benefit which he expected to derive from the success of the adventure of laying the cable. His interest in that adventure, which in the policy was valued at the nominal value of his shares, was held to be protected by the ingeniously worded policy, which has elsewhere been set out (*x*).

Shares in company not exposed to maritime risks.

It has been said that shares in a company cannot be insured against maritime risks on the technical ground that being of an incorporeal nature, they cannot be exposed to those risks, nor are they directly liable to be lost in consequence of them (*y*).

Undoubtedly, however, shares in a company owning a ship are liable to be depreciated, or to become valueless, in consequence of casualties affecting the ship, and it may well be argued that a shareholder is as much interested in the safety of the ship as the shareholders in the Atlantic Telegraph Company were in the laying of the cable. The opinion has already been expressed that a shareholder can protect himself against such depreciation by a properly worded policy (*z*).

(*u*) (1867), L. R. 2 Ex. 139; see per Willes, J., p. 144. The *dictum* of Smith, M. R., in Driefontein Consolidated Gold Mines, Ltd. *v.* Janson, [1901] 2 K. B. 419, 427, that the beneficial ownership in the property of the plaintiff company belonged to the shareholders is inconsistent with the authorities cited in note (*s*), *supra*. In Paterson *v.* Harris (1861), 1 B. & S. 336; 30 L. J. Q. B. 354, a shareholder recovered for a loss of part of the Atlantic cable; but there was no plea traversing his interest in the cable, and the question now discussed was not raised.

(*x*) *Ante*, § 249.

(*y*) Paterson *v.* Harris (1861), 1 B. & S. 354, 355; 30 L. J. Q. B. 361.

(*z*) *Ante*, § 249. In Pole *v.* Fitzgerald (1752), Willes, 641, Willes, C. J., held that there cannot be an insurance on a voyage, on the ground that it was impossible to estimate the loss of a voyage; but he was speaking of a loss of hypothetical profits of a voyage, which might never have been earned. See the remarks of Lawrence, J., on this case, 2 B. & P. N. R. p. 301.

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308. We have seen (*a*) that the master has an insurable interest in his wages, and may effect a policy on these and on any commissions he is properly entitled to (*b*).

Master's wages and commission.

Master buying ship or cargo.

It seems that in the United States, the Courts, regarding him in the relation of a confidential agent, have held that if he buys on his own account ship or cargo, when sold in case of misfortune abroad, he has no insurable interest therein, unless the purchase be ratified by those whom it may concern (*c*).

Seamen's wages.

Sect. 11 of the Marine Insurance Act, 1906, enables seamen and officers under the master to insure their wages, and this enactment will no doubt apply to any profits which they are to receive in lieu of wages (*d*).

Seamen's merchandise, by American law.

In the United States a seaman is allowed to insure any goods put on board by him as merchandise, notwithstanding the freight of these be a perquisite and so form a part of his wages (*e*).

Insurable interest of carriers.

309. A shipowner or other carrier has an insurable interest in the goods which he carries in respect of his liability for loss or damage that may happen to them during transit (*f*).

Of owner of property who is indemnified against loss.

At the same time the insurable interest of the owner of the goods is not affected by the existence of this liability. The general rule is thus stated in sect. 14 (3) of the Marine Insurance Act, 1906:—

> The owner of insurable property has an insurable

(*a*) Mar. Ins. Act, 1906, s. 11; *ante*, § 245.

(*b*) King *v.* Glover (1806), 2 B. & P. N. R. 206; and see Hawkins *v.* Twizell (1856), 5 E. & B. 883; 25 L. J. Q. B. 160.

(*c*) Copeland *v.* Mercantile Ins. Co. (1828), 6 Pick. 198; Barker *v.* Marine Ins. Co. (1821), 2 Mason, 369.

(*d*) See *ante*, § 244.

(*e*) Galloway *v.* Morris (1802), 3 Yeates, 445.

(*f*) Mar. Ins. Act, 1906, s. 3 (2) (c); *ante*, § 1. See Crowley *v.* Cohen (1832), 3 B. & Ad. 478; Joyce *v.* Kennard (1871), L. R. 7 Q. B. 78; Stephens *v.* Australasian Ins. Co. (1872), L. R. 8 C. P. 18; Hill *v.* Scott (C. A.), [1895] 2 Q. B. 713; Munich Ass. Co. *v.* Dodwell (1904), 128 Fed. R. 410.

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interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss (*g*).

Miscellaneous cases of insurable interest.

310. There are other cases of insurable interest which cannot be ranged under any of the foregoing heads.

The owner of the cargo has no insurable interest in the ship.

A party interested in cargo alone has no insurable interest in the ship; for the goods may arrive safe though the ship be lost, and *vice versâ*. Hence, where the owners of the cargo effected a policy on goods, with a memorandum declaring the insurance to be "on money expended for reclaiming ship and cargo"; "the loss to be paid in case the ship does not arrive" at the port of destination; it was held that the assured had no insurable interest in the subject insured, against the event sought to be provided for by this policy (*h*).

Bills of exchange.

A bill of exchange drawn by the captain abroad to cover ship's disbursements gives the holder no lien on the ship by British law (*i*). It follows that he has no insurable interest in the ship; and the opinion to the contrary expressed by Gibbs, C. J., in Tasker *v.* Scott (*k*) seems to be an *obiter dictum* unnecessary to the case before him. The question really at issue was whether the holder of the bill could recover the premium from the master of the ship on the ground that the latter had authorized him to insure.

Instead of borrowing at respondentia, captains engaged in the East India Company's trade had, since the year 1810,

(*g*) See Hobbs *v.* Hannam (1811), 3 Camp. 93, a case of an insurance by a shipowner, to whom the charterer had undertaken to pay the value of the ship if lost during the voyage. The doctrine of subrogation will, of course, prevent the assured from recovering in all more than the value of his property: see *post*, Part III., Chap. IX., "Subrogation."

(*h*) Kulen Kemp *v.* Vigne (1786), 1 T. R. 304. The expenditure, it may be noticed, was ordered by the Admiralty Court to be a charge on the cargo.

(*i*) It seems to be otherwise by French law. Castrique *v.* Imrie (1861), 8 C. B. N. S. 405; (1870), L. R. 4 H. of L. 414. This law was in that case applied by a French Court to a British ship, no doubt erroneously; but as the judgment was *in rem*, it was held binding on the Courts of this country. The remedy, if any, was by appeal to the Cour de Cassation in France.

(*k*) Tasker *v.* Scott (1815), 1 Marsh. R. 556; *S. C.*, 6 Taunt. 234.

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practised the following mode of raising money to pay for their outward investments. Bills were drawn for the required amount upon the captain's agents in India, payable in so many days after the ship's arrival outwards; these bills, drawn in two sets, were indorsed to the person in this country who had made the required advances. One set was left with him; the other set, together with the goods, consigned to the captain's agents, was taken out in the ship, and the indorsee of the bills then effected insurance on them for his own benefit: the understanding was, that if the ship arrived safe the bills were to be paid; if she did not arrive they were not to be paid. After the practice had prevailed some time a case came before the Court of Common Pleas in which the indorsees of bills so drawn and insured sued the underwriter, describing them as "bills of exchange," and averring the total loss of ship, goods, and the set of bills on board of her: Best, C. J., held that upon such policy the assured could recover nothing; the instruments, being drawn on a contingency, were not bills, but so much waste paper; the plaintiffs had lost nothing by them, because they could have recovered nothing by them; they had, therefore, no insurable interest, because they had nothing at risk (*l*).

Money advanced for repairs.

It has been decided in the United States that advances for repairs of ship give no insurable interest in the ship, unless when secured by a lien by law or contract (*m*).

Interest of insurer.

An insurer has, for the purpose of re-insurance, an insurable interest in the thing insured. In view of the importance in modern times of the question of re-insurance, the subject will presently be dealt with as a whole at some length (*n*).

(*l*) Palmer *v.* Pratt (1824), 2 Bing. 185. "I quite concur with Mr. Phillips," said Arnould, "that this is, both in itself and in reference to the grounds of the judgment, a very unsatisfactory decision." See 1 Phillips, s. 203, n.; see also Lowry *v.* Bourdieu (1780), 2 Dougl. 468.

(*m*) Buchanan *v.* Ocean Ins. Co. (1826), 6 Cowen, 318; 1 Phillips, s. 202. See, however, Moran *v.* Uzielli, [1905] 2 K. B. 555, *ante*, § 257a.

(*n*) *Post*, §§ 322—328.

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Wager policies. Definition of a wager policy.

311. The term *Wager Policy* relates to the form of the instrument as well as to the nature of the contract.

A wager (or honour) policy may be defined to be one in which the parties, by express terms, disclaim, on the face of it, the intention of making a contract of indemnity.

Form of wager policies.

Such a policy is generally known by having one or other of the following clauses written on the face of it:—"Interest or no interest," or "Without further proof of interest than the policy," or "This policy to be deemed sufficient proof of interest," or any other terms which purport either to entitle the assured to recover against the underwriters a stipulated sum of money, whether he has any interest in the ship or cargo or not; or to bind the underwriter not to require any proof of the assured's interest other than the policy itself (*o*). As, moreover, in these cases there is nothing actually at risk which can be sea-damaged or abandoned, such policies frequently also contain the clause, "Free of all average, and without benefit of salvage."

Wager policies were at one time deemed legal.

It has been made a subject of very learned inquiry whether such policies were legal at common law. It will at present be sufficient to give what is now firmly established as the true result of the authorities, viz.:—

1. That by the law of England, as it stood at the time of passing the Act of 19 Geo. 2, c. 37, a wager policy properly so called, *i.e.*, one in which the parties, by express terms, such as the words "interest or no interest," or "without proof of interest," disclaimed making a contract of indemnity, was then (contrary to older determinations) deemed a valid contract of insurance (*p*).

(*o*) See the judgment of Best, C. J., in Murphy *v.* Bell (1828), 4 Bing. 569—572. A clause of this kind is usually called a "p.p.i." (policy proof of interest) clause, and the policy containing it is also known as a "p.p.i." policy.

(*p*) This point was established by Assievedo *v.* Cambridge (1710), 10 Mod. 77; Depaba *v.* Ludlow (1721), 1 Comyns, 360; Dean *v.* Dicker (1746), 2 Str. 1250. They were also recognized as legal by Lord Mansfield, and were held legal at common law in Ireland in Keith *v.* Protection Ins. Co. of Paris (1882), 10 L. R. Ir. 51.

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A policy in the common form was always a policy upon interest.

2. That a policy, containing no such clause disclaiming or dispensing with the proof of interest, but effected in the common form, was, at common law, as it still is, considered to be a contract of indemnity only, upon which the assured could never recover without averment and proof of interest (*q*).

19 Geo. 2, c. 37.

312. About the year 1746 wager policies became so prevalent that the Legislature, wisely considering it to be against the policy of this country, as a great maritime state, to permit parties who had no interest in the safety of British ships and cargoes, by means of these policies, to give themselves a direct interest in their loss, interfered by the 19th Geo. 2, c. 37, to suppress the practice.

That Act prohibited the making of insurances on British ships and their cargoes "interest or no interest," or "without further proof of interest than the policy," or "without benefit of salvage to the insurer," or by way of gaming or wagering (*r*). Such insurances, as the preamble recites, had been found to be productive of many pernicious practices; such as the "fraudulent loss, destruction or capture of great numbers of ships, with their cargoes"; the "encouragement of the exportation of wool, and the carrying on of many prohibited and clandestine trades, which, by means of such insurances,

(*q*) For this latter position, see the observations of Lord Eldon in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. 321, dissenting from the *dictum* of Lord Kenyon in Craufurd *v.* Hunter (1798), 8 T. R. 23, in which that learned judge had said "that a person at common law might have insured without interest." The position, as stated in the text, was laid down as law by Chambre, J., in Lucena *v.* Craufurd (1802), 3 B. & P. 101, and was finally established by the judgment of the Exchequer Chamber in Cousin *v.* Nantes (1811), 3 Taunt. 513, in which the *dictum* of Lord Kenyon and the case of Nantes *v.* Thompson (1802), 2 East, 385, founded upon it, were decisively overruled.

(*r*) The following is the text of this provision:—"Be it enacted that no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty or any of his subjects, or on any goods, merchandises or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes."

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have been concealed"; the introduction of "a mischievous kind of gaming, under pretence of insuring against the risk on shipping and fair trade."

Hence it appears, as pointed out by Best, C. J., that gaming was by no means the sole evil which the Legislature, by this Act, proposed to remedy; but its object also, and perhaps chiefly, was to prevent policies in this form from being used to protect persons who were carrying on an illegal traffic, or made the means of profiting by the wilful destruction and capture of ships (*s*).

Mar. Ins. Act, 1906, s. 4.

313. This Act has been repealed by sect. 92 of the Marine Insurance Act, 1906, sect. 4 of which deals with wager policies and insurances in general made by way of gaming and wagering in the following terms:—

> (1) Every contract of marine insurance by way of gaming or wagering is void.
>
> (2) A contract of marine insurance is deemed to be a gaming or wagering contract—
>
> (a) Where the assured has not an insurable interest as defined by this Act (*t*), and the contract is entered into with no expectation of acquiring such an interest; or
>
> (b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:
>
> Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer (*u*).

Changes which it effects.

An important change has been effected by this section. 19 Geo. 2, c. 37, in terms only prohibited wager policies on British ships and their cargoes (*x*), and was held not to

(*s*) Per Best, C. J., in Murphy *v.* Bell (1828), 4 Bing. 569, 570.

(*t*) See *ante*, § 254.

(*u*) This proviso gives effect to the opinion of nine of the judges in Lucena *v.* Craufurd (1806), 2 B. & P. N. R. at p. 310. There seems to be no possibility of salvage in insurances on profits or commissions.

(*x*) It was held to apply to other subjects of insurance as well as

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extend to foreign vessels (*y*). There is no such limitation in the Marine Insurance Act, under which every insurance by way of gaming and wagering within the meaning of sect. 4 is void.

Wager policies now void in Ireland.

Another change effected by the Marine Insurance Act, 1906, is that wager policies are now void in Ireland. The Irish Court had previously held that 19 Geo. 2, c. 37, was not extended to Ireland by the Irish Act, 21 & 22 Geo. 3, c. 48, and consequently that wager policies, being legal at common law, were valid (*z*).

313a. Wager policies, as we have seen, were expressly prohibited by 19 Geo. 2, c. 37, and under that Act were considered illegal (*a*).

Wager policies not illegal under Mar. Ins. Act, 1906.

Sect. 4 (1) of the Marine Insurance Act, 1906, however, merely declares that they are void. As wager policies were not illegal at common law, the result seems to be the same as has been held to follow, as regards wagering contracts, from the similar provision of the Gaming Act, 1845, s. 18,

"ship" and "goods." In a certain sense a marine insurance must in general be either on the ship or on the goods on board of her; for being against maritime perils, it must be against loss caused by some event which physically affects some tangible property at risk. Accordingly, for the purposes of the Act, an insurance was deemed to be on the thing physically at risk, the loss of which involved the loss of the subject-matter insured. Thus policies on "profits," "commissions," and "cash advances" were held to be within the Act. See Smith *v.* Reynolds (1856), 1 H. & N. 221; 25 L. J. Ex. 337; De Mattos *v.* North (1868), L. R. 3 Ex. 185; Allkins *v.* Jupe (1877), 2 C. P. D. 375; Mortimer *v.* Broadwood (1869), 17 W. R. 653; Berridge *v.* Man On Ins. Co. (1887), 18 Q. B. D. 346. In fact it was no doubt correct to say that the Act made every marine policy relating to a British ship void, which on the face of it was a wager policy.

(*y*) Thellusson *v.* Fletcher (1780), 1 Dougl. 315.

(*z*) Keith *v.* Protection Marine Ins. Co. of Paris (1882), 10 L. R. Ir. 51.

(*a*) Allkins *v.* Jupe (1877), 2 C. P. D. 375; Gedge *v.* Royal Exchange Ass. Corpn., [1900] 2 Q. B. 214. See also Lowry *v.* Bourdieu (1780), 2 Dougl. 468; Andree *v.* Fletcher (1789), 3 T. R. 266. In Tasker *v.* Scott (1815), 6 Taunt. 234, Gibbs, C. J., held, on the contrary, that a person who authorized another to effect a wager policy was liable to repay him the premium, on the ground that 19 Geo. 2, c. 37, made the insurance not illegal, but only unavailable.

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i.e., though void, they are not illegal under the Act of 1906 (*b*). A later statute, however, the Marine Insurance (Gambling Policies) Act, 1909 (9 Edw. 7, c. 12) (*c*), prohibits certain insurances, which in the Act are termed "contracts by way of gambling on loss by maritime perils," by making them criminal. It is now an offence to effect a contract of marine insurance without having any *bonâ fide* interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bonâ fide* expectation of acquiring such an interest. The offender is liable, on summary conviction, to imprisonment for not more than six months, with or without hard labour, or to a fine not exceeding 100*l*., and also to forfeit to the Crown any money he may receive under the contract (*d*). It is also an offence under this Act, entailing the same penalties, for any person in the employment of the owner (*e*) of a ship, not being a part-owner, to effect a contract of marine insurance in relation to the ship, "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term (*f*). Further, any broker or other person through whom, and any insurer with whom, an insurance is effected is also guilty of an offence, punishable in like manner, if

When prohibited by Mar. Ins. Act, 1909.

(*b*) In Cheshire *v.* Vaughan, [1920] 3 K. B. at p. 251, Bankes, L. J., says that it may well be that the making of a p.p.i. policy is against public policy in spite of the repeal of the statute of 1745, which declared that such contracts should be illegal, and the substitution of sect. 4 of the Act of 1906 which speaks of them as being void, because the mischief aimed against is the same. For the effect of the Gaming Act, 1845, see Fitch *v.* Jones (1855), 5 E. & B. 238; per Lush, J., Haigh *v.* Sheffield Town Council (1874), L. R. 10 Q. B. 102, 109; Beeston *v.* Beeston (1875), 1 Ex. D. 13; per Hawkins, J., Read *v.* Anderson (1882), 10 Q. B. D. 100, 104; per Bowen, L. J., Bridger *v.* Savage (1885), 15 Q. B. D. 363, 367; Powell *v.* Kempton Park Racecourse Co., [1899] A. C. 143, 170, 196; Hyams *v.* Stuart King, [1908] 2 K. B. 696, 707, 727.

(*c*) For the text of this Act, see Vol. II. Appendix A.

(*d*) Mar. Ins. Act, 1909, s. 1, sub-s. 1 (a).

(*e*) "Owner" includes "charterer": Mar. Ins. Act, 1909, s. 1 (8).

(*f*) Mar. Ins. Act, 1909, s. 1, sub-s. 1 (b).

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he acted with knowledge that the insurance was one prohibited by this Act (*g*). Proceedings under the Act cannot be instituted without the consent in England or Ireland of the Attorney-General, or in Scotland of the Lord Advocate; nor can they be instituted against any person (except one in the employment of the shipowner who has effected an honour policy), until an opportunity has been afforded him of showing that the contract was not one prohibited by the Act, and any information given by him for that purpose is not admissible in evidence against him (*h*).

Thus the Act of 1909 prohibits, without any qualification, insurances in relation to a ship effected by means of honour policies by persons in the employment of the owners, other than part-owners. Even if the assured had an insurable interest, that fact would afford no defence to a charge under sect. 1, sub-s. 1 (b). On the other hand, it seems that an insurance effected by a person who has a genuine interest, direct or indirect, in the subject-matter insured cannot be within sub-s. 1 (a), even though the insurance be made on a valuation so excessive as to render the contract one by way of gaming or wagering within the meaning of the Marine Insurance Act, 1906, s. 4, or of the Gaming Act, 1845, s. 18 (*i*). But when proceedings have been taken under sect. 1, sub-s. 1 (a) of the Act of 1909 against any person who has effected a policy with a "p.p.i." or like clause, the onus of proving that he has not committed an offence of effecting a contract by way of gambling is thrown on him (*j*). One effect of the Act is, no doubt, that a broker who has committed an offence by knowingly making a contract prohibited by the Act cannot claim any remuneration or any indemnity from his principal for payments made by him in respect of the transaction (*k*).

(*g*) *Id.* s. 1 (2).

(*h*) *Id.* s. 1 (4).

(*i*) See *infra*, §§ 314, 319.

(*j*) Mar. Ins. Act, 1909, s. 1 (5).

(*k*) See Thacker *v.* Hardy (1878), 4 Q. B. D. 685, 687.

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Effect of no expectation of interest.

314. Sect. 4 (2) (a) of the Marine Insurance Act, 1906, declares, as we have seen, that a contract of marine insurance is deemed to be a gaming or wagering contract, where the assured has not an insurable interest, and the contract is entered into with no expectation of acquiring one. The words "where the assured has not an insurable interest" apparently relate to the time when the contract is made. By sect. 6 (1) of the Act it is not necessary that the assured should have an insurable interest at this time (*l*). Therefore if he effects the insurance, believing that he will acquire such an interest, and acquires it before the loss, he can recover. But it seems to follow from sect. 4 that if he insures at a time when he has no insurable interest and does not expect to acquire one, he cannot even recover when at the time of the loss he has an insurable interest, though the policy contains no express terms which show that it was intended to be a gaming or wagering contract. Under the Act of Geo. II. it was held that all policies must be taken to be on interest, unless something was stated showing the contrary, and were not valid, whether on foreign or British ships, unless the assured had an interest; and that it was not possible to recover by action upon them without averment of interest, and proof thereof when that averment was traversed (*m*).

Are wager policies void under the Gaming Act, 1845?

315. Whether a policy expressly admitting interest is void under the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, which provides that all contracts or agreements by way of gaming or wagering shall be null and void, is a question which no underwriter has raised (*n*). Arnould seemed to think that the policy is void under this Act (*o*). In support of this view it may be argued that the form itself of the policy shows that it was not intended to be a contract of

(*l*) See *ante*, § 258.

(*m*) Cousins *v.* Nantes (1811), 3 Taunt. 513.

(*n*) The materiality of this question lies in the fact that it is only in respect of contracts void under this particular statute that the Gaming Act, 1892, has any application.

(*o*) 2nd ed. vol. i. p. 333, n.

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indemnity. Yet the stipulation that proof of interest is dispensed with is not inconsistent with there being an insurable interest in the assured; and as a matter of fact it is well known that these policies are constantly effected on behalf of persons who have an interest in the subject of the insurance, sometimes, perhaps, on account of some difficulty in proving interest (*p*).

It is submitted that a policy in which interest is admitted is not void under the Gaming Act, 1845 (and therefore that the Gaming Act, 1892, has no application to it), if in fact the assured has or expects to acquire such an interest as shows that he did not intend to make a wager (*q*). If such a policy

(*p*) See per Kennedy, J., in Gedge *v.* Royal Exchange Ass. Corporation, [1900] 2 Q. B. 214, 223. The fact that there may be a real insurable interest is, no doubt, the reason why Bigham, J., after consulting Mathew, J., announced that he would, with the consent of the parties, hear a case in which the policy contained a "p.p.i." clause, as if the policy did not contain the clause. Buchanan *v.* Faber (1899), 4 Com. Cas. 227, n. In a later case, where there was no agreement that the clause should be deemed to be deleted, and the assured was relying on the fact that the Act of George II. was not pleaded to enable him to recover without having any insurable interest, Kennedy, J., held that he was bound to take notice of the illegality and the fact that the insurance was a mere wager. Gedge *v.* Royal Exchange Ass. Corporation, *supra*. Wager policies are no longer prohibited in terms, as they were by 19 Geo. 2, c. 37; they are only declared to be void (see *infra*, note (*q*)). Yet, even though it be not pleaded that a "p.p.i." policy is void under sect. 4 of the Mar. Ins. Act, 1906, or under the Gaming Act, 1845, it seems, according to the decision of the Divisional Court in Luckett *v.* Wood (1908), 26 Times L. R. 617, to be the duty of the Court, in an action on the policy, to take notice of the fact that the contract is not enforceable. See also North-Western Salt Co. *v.* Electrolytic Alkali Co., [1913] 3 K. B. 422; [1914] A. C. 461.

(*q*) "The Act," said Willes, J., "has no application to a contract upon a matter in which the parties have an interest." Wilson *v.* Jones (1867), L. R. 2 Ex. 139. Cf. however, Lord Shaw's *dictum* in Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. at p. 543. It may be pointed out that under the Gaming Act, 1892, any promise, express or implied, to repay any sum of money paid in respect of a contract made void by 8 & 9 Vict. c. 109, or to pay any money by way of commission, reward, or otherwise in respect of such contract or of any services in relation thereto, is null and void. See Tatam *v.* Reeve, [1893] 1 Q. B. 44; 62 L. J. Q. B. 30; De Mattos *v.* Benjamin (1894), 63 L. J. Q. B. 248; Saffery *v.* Mayer, [1901] 1 K. B. 11. In Tasker *v.* Scott (1815), 6 Taunt. 234, Gibbs, C. J., held

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has hitherto not been within the Gaming Acts, it is apprehended that it is not brought within those Acts by sect. 4 (2) of the Marine Insurance Act, 1906, which declares that every policy containing a "p.p.i." clause is deemed to be a gaming or wagering contract. The definition of such a contract for the purposes of the Marine Insurance Act, 1906, cannot, it is submitted, enlarge the meaning of the term "contracts by way of gaming or wagering" in the Gaming Act, 1845 (*r*).

Dictum that wager policies vitiate other insurances.

315a. The "Gunford" case, in which insurances on a vessel were held to be avoided by the concealment of a large over-insurance by means of "p.p.i." policies on disbursements, elicited a remarkable *dictum* of Lord Shaw of Dunfermline's that such policies, apart from the effect of their non-disclosure, vitiate all other insurances effected by the same assured on the same adventure (*s*). "It is necessary," said his Lordship, "to examine fundamentally the position of an owner who has made legitimate insurances upon ship, cargo, or freight, and also made separate gambling insurances. My Lords, it appears to me that, whenever owners enter into gambling transactions of this kind, these transactions themselves are not only invalid, but they infect and invalidate the entire insurances which the same assured have made upon vessel, freight, or cargo. The reason of that is this: the

that a person who authorized another to effect a wager policy was liable to repay him the premium, on the ground that 19 Geo. 2, c. 37, made the insurance, not illegal, but only unavailable. In Allkins *v.* Jupe (1877), 2 C. P. D. 375, the Court of Common Pleas held that wager policies were rendered illegal by 19 Geo. 2, c. 37. Sect. 4 of the Mar. Ins. Act, 1906, however, only declares that wager policies are void. Read *v.* Anderson (1884), 13 Q. B. D. 779 (C. A.), is therefore an authority in support of the liability of the assured to repay the premium, if the Gaming Acts be not applicable, unless the agent in effecting a wager policy was guilty of an offence under the Marine Ins. Act, 1909 (see *ante*, § 313a). But see the expression of opinion of Bankes, L. J., cited *ante* in note (*b*) to § 313a.

(*r*) Mr. Arthur Cohen comes to the same conclusion on this point: see Halsbury's Laws of England, vol. xvii. § 746.

(*s*) Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529, 543. This question was not raised by the appellants' case; they relied entirely on the concealment.

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voyage is one, and the ship, its earnings, its cargo, its crew, all are involved in that one and single hazard which has been undertaken and which is by the gambling transaction improperly weighted towards loss—a loss which, falling upon the ship, would not rest there, but spread to unsalved cargo and to freight, not to speak of the peril to human life which would be thus encountered. The line of plain duty for all parties to the contract is that the ship shall be preserved; but when a gamble has been made by one of the parties for gain upon the event of loss of ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed. This hazard against the life of the vessel humbly appears to me to taint every policy entered upon by the same gambling adventurer, and no such policy thus depending upon the same hazard is enforceable. The rule governing this is simple and familiar, namely, that the law will not enforce a transaction which is thus tainted by conflict between duty and self-interest. The rarity and difficulty, my Lords, of a right adjustment of the wavering balance swayed by self-interest have been memorably phrased. But the law does not attempt the task; the penalty against such a conflict between interest and duty is the invalidation of the bargain. I remark, however, that the foregoing observations are not directed to the case of insurance upon ships in which third parties have acquired, in ignorance of the other and over-insurances and in good faith and for valuable consideration, separate interests. The rights of such parties would require to be separately and fully considered."

The editors are not aware that there is any direct authority, except this *dictum*, for the general proposition that an insurance otherwise valid will be vitiated by the gambling nature of an independent insurance effected by the same assured.

Cases on 19 Geo. 2, c. 37.

316. We will now consider some of the cases on the question what policies are or are not within the prohibition contained in the first section of 19 Geo. 2, c. 37, and the fourth section of the Marine Insurance Act, 1906.

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Kent v. Bird.

Where the surgeon of an East Indiaman agreed to pay 20*l.* to a passenger in the same ship at the next port she should reach, provided that if she did not save her passage to China, the passenger should pay him 1,000*l.* within one month after her arrival in the river Thames, without reference to any property; this agreement was held void, as being a contract by way of gaming or wagering within the first section of the stat. 19 Geo. 2, c. 37, though the surgeon had some goods on board which were liable to suffer by the loss of the season (*t*).

Lowry v. Bourdieu.

Lowry, having advanced to Lawson, the captain of an East India ship, 26,000*l.* on the security of a common money bond, effected a policy for the amount, which appeared on the face of it to be "on Captain Lawson's bond for 26,000*l.*"—"in case of loss no other proof of interest to be required than the bond, warranted free of average, and without benefit of salvage to the insurer,"—Lord Mansfield, Ashurst, J., and Buller, J., held that this was void, as a gaming policy under the statute. "The plaintiffs," observed his Lordship, "say, 'We mean to game, but we give our reason for it: Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us.' It was a hedge; but they had no interest: for if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson" (*u*).

Rule.

317. Any policy which by express terms dispensed with all proof of interest was held to be within the Act of 19 Geo. 2, c. 37, and void, though the clause by which the proof of interest was dispensed with was not in terms identical with those specified in the first section, even when it

(*t*) Kent *v.* Bird (1777), 2 Cowp. 583. The 20*l.* which the surgeon had paid by way of premium was returned. See also Gedge *v.* Royal Exchange Ass. Co., [1900] 2 Q. B. 214.

(*u*) Lowry *v.* Bourdieu (1780), 2 Dougl. 468. Willes, J., only thought it an unavailable, not an illegal, insurance; the rest of the Court, however, holding it illegal, the premium was not returned.

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Murphy v. Bell.

was manifest that the insurance was not a gaming one (*x*). Hence, where a policy of insurance stipulated "that the goods insured were and should be valued at five tierces coffee, valued at 27*l.* per tierce, say 135*l.*, that policy to be deemed sufficient proof of interest," the Court of Common Pleas held that the policy was void, for the object of the statute was to prevent insurances in which the policy was to be proof, not of the amount, but of the existence of interest (*y*).

"Any other like term."

Sect. 4 (2) of the Marine Insurance Act, 1906, expressly includes in the definition of gaming and wagering contracts policies subject to any term like those previously specified.

Insurance to be paid "in full."

It has been held that a stipulation in one of the Institute Time Clauses that, in the event of a total loss of ship, the freight insurance should be paid "in full" was not equivalent to a stipulation that it should be paid "without benefit of salvage" (*z*).

Valued policies not within the Act:

318. It was thought at one time that all valued policies were within 19 Geo. 2, c. 37, on the ground that frauds by the wilful loss or destruction of ships and cargoes might be accomplished by means of policies in which a higher value is put on the articles insured than they were worth; but the distinction between wager and valued policies is very clear. If the policy dispenses with all proof of the existence of interest, it is a wager policy, and void; but where the policy contains on the face of it no such dispensation, but only saves the plaintiff the trouble of showing the amount of his interest, leaving him still to prove some interest, it is a valued policy and good (*a*).

(*x*) Murphy *v.* Bell (1828), 4 Bing. 567; Berridge *v.* Man On Ins. Co. (C. A.) (1887), 18 Q. B. D. 346. In the latter case the clause was "Full interest admitted." In Grant *v.* Parkinson (1782), 2 Park, 561, the terms of an insurance on profits were: "In case of loss it is agreed that the profits shall be valued at 1,000*l.*, without any other voucher than the policy." The Court held that the last words were mere surplusage, referring to the valuation, not the interest, and that the policy was valid. (*y*) Murphy *v.* Bell, *supra*.

(*z*) Coker *v.* Bolton, [1912] 3 K. B. 315, Hamilton, J.

(*a*) Lewis *v.* Rucker (1761), 2 Burr. 1171; Murphy *v.* Bell (1828), 4 Bing. 572.

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unless valuation enormously exaggerated.

319. If, indeed, there appears to be an enormous disproportion between the real value of the articles insured and that inserted in the policy as their agreed value between the parties—for instance, if, in the words of Lord Mansfield, "it should come out in proof that a man had insured 2,000*l*., and had interest on board to the value of a cable only"—such policy, it was said, would have been within 19 Geo. 2, c. 37, and on that ground void, though the underwriter was aware of the extent of the over-valuation (*b*). Such a case is not covered by the definition of a gaming and wagering contract in sect. 4 (2) of the Marine Insurance Act, 1906 (*c*). It is however, submitted that sect. 4 (2) is not exhaustive, and has, therefore, not the effect of preventing such a policy from being void under sect. 4 (1) (*d*). Of course, if the underwriter was kept ignorant of the excessive valuation he might avoid the policy on the ground of such concealment (*e*).

Exceptions made by 19 Geo. 2, c. 37, abolished by the Mar. Ins. Act.

320. From the prohibition of all wager policies on British ships and goods, 19 Geo. 2, c. 37, made an exception in the case of insurances on privateers and on effects from places in the possession of the Crowns of Spain and Portugal. As we have seen, the Marine Insurance Act, 1906, which repeals the whole Act of 19 Geo. 2, declares all wager policies, without exception, to be void.

Incidents of a wager policy.

It has been held that there can be no abandonment under a wagering policy (*f*); also that a recapture, after the ship has been in an enemy's port, will not avail the underwriter (*g*).

(*b*) Lewis *v.* Rucker, *quâ supra*. "In the absence of proof," said Willes, J., "that the value fixed by the contract is so exaggerated as to be a mere cloak for gambling, in representing more than any possible interest which the assured could have in the ship and outfit, or that the exaggeration was fraudulent with a view to cheat the underwriter, the latter is bound in case of total loss to pay the agreed sum." (Memorandum printed as App. LVII. to vol. ii. of the Report of the Unseaworthy Ships Commission of 1874; cited by Mathew, J., in Herring *v.* Janson (1895), 1 Com. Cas. 177.)

(*c*) *Ante*, § 313.

(*d*) This submission is not inconsistent with the language of s. 27 (3) of the Mar. Ins. Act, 1906, *post*, § 338; and the *dicta* of Lord Shaw and Lord Robson in Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. at pp. 542, 548, were probably not intended to apply to the case under discussion.

(*e*) *Post*, § 604.

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Wagering policies are illegal in most foreign countries.

321. It is not only in our own country that insurances by way of wager are held illegal; in most countries their illegality is equally established by general mercantile usage or positive enactment.

In France.

In France, though not prohibited in express terms, they were held unlawful as opposed to the spirit of the Ordonnance de la Marine (*h*) and the text of the Code Civil (*i*). When the provisions of the Code de Commerce were under the consideration of the French legislature, an attempt was made to procure the protection of the law for this species of contract, but it was immediately checked by the indignant exclamation of the Imperial orator, that "it was not for a great nation like France to legalize the immorality of gambling contracts (*des paris*)" (*k*).

In the United States.

In the greater number of the United States of America these policies, though not prohibited by positive statute, have invariably been considered illegal (*l*). In New York,

(*f*) Kulen Kemp *v.* Vigne (1786), 1 T. R. 304.

(*g*) Dean *v.* Dicker (1746), 2 Str. 1250.

(*h*) L. 3, t. 6, art. 22, 23; 2 Valin, Comment. sur l'Ordonnance de la marine, vol. ii. p. 73, ed. 1766; pp. 286—290, ed. Becane, A.D. 1829.

(*i*) Code Civil, art. 1965, 1966, which declares all wagers illegal. The Code de Commerce, says Boulay-Paty, cannot be more indulgent on this point than the Code Civil, Droit Mar. tom. iii. tit. x. p. 238. They seem now to be impliedly prohibited by art. 334 of the Code de Commerce as altered in 1885. The article formerly began: "L'assurance peut avoir pour objet" (the various subjects of insurance); now it runs: "Toute personne intéressée peut faire assurer," &c.

(*k*) See Estrangin, note to Pothier, Traité d'Assurance, p. 14; Boulay-Paty, *quâ supra*, note by M. Becane to his edition of Valin, tom. ii. p. 285.

(*l*) 1 Phillips, Ins. ss. 5, 7, 211; 3 Kent, Com. 277, n. (*d*). According to American law "p.p.i." policies are not necessarily treated as wagering policies; they are deemed to be policies on interest, if the parties so intended: Brown *v.* Merchants' Mar. Ins. Co. (1907), 152 Fed. R. 411. See also 1 Phillips, s. 7.

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however, they were held legal (*m*), but are now prohibited by the revised statutes of that State (*n*).

Re-insurance.

322. After an insurance has been made, the underwriter may, by the law and practice of all countries (*o*), have the whole amount at risk (or, as in France, the whole minus the premium) re-insured to him by some other underwriter. The object of this is to enable him to indemnify himself against the consequences of his own act, whenever he finds he has undertaken a risk on imprudent terms or bound himself to a greater amount than he may be able to discharge (*p*). If he gives a less premium for the re-insurance than he receives on the original policy, he gains the difference; he gains nothing if he gives the same premium, and suffers a loss if he gives more, as may sometimes happen, to cover a dangerous risk.

Formerly illegal in this country.

This means of protection for insurers was formerly illegal by the law of this country. About the middle of the eighteenth century this practice of re-insurance, having in this country come to be employed as a mode of speculating in the rise and fall of premiums, and being likely to be used as a cover for wager policies, was declared by the 4th section of the 19 Geo. 2, c. 37, unlawful, unless the insurer were insolvent, bankrupt, or dead. This was repealed and re-insurances made lawful by the 27 & 28 Vict. c. 56, s. 1 (*q*).

Now permitted.

Now by sect. 9 of the Marine Insurance Act, 1906—

Mar. Ins. Act, 1906, s. 9.

(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

(*m*) Juhel *v.* Church (1801), 2 Johnson's Cases, 333.

(*n*) N. Y. Rev. St. Pt. I. c. xx. tit. viii. ss. 8, 9, 10, cited in Kent's Com., *ubi supra*.

(*o*) Re-insurances are expressly sanctioned by most of the Continental Commercial Codes. See that of France, art. 342; Spain, art. 749; Italy, art. 426; Germany, art. 779; Holland, art. 271; Scandinavia, art. 230. They are permitted in the United States, 3 Kent, Com. 278. See also 1 Emerigon, c. viii. ss. 14, 15, 16, pp. 252—261; 3 Boulay-Paty, Droit Mar. 429—446; 1 Benecke, 281—289.

(*p*) A policy of re-insurance is, however, not a mere contract of indemnity. See Nelson *v.* Empress Assurance Corporation (1905), 10 Com. Cas. 237 (C. A.), *infra*, § 323.

(*q*) This statute was repealed by 30 & 31 Vict. c. 23, the schedule to which again repealed 19 Geo. 2, c. 37, s. 4.

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323. There have been several decisions in our Courts within the last few years upon policies which happened, in fact, to be policies of re-insurance. This is a circumstance which is interesting as illustrating the large extent to which policies of this nature are now used. The decisions themselves, however, do not turn as a rule upon questions peculiar to re-insurance, and will be found to be noticed in their proper places so far as they illustrate any points of marine insurance law in general. The law relating to contracts of re-insurance is, generally speaking and apart from special circumstances, the same as that which governs the original contract.

The re-insurance contract.

The thing which the re-assured insures is the thing originally insured. In this thing he has an insurable interest to the extent of the liability which he may incur under and by reason of his original contract of insurance (*r*). As it is, apart from usage, never necessary in a contract of insurance to describe the interest of the assured, but is sufficient to specify simply what is the thing insured, it follows that a contract of re-insurance need only show that the thing intended to be covered is ship, freight, goods, or whatever it may be; it is not as a matter of law necessary that it should appear on the face of it to be a contract of re-insurance (*s*).

(*r*) See per Buckley, L. J., in British Dominions Gen. Ins. Co., Ltd. *v.* Duder, [1915] 2 K. B. at p. 400. It is doubtful whether this view is consistent with the language of Mathew, L. J., in Nelson *v.* Empress Assurance Corp. (1905), 10 Com. Cas. at p. 240, that "a policy of re-insurance is a policy on an interest in the subject-matter of the insurance, that interest being different from that protected by the original policy and acquired by the fact that the assured is the underwriter under the original policy."

(*s*) Mar. Ins. Act, 1906, s. 26, *ante*, §§ 251, 252; Mackenzie *v.* Whitworth (1875), L. R. 10 Ex. 142; 1 Ex. D. 36 (C. A.). By the 19 Geo. 2, c. 37, the policy was required to express that it was a re-insurance, and this remained the law till 1867.

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In English policies, however, it is now an almost universal practice to insert in re-insurance policies a clause (the effect of which will be discussed hereafter) by which this particular circumstance is specially called to the underwriter's attention (*t*). And though, generally speaking, it seems unnecessary to disclose the fact that the risk is one of re-insurance, there might in a particular case be circumstances attending the original contract which would affect the mind of a re-insurer. If, for instance, the original assured were known to the original insurer to be a person who on previous occasions had attempted to defraud his underwriters, it might be incumbent on the original insurer to disclose to a re-insurer the character of the original assured, and therefore also the fact that the risk is one of re-insurance (*u*).

Definition of re-insurance.

324. Re-insurance is defined to be a contract by which, in consideration of a certain premium, the original insurer throws upon another the risk for which he has made himself responsible to the original assured, to whom, however, he alone remains liable on the original insurance (*x*).

Totally distinct from the original insurance.

Sect. 9 (2) of the Marine Insurance Act, 1906, states that "unless the policy otherwise provides, the original assured has no right or interest in respect of such insurance." Thus, in general, the contract of re-insurance is totally distinct from and unconnected with the original insurance (*y*); the original assured has no kind of claim against the re-insurer, or against

(*t*) In Mackenzie *v.* Whitworth, *ubi supra*, a Liverpool jury refused to find for an underwriter upon the issue that the fact that the contract is one of re-insurance must be disclosed. A Commons' amendment to sect. 18 of the Marine Insurance Bill declared that "the fact that a policy is effected by way of re-insurance is material," but it was not agreed to by the House of Lords.

(*u*) Cf. New York Bowery Fire Ins. Co. *v.* N. Y. Fire Ins. Co. (1837), 17 Wend. 359.

(*x*) 1 Emerigon, c. viii. s. 14, p. 252; 3 Boulay-Paty, Droit Mar. 329.

(*y*) See Nelson *v.* Empress Assurance Corporation (1905), 10 Com. Cas. 237, in which the Court of Appeal held that the original insurer cannot bring the re-insurers in as third parties to an action on the original policy.

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any moneys paid by the re-insurer to the re-assured (*z*). The re-assured remains solely liable on the original insurance and alone has any claim against the re-insurer (*a*).

Hence, supposing the original insurer to have become bankrupt and the assured to have been paid a small dividend out of his estate, the re-insurer is still liable to pay the whole amount of the re-insurance to the trustees of the original insurer and not merely the dividend (*b*).

The re-assured, in order to recover against the re-insurers, must prove the loss in the same manner as the original assured must have proved it against them (*c*). The re-insurers are entitled to raise all defences which were open to the re-assured against the original assured (*d*), and they are also entitled in the action to have from the re-assured all the information and assistance which the latter were

Defences open to re-insurers.

(*z*) Herckenrath *v.* The American Mut. Ins. Co. (1848), 3 Barb. Ch. N. Y. 63; 1 Parsons, 301.

(*a*) Le premier contrat subsiste tel qu'il a été concu, sans novation ni altération. La réassurance est absolument étrangère à l'assuré primitif, avec le quel le réassureur ne contracte aucune sorte d'obligation: 1 Emerigon, c. viii. s. 14, p. 252.

(*b*) Herckenrath *v.* The American Mut. Ins. Co., *ubi supra;* 2 Phillips, s. 1752; 1 Parsons, 300; Emerigon, 253. See also In re Law Guarantee, &c. Soc., [1914] 2 Ch. 617, 649; British Union and Nat. Ins. Co. *v.* Rawson, [1916] 2 Ch. 476. In In re Eddystone Marine Insurance Co., [1892] 2 Ch. 423, where the policy of re-insurance contained the words "to pay as may be paid thereon," the re-assured, who had paid nothing to the original assured, were nevertheless held entitled to recover the whole sum from their re-insurers. So, in the United States, Allemannia Ins. Co. *v.* Firemen's Ins. Co. (1907), 209 U. S. 326. In British Dominions Gen. Ins. Co. *v.* Duder, [1915] 2 K. B. 394, the Court of Appeal, reversing Bailhache, J., [1914] 3 K. B. 835, held that insurers who had effected a compromise in respect of a total loss for less than 100 per cent. were bound to give the benefit of such settlement to their re-insurers, though the latter had refused to assent thereto. See as to this case the judgment of Pickford, L. J., in British Union and Nat. Ins. Co. *v.* Rawson, *supra*.

(*c*) Chippendale *v.* Holt (1895), 65 L. J. Q. B. 104; 1 Com. Cas. 197; 1 Parsons, 301.

(*d*) See Marten *v.* Steamship Owners' Underwriting Association (1902), 7 Com. Cas. 195, in which Bigham, J., held that in an action for a constructive total loss the re-insurers could set up a clause in the original policy providing that the insured value of the ship should be taken to be her repaired value.

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It may even happen that a re-insurer has additional defences which were not open to the re-assured; for example, the original insurance may have been regularly effected, but the re-insurance may be voidable for concealment (*g*) or misrepresentation, or on any other grounds.

325. Likewise it appears that there may be cases in which the liability of a re-insurer may, even as regards amount,

(*e*) Thus the re-insurers are entitled to an affidavit of ship's papers, though they be not in the custody of the plaintiffs: China Traders Ins. Co. *v.* Royal Exchange Ass. Co., [1898] 2 Q. B. 187 (C. A.).

(*f*) The position is apparently the same even when the policy contains the clause "to pay as may be paid thereon": Chippendale *v.* Holt, *ubi supra*. See per Bigham, J., Western Assurance Co. of Toronto *v.* Poole, [1903] 1 K. B. 376, 386. So in a contract of life insurance, where the re-insurance contract provided that the original insurers were to make the settlement in the event of a claim being made: Australian Widows Fund Life Ass. Soc., Ltd. *v.* National Mutual Life Ass. of Australasia, Ltd., [1914] A. C. 634.

(*g*) See Property Ins. Co. *v.* National Protector Ins. Co. (1913), 18 Com. Cas. 119. A possible example is New York Bowery Fire Ins. Co. *v.* N. Y. Fire Ins. Co. (1837), 17 Wend. 359.

and even where the policies are in the same terms, be either greater or less than that of the re-assured (*h*). This result seems to be brought about by the operation of the suing and labouring clause. Sect. 325.

Effect of suing and labouring clause in re-insurance contracts.

For example, let us suppose A., a shipowner, to abandon his vessel to B., his underwriter, who has in turn re-insured with C. B. spends 1,000*l*. in fruitless endeavours to save the vessel, which is worth 10,000*l*. B. only pays A. 10,000*l*., the value of the vessel, but by virtue of the suing and labouring clause recovers 1,000*l*. beyond that sum from C. It is surprising, however, to note that if C. have re-insured with D., the latter is not necessarily liable for the whole of the 11,000*l*. which C. has paid B., even although all the policies contain the suing and labouring clause, and although C.'s re-insurance with D. was for the same amount as B.'s re-insurance with C. For in order to entitle C. to recover the additional 1,000*l*. from D., the former would have to show that he or his agents had sued or laboured for the safety of the vessel. But inasmuch as the expense was incurred not by C. but by B., it seems to follow that C., although he has properly paid 11,000*l*. to B., nevertheless can only recover 10,000*l*. from D. This somewhat anomalous result seems to follow from the decision of the Court of Appeal in Uzielli *v.* The Boston Marine Insurance Co. (*i*). The facts of that case may be shortly summarized as follow. The "Rosa Middleton" was insured at Lloyd's for 1,500*l*. The Lloyd's underwriters re-insured with the plaintiffs, who in their turn re-insured with the defendants for the sum of 1,000*l*. The vessel became a constructive total loss,

Uzielli *v.* Boston Marine Insurance Co.

(*h*) Phillips, vol. ii. s. 1751, citing Herckenrath *v.* American Mut. Ins. Co., 3 Barbour's Ch. R. 63, probably goes too far in stating that a re-insurer is never liable beyond the amount for which the insurer is legally liable.

(*i*) (1884), 15 Q. B. D. 11. See Bigham, J.'s, remarks on this case in Western Assurance Co. of Toronto *v.* Poole, [1903] 1 K. B. 376. In British Dominions General Ins. Co. *v.* Duder, [1915] 2 K. B. 394, the Court of Appeal express their difficulty in understanding this case, and in particular why the difference between the 88 per cent. and the 100 per cent. was held to be recoverable.

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which the Lloyd's underwriters compromised by a payment of 88 per cent. They had, however, spent sums amounting to 24 per cent. in getting the ship off, and were entitled to recover the total, or 112 per cent., by virtue of the suing and labouring clause, from the plaintiffs. For this 112 per cent. the plaintiffs then brought their action against the defendants, claiming accordingly the sum of 1,120*l.*, and relying on the suing and labouring clause, and also on the clause by which the defendants undertook to pay as might be paid on the policy entered into between the plaintiffs and the Lloyd's underwriters. Mathew, J., gave judgment for the plaintiffs for the whole sum claimed, but the Court of Appeal held that the suing and labouring clause did not apply, and that the other special clause extended the liability of the defendants to 1,000*l.*, the sum for which they had insured, but not beyond (*k*).

Amount recoverable on open policy of re-insurance.

326. A question has been raised amongst foreign jurists as to whether, in an open policy of re-insurance, the re-assured is entitled to recover the whole amount of the original insurance without deducting therefrom the premiums of the original insurance or the premium of the premium. Emerigon (*l*) supported the practice, which was stated by Arnould (*m*) to prevail in every other foreign country except France, whereby the whole amount was recoverable. But Pothier (*n*), Valin (*o*), Estrangin (*p*), and Boulay-Paty (*q*) were all opposed to Emerigon on the point upon the ground that, the premium of the original insurance having been already paid to the underwriter, he runs no risk upon it and therefore cannot insure it.

(*k*) The special clause is here noticed incidentally only; it is proposed to discuss it in more detail subsequently.
(*l*) Vol. i. c. viii. s. 14, sub-s. 4, pp. 253—256.
(*m*) 2nd ed. p. 341.
(*n*) D'Assurance, No. 36.
(*o*) Comment. vol. ii. p. 279.
(*p*) Comment. on Pothier, No. 36, p. 46.
(*q*) 3 Droit Mar. tit. x. s. 10, 429 *et seq.*

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Re-insurer not entitled to notice of abandonment.

In cases of constructive total loss the re-assured need not give notice of abandonment to the re-insurer (*r*).

Expense of resisting original claim.

It has been held in the United States that the amount of loss recoverable on a policy of re-insurance will include the expense of resisting the claim of the original assured, provided the original insurer was justified in contesting the claim (*s*).

The re-insurance clause, "to pay as may be paid thereon."

327. It now remains to consider the effect of a clause which is found almost universally in policies of re-insurance. The clause is to the following effect:—"Being a re-insurance, subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon" (*t*).

It has been decided that this clause does not preclude the re-insurer from insisting upon proper proof that a loss strictly within the terms of the original policy has taken place. Where, therefore, the plaintiffs, who were the original insurers, had accepted a notice of abandonment, and actually in good faith paid their assured for a constructive total loss, it was held that these facts alone did not entitle them to recover from their re-insurers, without proof that a constructive total loss had in fact occurred (*u*). Conversely, where the liability of the original insurer is once established, it is not necessary that he should prove actual payment. The trustee, therefore, of an insolvent underwriter, though he may have paid nothing, or only a small dividend, on the original policy, may nevertheless, notwithstanding the clause, recover from the re-insurers to the full extent of the liability which they have undertaken (*x*).

(*r*) Mar. Ins. Act, 1906, s. 62 (9). See *post*, § 1191.
(*s*) Hastie *v.* De Peyster (1805), 3 Caines, 190; N. Y. State Ins. Co. *v.* Protection Ins. Co. (1841), 1 Story, 458; 2 Phillips, s. 2145.
(*t*) Commonly known as one of the "rubber clauses," from being usually stamped on the margin of the policy with a rubber stamp. The original policy or policies to which the re-insurance is intended to apply are sometimes specified.
(*u*) Chippendale *v.* Holt (1895), 65 L. J. Q. B. 104; 1 Com. Cas. 197. See also Marten *v.* Steamship Owners' Underwriting Association (1902), 7 Com. Cas. 195.
(*x*) See *ante*, § 324.

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Re-insurer not liable, beyond his subscription, for suing and labouring expenses.

This clause does not enable the original underwriter to recover from his re-insurer to an extent beyond the subscription of the latter. Thus, as we have already seen, in Uzielli *v.* The Boston Marine Insurance Co. (*y*), an underwriter had paid a loss amounting in all to 112*l.* per cent., of which amount 88 per cent. was payable in respect of the constructive total loss of the vessel, and the remaining 24 per cent. for suing and labouring charges. He had re-insured for 1,000*l.* only, but sought to recover 112*l.* per cent. or 1,120*l.*, on his policy of re-insurance. It was held, first, for reasons which we have already explained, that the re-insurer was not liable under the suing and labouring clause; and secondly, that the special clause which we are now considering could not render him liable beyond the amount which he had agreed to re-insure. He was accordingly held liable for 1,000*l.* and no more.

The precise effect of the clause under consideration has not been judicially determined. In one case, Bigham, J., expressed his view as to the effect of a policy of re-insurance on ship containing this clause in the following terms:—"The re-insurer, when called upon to perform his promise, is entitled to require the re-assured first to show that a loss of the kind re-insured has in fact happened; and, secondly, that the re-assured has taken all proper and business-like steps to have the amount of it fairly and carefully ascertained. That is all. He must then pay. There is nothing in his contract either express or implied which entitles him to have the ship or to deal with it in any way: though he is, no doubt, entitled to require that the original underwriter should realise it in such a way as to reduce the loss as much as may be reasonably possible. Nor is he entitled to rip up the settlement between the shipowner and the original underwriter, except upon the ground that it is dishonest, or has been arrived at carelessly. So long as liability exists, the mere fact of some honest mistake having occurred in fixing the exact amount of

(*y*) (1884), 15 Q. B. D. 11.

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it will afford no excuse for not paying. He has promised 'to pay as may be paid thereon.' Such is, in my opinion, the meaning and effect of these re-insurance policies" (*z*). If this view be correct, the result is anomalous. The re-insurer is entitled, notwithstanding his promise "to pay as may be paid thereon," to say that the original insurer was not liable to pay anything. Yet he may not say that as regards part of the claim the original insurer was under no liability to pay.

Where original policy and re-insurance policy contain different clauses.

328. Difficult questions have arisen where the policy of re-insurance, while expressed to be subject to the clauses and conditions of the original policy, has been found to contain clauses which are inconsistent with them. Of course, if the re-insurance policy contains a special clause by which it is obviously intended to limit the risks covered by the original policy—as, for example, where the re-insurance is expressed to be against total loss only, or against fire risks only—the risks will be limited accordingly (*a*). But sometimes the intention of the parties has not been so obvious. In Joyce *v.* Realm Marine Insurance Co. (*b*), the original insurance was on cargo, for voyages both outward and homeward between Liverpool and West African ports, and it was declared that outward cargoes should be considered as homeward interest twenty-four hours after the vessel's arrival at her first port of discharge. The re-insurance policy was upon cargo, at and from West African ports to the vessel's ports of discharge in

Joyce *v.* Realm Insurance Co.

(*z*) Western Assurance Co. of Toronto *v.* Poole, [1903] 1 K. B. 376, 386.

(*a*) See Chippendale *v.* Holt and Marten *v.* Steamship Owners' Underwriting Association, *ante*, § 327. Where the clause, after stating that the re-insurance was against total or constructive total loss only, ended with the words "but to follow hull underwriters in event of a compromised or arranged loss being settled," and a claim against these underwriters for a constructive total loss or in the alternative for a partial loss had been compromised for a considerable sum, Bray, J., held that the re-insurers were liable: Street *v.* Royal Exchange Ass. (1913), 18 Com. Cas. 284; affirmed 19 Com. Cas. 339 (C. A.).

(*b*) (1872), L. R. 7 Q. B. 580.

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the United Kingdom, "to commence from the loading of the goods at as above." Goods shipped at Liverpool were lost more than twenty-four hours after the ship's arrival at her first port of discharge in West Africa. The re-insurers contended that their risk had not attached, inasmuch as the goods had not been loaded on the coast of Africa. The Court of Queen's Bench, however, held that the clause in the original policy prevailed, and that the re-insurers were therefore liable.

Franco-Hungarian Insurance Co. v. Merchants' Marine Insurance Co.

In 1888 Day, J., appears to have held that where a twelve months' policy expired on 1st June, 1883, subject, however, to a "continuation clause," which provided that if at the expiration of the twelve months the ship should be at any place other than her home port of discharge in Europe, the risk should be prolonged until her arrival at such port, the clause under discussion did not extend the liability of re-insurers so as to render them responsible for a loss which took place after the expiration of the twelve months, and was only covered by the continuation clause. He considered that time was of the essence of a contract of this description, and that the clause only incorporated such conditions as were applicable to an insurance ending on the 1st June, 1883 (*c*).

Charlesworth v. Faber.

In Charlesworth *v.* Faber (*d*) the same question was litigated, and Bigham, J., held that the "continuation clause," being a usual one, was incorporated in the policy of re-insurance. The learned Judge distinguished the previous case on the ground that no evidence appeared to have been given before Day, J., to show that the clause was in common use; but such evidence would apparently have been irrelevant, according to the *ratio decidendi* of the case, and the two judgments cannot thus be reconciled.

Marten v. Nippon Sea Insurance Co.

Charlesworth *v.* Faber is, however, in agreement with the

(*c*) Franco-Hungarian Ins. Co. *v.* Merchants' Mar. Ins. Co. (1888), Shipping Gazette Weekly Summary, 15th June, 1888. The statement of the case is taken from McArthur, p. 336. The validity of a "continuation clause" has been established by legislation: see *post*, § 440.

(*d*) (1900), 5 Com. Cas. 408.

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earlier decision of Bigham, J., in Marten *v.* The Nippon Sea Insurance Co. (*e*). The original policy, which was on goods at and from Liverpool to Guayaquil until there discharged and safely landed, contained in the margin what is called the "warehouse to warehouse" clause, whereby all risks whatsoever are included until the goods are safely delivered to the consignee. The re-insurance policy contained the usual clause by which the risk is made to determine on the discharge and safe landing of the goods, also the common re-insurance clause. It was held that the "warehouse to warehouse" clause, being such a common clause that the re-insurers ought to have known that it was in the original policy, was incorporated into the policy of re-insurance.

Property Insurance Co. v. National Protector Insurance Co.

The judgment of Scrutton, J., in a recent case seems to be founded on the view that the "rubber" clause has the effect of incorporating unusual as well as usual conditions in the original policy, but that if the original policy contains unusual clauses, the existence of which has not been disclosed to the re-insurer, he may avoid the re-insurance on the ground of concealment. This view accords best with the wording of the clause. In the case in question the clause ran:—"subject without notice to the same clause and conditions, &c." The original insurance in this case gave liberty to navigate the Canadian lakes, and the learned Judge held that the clause giving this liberty was so unusual that ordinarily it ought to be disclosed; but he also held that the effect of the words "without notice" was that the re-insurers waived information as to unusual conditions in the original policy, and were liable for a loss which occurred while the insured vessel was in the lakes (*f*).

To which of several insurances the

328a. The "rubber" re-insurance clause often contains a blank space intended to be filled up by words identifying the

(*e*) (1898), 3 Com. Cas. 164.

(*f*) Property Ins. Co. *v.* National Protector Ins. Co. (1913), 18 Com. Cas. 119. The "original insurance" in this statement of this case was itself a re-insurance.

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re-insurance policy applies. Lower Rhine Co. v. Sedgwick.

very policies which it is intended to re-insure. Where this space is filled up, it seems clear that the re-assured will only be protected against liabilities incurred under those particular policies. Where the space is not filled up, the presumption will be that the re-insurance is only against risks actually existing at the date of the re-insurance policy, and not against other liabilities which the original insurer may subsequently undertake in relation to the same subject-matter. At any rate, if subsequent policies are to be covered, they must not differ in their terms from those of the original policies (*g*).

Reliance Mar. Ins. Co. v. Duder.

In a recent case the re-insurance was expressed to be "subject to the same terms, clauses and conditions as the original policy or policies." The original assured had effected two insurances on ship for a voyage from Australia to the West Coast of South America, and a third insurance, with the same underwriters, at and from ports on the West Coast to Europe, "risk to commence from expiration of previous policy." The re-insurance policy was for a voyage at and from the West Coast to Europe, the termini being described exactly as in the third policy. A loss took place on the West Coast, for which the shipowners were paid under the two earlier policies; but it also occurred within the limits of space and time covered by the words of the re-insurance policy. In answer to a claim on this policy, the re-insurers set up the defence that the original insurers had only intended to re-insure their risk under the third policy, and that they could not recover by reason of sect. 26 (3) of the Marine Insurance Act, 1906. The Court of Appeal, however, while holding that an intention only to cover this risk had not been proved, also said that as the loss was within the terms of the policy of re-insurance, evidence was not admissible of an intention,

(*g*) The Lower Rhine Co. *v.* Sedgwick, [1898] 1 Q. B. 739; [1899] 1 Q. B. 179. The facts of the case are somewhat complicated, but the decision supports the above conclusions. See, as to the grounds of the decision, per Kennedy, L. J., in Reliance Mar. Ins. Co. *v.* Duder, [1913] 1 K. B. 265, 277.

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not communicated to the re-insurer, to re-insure only the risk under one of the original policies (*h*). Where, however, the intention to cover only the third risk could be gathered from the re-insurance policy itself as well as from other evidence, and such intention had not only been communicated to the re-insurer, but had been thoroughly discussed by the parties, it was held by Sankey, J., that the evidence to this effect was admissible, and that the re-insurer was not liable for a loss which was covered by the two insurances on the voyage from Australia (*i*).

Of insuring the solvency of the underwriter.

329. Besides re-insurances, properly so called, *i.e.*, insurances effected by one underwriter with another to secure himself, the assured may also, if he pleases, insure the solvency of the underwriter with whom he has effected the policy. As, however, this practice tends greatly to lessen the profits of the voyage by multiplying the charges of it, it will not frequently be resorted to in any country and appears never to have been in use in our own, though it is neither prohibited by statute nor illegal at common law (*j*).

Double insurance.

330. Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk and the same interest (*k*). It is therefore a totally different

(*h*) Reliance Marine Ins. Co. *v.* Duder, [1913] 1 K. B. 265, Cozens-Hardy, M. R., and Kennedy, L. J. (Buckley, L. J., *dubitante*). See, further, as to this case, *ante*, § 252b. A similar view was expressed by Bray, J., in Scottish National Ins. Co. *v.* Poole (1912), 18 Com. Cas. 9, viz., that the policy of re-insurance applied to any original policy which the original insurers had subscribed at the time when the re-insurer executed the policy, and which corresponded with the terms of the slip that he had initialed.

(*i*) Janson *v.* Poole (1915), 84 L. J. K. B. 1543.

(*j*) Park on Ins. vol. ii. p. 599, seems to have thought that it would be void as a wager policy under the statute; but Arnould (2nd ed. p. 343) agreed with Benecke that it would be difficult to discover any satisfactory ground for this opinion. Policies guaranteeing the solvency of third parties other than underwriters are sometimes effected at Lloyds: see Seaton *v.* Burnand, [1900] A. C. 135; Hambro *v.* Burnand, [1904] 2 K. B. 10.

(*k*) See Union Mar. Ins. Co. *v.* Martin (1866), 35 L. J. C. P. 181, for a case in which the question arose whether there was a double

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thing from a re-insurance, which, as we have seen, is effected by the underwriter to secure himself from having to pay a loss.

Double insurances are not prohibited by the law maritime unless made fraudulently: in fact, a moment's consideration will show that they are in many cases of necessary use.

A merchant, who expects consignments from abroad, may be ignorant of their exact value; he may, in the first instance, have effected an insurance on them only to an amount which subsequent information may lead him to think inadequate to cover their full value, and on that ground he may be desirous of effecting a further insurance; or he may have insured as much as he is able in one place, and being desirous of further security may then proceed to effect additional insurances elsewhere. If it turns out that the whole amount insured is greater than the whole value of the interest at risk, this is called an over-insurance.

Over-insurance.

Mar. Ins. Act, s. 32.

The legal position when there has been a double insurance resulting in over-insurance is now regulated by sects. 32 and 80 of the Marine Insurance Act, 1906. Sect. 32 is as follows:—

> (1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act (*l*), the assured is said to be over-insured by double insurance.
>
> (2) Where the assured is over-insured by double insurance—
>
> (a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

insurance, or whether the second of two overlapping policies effected with the same insurer was in substitution for the earlier one. As to the "same subject," see the remarks, *infra*, § 331, on disbursement policies.

(*l*) For the insurable value on which the measure of indemnity (*infra*, § 338) depends, see Mar. Ins. Act, 1906, ss. 16, 27, *infra*, Part I., Chap. XIII.

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> (b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured (*m*);
>
> (c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;
>
> (d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

By sect. 80:—

> (1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract (*n*).
>
> (2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt (*o*).

According to sect. 32, to constitute an over-insurance by double insurance the policies must be on the same adventure and the same interest of the assured. It is possible, in fact, that an insurance on disbursements, though nominally on a different subject-matter from ship or freight, is intended to cover expenditures which are made to earn the freight, and therefore covered by the insurance on the gross freight, or which are made for items ordinarily included in the insurance on ship. In such a case it seems that the policy on

(*m*) See *infra*, §§ 349—352, for the effect of different valuations.

(*n*) See the remarks of Hamilton, J., on this provision in American Surety Co. *v.* Wrightson (1910), 16 Com. Cas. 37, 54.

(*o*) See *infra*, § 354, for the adjustment of the contributions when the policies contain different valuations.

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disbursements is on the same interest of the assured as that covered by one or the other of the policies on ship or freight, and that there may be an over-insurance by double insurance within the meaning of sect. 32. There are *dicta* in the "Gunford" case to this effect (*p*). When, however, as was done in this case, and is almost invariably done, the insurance on disbursements is made by a "p.p.i." policy, it is submitted that the disbursement policy cannot be taken into account in order to determine, for the purposes of sect. 32, whether there has been an over-insurance. It is implied in sect. 80, which provides for contribution between the different sets of insurers, that the policies are valid policies.

Rule of contribution in case of over-insurance.

331. The rule that now prevails in this country may therefore be summarized as follows: In case of over-insurance the different sets of policies are considered as making but one insurance, and are good to the extent of the value of the effects put in risk; the assured can recover on the different policies no more than their value, but he may sue the underwriters on any of the policies, and recover from those he so sues to the full extent of his loss, supposing it to be covered by the policy on which he elects to sue, leaving the underwriters on that policy to recover a rateable sum by way of contribution from the underwriters on the other policy (*q*).

Davis v. Gildart.

Hence where a merchant, the value of whose whole interest was 2,200*l*., first effected a policy on this interest at Liverpool for 1,700*l*., and then (without fraud) another policy on the same interest (*r*) at London for 2,200*l*., he was allowed to recover the whole amount on the London policy, and the

(*p*) See Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529, per Lord Alverstone, C. J. (p. 536), and Lord Robson (p. 549).

(*q*) Newby *v.* Reid (1763), 1 W. Bl. 416; Rogers *v.* Davis, and Davis *v.* Gildart (1776), cited 1 Marshall, Ins. 140, 141; 2 Park, Ins. 601. As regards the amount of the contribution, difficulties may arise when some of the policies cover other subject-matters in addition to those covered by a different set: see American Surety Co. *v.* Wrightson (1910), 16 Com. Cas. 37.

(*r*) But for a different risk, see Rogers *v.* Davis, *quâ supra*.

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London underwriters were allowed to recover a rateable amount by way of contribution from the Liverpool underwriters (*s*).

Rule in France and the United States.

The rule of contribution in cases of over-insurance by double insurance was established by Lord Mansfield (*t*). It is not the rule which formerly prevailed in this country, which now prevails in France, and which in the United States is generally rendered binding on the parties to the second policy by an express clause relating to prior insurance.

That rule is, in the words of the Code de Commerce, "that where there exists several contracts (N.B., not necessarily 'policies') (*u*) of insurance effected without fraud on the same subject, if the first contract insures the total value of the subject at risk, it alone shall be enforced." The insurers who have signed the subsequent contracts are freed from liability, and only receive $\frac{1}{2}$ per cent. on the sum insured.

If the whole value of the subject insured is not covered by the first contract, those insurers who have signed the subsequent contracts shall be responsible for the surplus in the order of the date of their respective signatures (*v*).

Formerly the rule in this country.

So in this country it was once pleaded, and "proved by all the exchange," to be the custom of merchants "that where a policy is subscribed by a number of underwriters, and the goods are not equal in value to the sums subscribed (taken together), the underwriters in case of loss shall be liable in the order in which they subscribe, and the remaining underwriters shall be exonerated from all liability and return the premium, deducting $\frac{1}{2}$ per cent." (*w*).

The American clause.

The common law rule in the United States is that laid

(*s*) Davis *v.* Gildart, *quâ supra*.

(*t*) In Newby *v.* Reid, *supra*.

(*u*) Each subscription to the policy forms a new contract if it bears a separate date.

(*v*) Code de Commerce, art. 359.

(*w*) The African Co. *v.* Bull (1690), 1 Show. 132; see also Malynes, Lex Mercatoria, 112. But the rule in France was never applied to several subscriptions to one policy, unless they bore different dates; and this probably is the true meaning of the English rule.

Sect. 331. down by Lord Mansfield; but the law as it anciently prevailed in England, and is now established in France, is deemed by the American merchants so preferable, in point of simplicity and convenience, that clauses are very generally introduced into their policies to prevent the rule of contribution, and to make the insurers responsible according to the order of date of their subscriptions.

The following clause has been used in the second policy for this purpose:—"It is further agreed, that if the assured shall have made any other assurance upon the premises prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient."

The following is a form adapted to the first policy:—"In case of any subsequent assurance, the insurer shall, nevertheless, be answerable for the full extent of the sum subscribed by him without right to claim contribution from subsequent assurers" (*x*).

In France and the United States policies prior in time bear the loss.

In France and in the United States (in cases where this rule has been adopted), it has been decided that, even where the second policy is dated on the same day as the first, inquiry may be made as to which of the two was actually first effected in point of time, and that which was so will alone bear the loss (*y*).

This rule, however, does not in France extend to different subscriptions of uniform date to the same policy; for if they all bear one date they make but one contract, and the whole body of the underwriters, in case the sum insured in such policy exceeds the value at risk, contribute rateably to the loss and return a rateable share of premium for the excess (*z*).

Rule as to return of

332. Sect. 84 (3) (f) of the Marine Insurance Act, 1906,

(*x*) 3 Kent, Com. 281.

(*y*) 4 Boulay-Paty, Droit Mar. 122, 123; Brown *v.* Hartford Ins. Co. (1808), 3 Day's R. 58; cited 1 Parsons, 287; Potter *v.* Marine Ins. Co. (1822), 2 Mason's R. 475; cited 3 Kent, Com. 281.

(*z*) 4 Boulay-Paty, Droit Mar. 116, 117.

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declares that, subject to the other provisions of the section relating to the return of premium, "where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable" (*a*).

This rule is, however, subject to a limitation expressed in the following proviso:—

> Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

The reason why, where two sets of policies of different date are effected on the same property, the underwriters on the later set in point of date are alone called on for a rateable return of premium, if these policies were effected after the risk had attached on the earlier set, is that as the underwriters on the first set of policies were at one time liable to the whole extent of the sum therein insured, so they are fairly entitled to retain the whole premium (*b*).

The provision that there is no return of premium if the full sum insured has been paid on the policy seems to have made a change in the law. The insurer has a claim for contribution under sect. 80, and the only reason that can be suggested for the provision is that if he be compelled to pay in full, he does run the risk of not recovering the contributions of other underwriters in case of their becoming insolvent (*c*). The provision that there is to be no return of premium when the double insurance has been effected knowingly also effects a change of law, which seems to have been made with the object of discouraging double insurance (*d*).

(*a*) See 2 Marshall, Ins. 649.

(*b*) Fisk *v.* Masterman (1841), 8 M. & W. 165.

(*c*) See *post*, § 1262, where the effect of this provision is further discussed.

(*d*) See Chalmers & Owen, Mar. Ins. Act, 2nd ed. 136.

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Insurances of different interests in the same subject.

333. Although in cases of double insurance, properly so called, *i.e.*, where the same person insures the same interest by several policies on the same risk, he cannot recover more than an indemnity—*i.e.*, more than the real or declared value of the thing insured, under all the policies put together—yet it is different where two or more persons insure the same thing against the same risks on distinct interests.

In such case each of the parties, having such distinct interests in the thing insured, may effect insurance in respect thereof to the full value of the thing insured, and each in case of loss may recover to the full extent of his interest.

This, as Lord Mansfield remarks, "is by no means within the idea of a double insurance, which is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss by reason of his having made two insurances upon the same goods or the same ship;" whereas the case now referred to is the insurance by two different persons of two different interests each to the whole value.

Effect of doctrine of subrogation.

The doctrine of subrogation must, however, apply in cases where more than the value of the thing insured is recovered from the underwriters, so that in the result the whole sum retained by the assured will be no more than such value. The principle is well illustrated by the following passage from the judgment of Cotton, L. J., in an action arising out of a fire insurance:—

"The rule is perfectly established in the case of a marine policy," said the learned Lord Justice, "that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights. The reason of that is obvious enough. Where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insure in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever this is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person becomes insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other" (*e*).

Godin *v.* London Ass. Co.

334. The following case was quoted by Arnould as a good illustration of the principle:—

Meybohm, of St. Petersburg, was in debt for advances both to Amyand, of London, and to Tamesz, of Moscow. Under these circumstances, Meybohm wrote to Amyand, to the effect that he should send him goods, as per invoice, and directing him to insure. Amyand, accordingly, who had already insured to a certain extent on the expected consignment, effected a further insurance, thus making the aggregate sum insured by him more than sufficient to cover the full value of the consignment, but less than the amount of the balance then due to him from Meybohm in account. Meybohm shipped the goods as per invoice, but instead of

(*e*) North British, &c. Ins. Co. *v.* London, Liverpool & Globe Ins. Co. (1877), 5 Ch. D. 583.

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indorsing the bill of lading to Amyand he indorsed it to Tamesz, to whom at that time he was also indebted to a greater amount than the value of the goods shipped.

Tamesz subsequently procured a policy to be effected with the London Assurance Company, by Godin & Co., to the full value of the goods, the brokers informing the company of the prior insurance by a prior consignee and that both parties wished to be safe. The ship and goods having been lost, the Court (the judgment of which was delivered by Lord Mansfield) held that Tamesz could recover the full amount of his insurance (*f*).

Remarks on this case.

That Tamesz, indeed, as indorsee of the bill of lading and in advance to Meybohm to a greater amount than the sum insured in the policy, had a clear insurable interest to the full extent of his claim, and therefore might recover the whole sum insured, is a position that can hardly be disputed. Whether Amyand could also recover on the policies effected by him was a point not before the Court, and therefore not decided. Lord Mansfield intimated a pretty clear opinion that he could, on the ground that, as a factor to whom a balance was due, he had under the circumstances an insurable interest distinct from the interest of Meybohm. At all events, his Lordship was clear that, assuming Amyand to have insured as agent only, he had a lien on the policies to the extent of his general balance.

Arnould thought (*g*) that Lord Mansfield was right in both points, notwithstanding the doubts of Marshall as to the former position (*h*); but considered it safer to regard the case as a mere illustration of the undoubted principle, "that where each of two parties, having distinct interests, in the subject to its full value, insures upon it to its full

(*f*) Godin *v.* London Ass. Co. (1758), 1 Burr. 489; 1 W. Bl. 103; 2 Park, Ins. 603 *et seq.*; 1 Marshall, Ins. 143.

(*g*) 2nd ed. p. 352.

(*h*) 1 Marshall, Ins. 145. Judge Duer, vol. ii. p. 163, n., cites Godin *v.* London Ass. Co., with other cases, as an authority for the position that the insurable interest of a factor or consignee is limited to his advances constituting a lien on the property.

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value, independently of the other, it is not a case of double insurance" (*i*).

Maclachlan maintained, however, that Amyand would not have been able to recover on his policy. "Amyand," he said, "*primâ facie* at the moment of the shipment had an insurable interest, and he was justified, therefore, in insuring on his own account. But Meybohm held in his hand the power of diverting the goods from Amyand, and exercised this power by indorsing the bill of lading to Tamesz for a debt greater than the value of the goods. That was the annihilation of any insurable interest held by Amyand, without the intervention of any of the perils insured against, and made his policy thenceforward of no effect" (*j*). The conclusion that at the time of the loss Amyand had ceased to have an insurable interest seems sound, and Lord Mansfield's opinion to the contrary is, of course, only an *obiter dictum* (*k*).

Discovery of over-insurance.

335. To enable the defendant to discover whether there was in any case a double or over-insurance, 19 Geo. 2, c. 37, s. 6, entitled him to call upon the plaintiff to declare in writing within fifteen days what sum he had insured on the whole, and how much he had borrowed on bottomry and respondentia for the voyage in question, or any part of it. This provision was not often put into use, perhaps because in most cases the underwriter was able to obtain the information he required by the order for discovery of ship's papers (*l*); and it has not been re-enacted by the Marine Insurance Act, 1906, which has repealed the whole of 19 Geo. 2, c. 37.

(*i*) Phillips, vol. i. p. 209. 3rd ed.

(*j*) Arnould, 6th ed. vol. i. p. 120.

(*k*) Phillips (1 Ins. s. 311) seems to agree with Lord Mansfield's opinion.

(*l*) See as to this order, *post*, vol. ii. § 1271.

CHAPTER XIII.

VALUATION OF INSURABLE INTERESTS.

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336. THE next point to be considered is the mode of estimating the insurable value of the interest at risk, with a view to procuring indemnity for the assured in case of loss.

Theoretical principle of valuation for the purposes of insurance.

Insurance being a contract of indemnity, it should seem that the true principle upon which the interest protected by a policy of insurance ought to be valued, is that which in case of loss will give the assured, as nearly as possible, a complete indemnity against the consequences of such loss.

The object, therefore, of such valuation ought in theory to be to place the assured, in case of loss, in exactly the same situation as he would have been in if no loss had taken place.

Applied to insurance on ship and freight.

337. To apply this principle to the case of ship, goods, and freight.

The ship, in view of modern commerce, is regarded by the shipowner, generally speaking, not so much as an instrument for carrying on his own traffic, as in itself a source of emolument, either by being used as a general ship for the purpose of carrying goods for freight, or by being let out on hire at a stipulated sum under contracts of affreightment. Out of such freight or hire the shipowner has to pay the seamen's wages, to furnish provisions, to

Wear and tear of the ship,

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and other deductions from the freight.

defray the expenses of the voyage, and to make good that diminution in the value of the ship and her apparel which necessarily takes place more or less in the course of every voyage, and which is familiarly called the wear and tear of the ship. What remains of the freight, after deducting these charges and outgoings, is the net profit of the voyage which the shipowner makes by the employment of his capital fixed in the ship.

Now, on the principle of valuation just adverted to, it is plain that the ship, for the purposes of insurance, ought to be estimated at her value after deducting the wear and tear of the voyage, for that is what the ship would have been worth to her owner on arrival but for the loss against which the insurance is intended to indemnify him.

In the same way with regard to freight, the true mode of estimating its value for the purposes of insurance on the above principle would be to take it at that sum, and no more, which the shipowner might calculate on receiving on the safe arrival of the ship—*i.e.*, the net freight, deducting seamen's wages and the other expenses of earning it—because, in case the ship is lost, that is all the shipowner loses (*a*).

As applied to insurances on goods.

So again with regard to goods, in order to put the merchant in the same situation as though no loss on his goods had taken place—in other words, to procure him a complete indemnity—it is clear that the value of the goods should be estimated, for the purpose of insurance, at the price which they would actually have produced had they arrived undamaged at their port of destination.

338. Such, unquestionably, as was very ably and unanswerably pointed out by Benecke, is the only mode of

(*a*) This is Arnould's text; but it would be more accurate to say that on principle the amount recoverable for a loss of freight ought to be the gross freight, less the expenses which would have been incurred after the time of the loss to earn the freight, but which, by reason of the loss, have been saved. For instance, in the case of a steamship, the expenses already incurred for coaling at an intermediate port ought not to be deducted. But as regards expenditures on stores, &c. included in the value of the ship, see *infra*, § 338, note (*c*).

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estimating the value of the interest at risk by which complete and absolute indemnity can in all cases be procured for the assured (*b*). Yet this, be the reason what it may, is not the principle of valuation which has been generally adopted in the practice of this or any other country. Parties engaged in the business of marine insurance are deemed to have contracted for an indemnity of a more limited description; and the object sought to be attained by the ordinary open policies on ships and goods, both in this and other countries, is to put the assured not in such a position as he would have been in if no loss had been incurred, but in the same situation he was in at the commencement of the risk.

Practical principle of valuations not to put the assured in the same situation as if no loss had occurred, but to replace him in the same situation as he was in at the outset of the adventure.

It is upon this basis that the insurable value of the interest at risk is invariably calculated in all open policies effected in this country. The worth of the thing insured to its owner at the outset of the risk covered, with the expenses of the insurance, is in all open policies its estimated value for the purposes of insurance.

The assured on ship and freight generally receives more, and the assured on goods less, than an indemnity.

As the ship in the course of every voyage is more or less diminished in value by wear and tear before the loss takes place; and as the goods would in most instances, but for the loss, have realized a higher sum at their port of destination than at their port of loading; it is very obvious that by this mode of insurance the assured on ship and on freight, in case of loss, will in all probability receive more than an indemnity, and the assured on goods less (*c*).

(*b*) Principles of Indemnity, cc. i. ii. pp. 1—70, to which the reader is referred for a full exposition of the application of this principle to practice. See also McArthur, 2nd ed. p. 68 n. (*h*), where the advantages of valuing the various interests at the beginning and at the end of the voyage respectively are contrasted.

(*c*) McArthur (p. 68) points out an additional reason to account for the fact that the shipowner benefits by a loss, the fact being, as he states, that an owner who insures his ship and freight to the full extent which the law allows (as to which see § 365, *post*) is in reality effecting a double insurance on certain of the component parts of his insurable interest. "The expenditure in outfit, stores, provisions, and advances on account of crew's wages, which the law includes in the value of the ship, is also included in the gross freight, so that it is doubly insured." In principle, such expenditure should either be excluded in estimating the value of the ship, or it should be deducted from the gross amount of the freight.

(*d*) For the reason, see *ante*, § 9.

(*e*) *I.e.*, sect. 4, which avoids policies made by way of gaming and wagering, and sect. 18, which provides that the assured must disclose all material circumstances. See *infra*, § 342.

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Policies for the purposes of this chapter may be divided into two classes, valued and open or unvalued, as policies of the latter class are called in the Marine Insurance Act, 1906 (*d*).

Difference between valued and open or unvalued policies.

The difference between these two classes of policies, as regards their form and effect, is indicated in sects. 27 and 28 of the Marine Insurance Act, 1906, the terms of which are the following:—

Mar. Ins. Act, 1906, s. 27.

Section 27.—(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act (*e*), and in the absence of fraud, the value fixed by the policy is, as between the insurer and the assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

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Section 28. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner herein-before specified.

We shall discuss these policies in their order, but first it is advisable to set out certain other provisions of the Marine Insurance Act, 1906, which are material to the discussion. They are contained in sects. 67 and 68 of the Act.

By sect. 67—

Measure of indemnity

(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable

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value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity (*f*).

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

Indemnity for total loss.

By sect. 68—

Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,—

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

Valued policies.

339. The statutory form, and usually every other form, of policy in this country contains the following clause:—

"The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at ——" (*g*).

The difference between an open and valued policy in form is solely this: that in a valued policy this blank is filled up with the sum at which the parties agree to fix the amount of the insurable interest; in an open policy it is left in blank.

Effect of valuation.

The difference in effect between a valued and an open policy is that under an open policy, in case of loss, the assured must prove the actual value of the subject of insur-

(*f*) "Measure of indemnity" is a new conventional expression introduced by this section.

(*g*) In a policy on freight the two words "as under" were added to this clause, and lower down in the margin was written "1,300*l*. on freight"—held, that this was not a valued policy: Wilson *v.* Nelson (1864), 5 B. & S. 354; 33 L. J. Q. B. 220; and see also Asfar *v.* Blundell, [1895] 2 Q. B. 196.

ance; under a valued policy he need not do so, the valuation in the policy being conclusive between the parties (*h*). Sect. 339.

Thus, in Barker *v.* Janson (*i*), a vessel that had been worth 8,000*l*. was so much injured at sea that she was not worth repairing; this, however, being unknown at home, she was insured while in that condition by a time policy for 6,000*l*., valued at 8,000*l*., and after it attached she was totally destroyed by perils insured against. In this case the valuation was held binding and the policy valid. And in a later case (*k*), the vessel was driven on shore and was so badly damaged as to amount to a constructive total loss. Whilst in that condition she was completely destroyed by fire. It was held, first that her owners could recover as for a loss by fire, and secondly that, the policy being a valued policy, they could recover the full amount at which she was valued.

The rule that the valuation is conclusive between the parties applies equally in favour of the underwriter. For instance, in North of England Insurance Association *v.* Armstrong (*l*), a policy had been effected on the "Hetton" for 6,000*l*., the vessel being valued at 6,000*l*. The "Hetton" was sunk by the "Uhlenhorst," whereupon the plaintiffs, who were the underwriters on the "Hetton," paid the defendants, the owners of the "Hetton," the sum of 6,000*l*. for this loss. The defendants then, under instructions from the plaintiffs, took proceedings in the Court of Admiralty, and recovered 5,000*l*. from the owners of the "Uhlenhorst," this sum being apparently the limit of the liability of the latter. The whole of this sum was claimed by the plaintiffs as salvage. The defendants contended that the real value

(*h*) Mar. Ins. Act, 1906, ss. 27, 28, *supra*. § 338; Barker *v.* Janson (1868), L. R. 3 C. P. 303; North of England Ins. Assoc. *v.* Armstrong (1870), L. R. 5 Q. B. 244; Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529; Lewis *v.* Rucker (1761), 2 Burr. 1167; Shawe *v.* Felton (1801), 2 East, 109.

(*i*) L. R. 3 C. P. 303.

(*k*) Woodside *v.* Globe Marine Ins. Co., [1896] 1 Q. B. 105.

(*l*) (1870), L. R. 5 Q. B. 244.

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of the "Hetton" at the time of her loss was 9,000*l.*, and therefore they were entitled to participate in the said sum of 5,000*l.*; and it was urged on their behalf that, if the plaintiffs' contention were correct, it would follow, had the owners of the "Uhlenhorst" been compelled to pay the full value of 9,000*l.*, that the underwriters would have been entitled to the whole, though they had only paid 6,000*l.* The Court regarded this anomaly (*m*) as one arising necessarily out of the peculiar nature of valued policies, and held that the underwriters were entitled to the whole sum (*n*).

The same principle was also applied in the underwriter's favour, in a later case where a vessel was undervalued in a policy and became liable to contribute to general average and salvage expenses. The SS. "Balmoral" was valued in the policy at 33,000*l.*, but her real value for the purpose of contribution was ascertained to be 40,000*l.*, and on this latter figure contribution was accordingly paid by her owners. It was held by the House of Lords, in an action by the owners against the underwriters to recover the whole amount of such contribution, that the valuation in the policy was binding and that the owners were only entitled to recover $\frac{33}{40}$ths of the ship's contribution (*o*).

Valuation applies in cases of partial, as well as total, loss.

340. As is expressly stated in sect. 27 (3) of the Marine Insurance Act, 1906 (*p*), the rule whereby the valuation in the contract is conclusive between the parties is the same, whether

(*m*) This point is further discussed in the chapter on "Subrogation," *post*, Vol. II. § 1230.

(*n*) The correctness of this decision was doubted by Lord Blackburn in Burnand *v.* Rodocanachi (1882), 7 App. Cas. 333, at p. 342; and it is perhaps not consistent with the reasoning of Lord Selborne at p. 335. The decision that the valuation is conclusive as between the parties is, however, confirmed by the language of sects. 67 and 68 of the Mar. Ins. Act, 1906, *ante*, § 338, and it was followed in Thames & Mersey Mar. Ins. Co. *v.* British & Chilian S.S. Co., [1915] 2 K. B. 214; [1916] 1 K. B. 30 (C. A.); *post*, § 1230. See also Bruce *v.* Jones, *infra*, § 351; The St. Johns (1900), 101 Fed. R. 469.

(*o*) The S.S. Balmoral Co. *v.* Marten, [1902] A. C. 511. See *post*, Vol. II. § 1006.

(*p*) *Ante*, § 338.

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the loss be total or only partial (*q*). There was an opinion at one time entertained by writers of eminence that though conclusive in cases of total loss, yet it was not so in cases of average loss, but that in such cases the policy was to be opened. By this was meant that the agreed valuation was to be set aside as the standard and the basis of the underwriter's liability and the actual amount of interest at risk proved, just as in the case of an open policy.

Erroneous doctrine as to "opening the policy."

For instance, supposing a particular average loss to take place on a valued policy on goods, *insured to the full amount of their valuation*, and the damage ascertained to amount to one-fourth; according to the doctrine in question, it would be necessary for the assured, instead of at once calling upon the underwriters for a fourth part of the amount insured, to prove the insurable value of the goods, *i.e.*, their prime cost, together with the premiums of insurance, &c., just as though the policy were an open one, and the underwriters would, in case the agreed valuation proved to be greater than such insurable value, only be liable to pay a fourth of the latter.

This doctrine, wholly repugnant to the true construction of the valuation clause (*r*), appears to have arisen out of a *dictum* of Lord Mansfield, in the case of Erasmus *v.* Banks, where that great Judge is reported to have said, "an average loss opens the policy" (*s*). The phrase is unhappy, and suggestive of error, in consequence of the meaning attached to the words "open the policy." It is quite clear, however, that the meaning of the expression is simply that in case of an average loss the parties must necessarily go out of the policy to ascertain the extent of the damage done to the goods.

True meaning of opening the policy.

Of course, in the case of the goods being partially damaged, the policy alone can never show what the underwriter ought to pay; for the amount due from him is the

(*q*) See Mar. Ins. Act, 1906, ss. 70, 71, *post*, Vol. II. Pt. III. Chap. V., for its application to partial losses of freight and goods.

(*r*) Irving *v.* Manning (1848), 1 H. L. Cas. 287; 6 C. B. 391; 1 C. B. 168; 2 C. B. 784. Phillips (vol. ii. s. 1203) discusses the point.

(*s*) Cited in Shawe *v.* Felton (1801), 2 East, 113.

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same percentage on the sum he has agreed to insure, as the damage which the goods have suffered is upon their value: in other words, the proportion of the whole sum insured which the underwriter has to pay in case of loss, must depend upon the proportion in which the goods are damaged: as the one sum cannot be ascertained without fixing the other, and as the damage the goods have sustained can never be made out except by calculations wholly extrinsic to the policy, every policy, whether open or valued, must in this sense be opened in every case of average loss (*t*).

Opening the policy, then, in this sense, means nothing more than resorting to extrinsic evidence, in order to ascertain the amount of damage sustained by the subject insured, so as to fix one element in calculating the amount of indemnification to which the assured is entitled; it is, in fact, merely ascertaining the percentage of damage sustained by the thing insured.

It has in fact long been established that a valuation has precisely the same effect in cases of particular average as it has in cases of total loss, viz., to relieve the assured from proving the prime cost, or insurable value (*u*).

There is moreover another sense in which the use of the phrase "opening the policy" has been used by a learned American judge. In cases of particular average on ship, the usual measure of the underwriter's liability is the repair bill, assuming always that its amount does not exceed the amount of the insurance (*x*). In particular average on goods, the amount of such liability is ascertained, in effect, by taking the proportion of loss to the sound value and then taking the same proportion of the amount for which the goods are insured (*y*). Judge Addison Brown points out that the

(*t*) See Mar. Ins. Act, 1906, s. 71 (3).

(*u*) See Lord Mansfield's observations in Lewis *v.* Rucker (1761), 2 Burr. 1167. See, too, Forbes *v.* Aspinall (1811), 13 East, 326; Usher *v.* Noble (1810), 12 East, 639; Tunno *v.* Edwards (1810), 12 East, 488; Goldsmid *v.* Gillies (1813), 4 Taunt. 804.

(*x*) Mar. Ins. Act, 1906, s. 69 (1).

(*y*) Mar. Ins. Act, 1906, s. 71 (3).

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result of these rules of adjustment is that "the policy value has no bearing upon the settlement of the amount to be paid by each underwriter, but only upon the amount of insurance that may be lawfully taken out; since each policy, up to the valuation, will pay the same amount, whether the valuation is high or low. Over-valuation in the policy, indeed, authorizes over-insurance to the same extent, if not fraudulent; because the insurer is estopped from asserting any excess in the valuation. The owner, if insured above the actual value of his goods, will thereby realize from the insurer more than his actual loss. But the mode of settlement on each policy is precisely the same as upon an open policy; that is, to pay the same proportion of the insurance that the loss bears to the sound value; and if any one policy does not insure more than the actual value, which rarely happens, it will pay the same amount that it would pay if the policy were open. Hence the maxim as to goods, that 'a partial loss opens the policy,' which to the above extent is correct" (*z*).

The value in the policy is always conclusive.

341. In cases of total loss, the value in the policy has always been held as the conclusive standard of indemnity (*a*). Nor is it any exception to this rule, save in appearance, that where a ship, insured in a valued policy, was sold under an Admiralty decree in a collision suit for less than the amount in the policy, the assured did not recover more than she sold for, on this obviously just ground, that the contract in the

(*z*) Per Brown, D. J., in Internat. Nav. Co. *v.* Atlantic Mut. Ins. Co. (1900), 100 F. 304. The following note at the end of his judgment explains how the valuation is a factor which is eliminated in the course of the calculation:—"If v represents the policy value of goods, s the sound value at port of discharge, d the difference or loss as ascertained by sale, and p the amount insured by any particular policy, then each underwriter by the above rule must pay $\frac{d}{s} \times v \times \frac{p}{v} = \frac{dp}{s}$. This shows that the amount payable on any valued policy is independent of v, the policy value."

(*a*) Shawe *v.* Felton (1801), 2 East, 109; Irving *v.* Manning (1847), 1 H. L. Cas. 287; 6 C. B. 391; *S. C.*, 1 C. B. 168; 2 C. B. 784. See Mar. Ins. Act, 1906, s. 68 (1), *ante*, § 338.

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It is also established, that the valuation is binding generally, and not merely in cases where the question is as to the amount of payment to be made by underwriters in case of a loss. Thus where a vessel was valued at 3,750*l*., and the policy provided that the assured should keep one-fifth uninsured, it was held that there was a breach of this stipulation as soon as there was an insurance for an amount exceeding four-fifths of 3,750*l*., although the shipowner was prepared to prove that the vessel was really worth 5,000*l*. (*c*).

There is, by English law, no exception to the rule under discussion. As long as the contract of insurance remains unimpeached, the valuation in the policy can under no circumstances be opened; or, to use the words of Cockburn, C. J. (*d*), "Where the value is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped" from disputing the value stated.

Certain foreign codes differ from our law on this point. Thus in Germany (*e*) an excessive valuation may be reduced at the instance of the underwriter; and by the Dutch (*f*), Belgian (*g*), Italian (*h*), and Spanish (*i*) commercial codes, amongst others, an over-valuation may under certain circumstances be rectified.

Effect of over-valuation in certain cases.

342. In our own country language has undoubtedly been

(*b*) Thompson *v.* Reynolds (1857), 26 L. J. Q. B. 93; 7 E. & B. 172.

(*c*) Muirhead *v.* Forth and North Sea, &c. Assoc., [1894] A. C. 72; and see other cases there referred to.

(*d*) In North of England Ins. Assoc. *v.* Armstrong (1870), L. R. 5 Q. B. at p. 248.

(*e*) Commercial Code, s. 797.

(*f*) S. 274.

(*g*) S. 212.

(*h*) S. 612.

(*i*) S. 752.

used not only by text writers (*k*), but also by judges (*l*) of eminence, implying that an agreed valuation may in certain cases be set aside, and another apparently substituted; and the language of sect. 27 (3) of the Marine Insurance Act, 1906, also suggests that this may be so (*m*). It is clear, however, that by the law of this country no attack can be successfully made upon the valuation which will not also avoid the policy *in toto* (*n*). In such cases the object of attack is in reality not the valuation, but the policy itself, on the ground of irregularities relating to the valuation. It appears that there are three cases in which irregularities in the valuation may have the effect of avoiding the policy: (1) Where the subject of insurance has been fraudulently over-valued, with the object of cheating the underwriter (*o*): (2) Where circumstances show that the object was not to effect a *bonâ fide* insurance, but to gamble; (3) Where, apart from fraud in the assured, there is such an over-valuation of the interest of the assured in the adventure as alters the nature of the risk, making it, for example, one of a speculative, and not of an ordinary business nature, and it is found that this

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The valuation will not be set aside, but the policy itself may be avoided.

(*k*) *E.g.*, Arnould, 2nd ed. pp. 361, 362; and in America, Phillips, ss. 1182, 1183; but see *contra*, 1 Parsons on Mar. Ins. p. 261.

(*l*) *E.g.*, Lord Ellenborough, as reported by Stevens on Average, 183. 5th ed.: "The valuation can only be opened where it is very exorbitant, or some proof of fraud can be established"; and again in Marshall *v.* Parker (1809), 2 Camp. 69: "Without evidence of fraud, I cannot disturb the valuation." So, too, per Bovill, C. J., in Barker *v.* Janson (1868), L. R. 3 C. P. 303: "An exorbitant valuation may be evidence of fraud; but when the transaction is *bonâ fide*, the valuation agreed upon is binding." So, also, per Willes, J., in Lidgett *v.* Secretan (1871), L. R. 6 C. P. 616, 629. "In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of the loss"; and per Lord Robson in Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. at p. 548.

(*m*) See sect. 27 (3), *ante*, § 338. The sub-section admits, however, of the construction that except in certain cases, for which see § 342, *infra*, the parties are precluded from giving evidence that the insured value is not the true one.

(*n*) See also the American authorities, cited 1 Parsons, 261, 262.

(*o*) "Had this over-valuation been tainted by fraud, the contract of insurance could not have been enforced": per Lord Shaw in Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. at p. 542.

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was a material fact which ought to have been, but was not, disclosed to the insurer.

Fraudulent over-valuation.

Thus in Haigh *v.* De la Cour (*p*) a fraudulent over-valuation of goods, made with intent to cheat the underwriters, was held to vitiate the policy. The actual value on board was only 1,400*l.*; the valuation in the policy was 5,000*l.*; the invoices were proved to be fictitious and the bills of lading to have been interpolated, after they were signed, by the captain; the ship was run away with, and carried to the West Indies (having been insured for Pernambuco), and the goods there disposed of by a person whom the assured had put on board as a supercargo. A very high valuation is, however, not necessarily fraudulent (*q*).

Over-valuation by way of gaming.

Similarly, an over-valuation made in order to cover a gambling transaction will avoid the whole contract. This matter has already been dealt with in the chapter on wager policies (*r*). Here it will be sufficient to quote Lord Mansfield, who, after agreeing that upon valued policies "the merchant need only prove some interest to take it out of the stat. 19 Geo. 2, because the adverse party has admitted the value," adds: "If indeed it should come out in proof that a man had insured 2,000*l.*, and had interest on board to the value of a cable only, there never has been, and, I believe, never will be, a determination that by such an evasion the Act of Parliament may be defeated" (*s*). It is to be observed that in cases of this nature the policy will be just as much avoided even if both parties to the contract were throughout fully cognizant of all the facts. The ground of avoidance is not any unfair conduct of the one party towards the other, but the policy of the enactments directed against wagering or gaming transactions.

Over-valuation not disclosed, and such as to alter the nature of the risk.

Thirdly, an over-valuation may under certain circumstances entitle the underwriter to avail himself of the doctrine of concealment (*t*), so as to avoid the policy. A good example of this is afforded by the case of Ionides *v.* Pender (*u*), where goods had been valued at an amount greatly exceeding any sum which they could possibly have realized. There were suspicious circumstances in the case, but the jury were unable to agree as to whether the assured's intentions were fraudulent. Evidence, however, from Lloyd's was produced to the effect that it was material for underwriters to know the extent of an over-valuation so excessive, as such speculative risks were either declined altogether, or only undertaken at high premiums. The jury found that the over-valuation was a material fact which had not been disclosed to the underwriters, and the Court of Queen's Bench affirmed a verdict which had been entered accordingly for the defendants (*x*).

It is obvious that in all these cases the question is not one of opening the valuation, but as to the validity of the policy.

Excessive valuation of ship.

343. No positive rules can be laid down as to what constitutes such an excess in valuation as will necessitate disclosure, or taint the transaction with fraud. A valuation which considerably exceeds the selling value of a ship is not necessarily fraudulent or so excessive as to need to be disclosed. In the case of the "Gunford" (*y*), though the selling value of the ship was about 9,000*l.* and the valuation in the policies 18,500*l.*, the appellants did not allege fraud, or rely on the non-disclosure of the difference between the valuation and the selling value. It is impossible to say what view the House of Lords would, if the question had been raised, have taken of this exceedingly high valuation. But Lord Shaw, who referred to the valuation, said: "Where there is heavy over-valuation fraud is, *a priori*, not very far to seek. But fraud

(*p*) (1812), 3 Camp. 319.
(*q*) See *infra*, § 343.
(*r*) See *ante*, § 319.
(*s*) Lewis *v.* Rucker (1761), 2 Burr. 1171.

(*t*) See Part II., Chap. II., "Concealment."
(*u*) (1874), L. R. 9 Q. B. 531.
(*x*) See also Herring *v.* Janson (1895), 1 Com. Cas. 177, where Mathew, J., quoted from a valuable memorandum of Willes, J., on this subject; and *infra*, § 589.
(*y*) Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529, *supra*, § 342.

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is not here pleaded: and upon the general question it ought to be remembered that to the insurer (*sic*) using a ship as part of the going concern of a business a statement of value going much beyond the amount to be realized if the concern was stopped and the asset put upon the market is intelligible and legitimate." And Lord Robson also expressed the view that there may be legitimate business reasons for a discrepancy between the selling value and the insured value (*z*). Moreover it must be remembered that underwriters are usually in a position to form a fairly accurate estimate of the real value of the ship, and that there are often reasons why they prefer a high valuation so long as they do not consider it a temptation to the assured (*a*).

Excessive valuation of goods.

In Ionides *v.* Pender it was stated, in evidence by underwriters (*b*), that an addition of 25 or even 30 per cent. to the invoice value of the goods would not, but that any addition beyond this would, make the risk speculative. Yet each case must depend on its own circumstances, and in each case the question must be determined as one of fact. As Mr. Gow (*c*) pertinently observes: "Cases have occurred in the history of commerce in which the insurance of four times the amount of invoice would be quite justifiable; for instance, that of shipments of silver to Japan, made for the purpose of obtaining in exchange gold at the Japanese ratio of 4 to 1, when the prevailing ratio in the rest of the world was about $15\frac{1}{2}$ to 1. Similarly, in such insurances as those of contraband cargoes, or cargoes destined to run a blockade, one can imagine a very high valuation put on goods whose value would be enormously enhanced by their mere arrival at their intended destination."

(*z*) [1911] A. C. pp. 542, 548. See also per Willes, J., in Lidgett *v.* Secretan (1870), L. R. 6 C. P. p. 627.

(*a*) The higher the valuation, the greater is the immunity of the insurer from small claims, under the warranty against average under 3 per cent. (see *post*, Vol. II. §§ 882, 892, 900); and the greater, also, is the difficulty of establishing a constructive total loss by reason of the cost of repairs exceeding the repaired value, if the policy contains the usual clause stipulating that the insured value shall be taken as the repaired value (see *post*, Vol. II. §§ 1091, 1132, 1133.

(*b*) L. R. 9 Q. B. at p. 535. (*c*) Marine Insurance, p. 69.

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Valuation of goods may include expected profits.

Apart from special circumstances, however, Lord Ellenborough suggested that in fixing the valuation, "the assured, if he wish to keep fairly within the principle of insurances, which is merely to obtain indemnity, will, in the case of goods, never go beyond the first cost, adding thereto only the premium and commission, and, if he see fit, the probable profit; and, in the case of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commissions thereupon" (*d*).

With regard to the case of goods, his Lordship, after adverting to the rule that, in open policies on goods, nothing more can be recovered than the invoice price plus the premiums, &c., and remarking that, as goods are generally sent to a profitable market, this rule, in case of loss, operates favourably for the underwriter, adds, "the assured may obviate this inconvenience by making the policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery" (*e*): thus distinctly admitting that the assured may value his goods in the policy so as greatly to exceed the invoice price, and to cover the expected profit. And, indeed, as Stevens remarks, this is the real advantage that valued policies on goods hold out to the merchant (*f*).

Mode proposed by Benecke.

344. Benecke, agreeably to the principles already pointed out in the last section, shows how, by means of a valued policy, the merchant may cover, not only the profits he expects to make on his goods at the port of delivery, but also, in case of their arriving there in bulk, but sea-damaged, may protect himself against the loss to which he would otherwise be exposed, from having to pay full duty, freight, and landing charges (*g*). Thus, supposing the sum required to be insured

(*d*) Forbes *v.* Aspinall (1811), 13 East, 327.

(*e*) Usher *v.* Noble (1810), 12 East, 639.

(*f*) Stevens on Average, 179.

(*g*) Sometimes the owner of goods protects himself against the loss due to his having to pay the full freight by a policy against particular average on "contingency freight." See *ante*, § 232.

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on the goods themselves (*i.e.*, so as to cover their prime cost, premiums of insurance and commission) to be 2,000*l.*; freight payable on their arrival, 200*l.*; expected profit, 400*l.*; duty and landing charges at the port of delivery, 100*l.*, the full duty and freight being payable on damaged goods arriving in bulk); then 2,700*l.* would be the sum required to be insured altogether. The plan recommended by Benecke is, to value at 2,700*l.*, and add this clause:—"Of these 2,700*l.*, 2,000*l.* are on the goods, 200*l.* on freight, 400*l.* on expected profit, 100*l.* on duty and landing charges" (*h*).

This clause, though unobjectionable, appears unnecessary in English policies, where, according to the liberal practice that prevails in the business of insurance, it seems very unlikely that any attempt would be made to set aside a valuation which was *bonâ fide* only intended to procure for the assured a complete indemnity in case of loss.

The valuation in the policy does not preclude the inquiry, whether or not the whole of the interest to which such valuation refers, has, in fact, been at risk.

345. The value fixed by the policy is conclusive of the insurable value "of the subject intended to be insured" (*i*). It does not preclude the inquiry whether in fact the assured had an insurable interest in the whole of the subject of valuation, or whether the whole interest valued was ever at risk.

Moreover, sect. 75 (2) of the Marine Insurance Act, 1906, expressly declares that—

> Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

(*h*) Benecke, Pr. of Indem. pp. 24, 29. In Thames and Mersey Co. *v.* Pitts, [1893] 1 Q. B. 476, the merchant valued his cargo at a certain figure, and declared that a certain portion of such valuation was "for advance on freight." It was held that the policy was to be treated as one policy on valued goods, and not as a policy by which goods and advanced freight were separately insured.

(*i*) Mar. Ins. Act, s. 27 (3), *ante*, § 338.

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For instance, if something has formed a constituent in the estimate of value in which the assured had no insurable interest (*e.g.*, if freight, paid in advance, were included in the valuation expressed in a policy on freight effected for the shipowner), it is clear that the underwriter, to the extent of this element of the value, would not be liable; and whether it was so or not may be investigated without infringing the valuation in the policy (*k*). Still more is it competent to the underwriter to show that the assured had no interest at all (*l*). The parties are only bound by the valuation as far as it goes; and if only part of the interest to which the valuation in the policy refers has ever been at risk on board, the assured, in case of loss, can only recover upon a proportionate amount of the valuation. For instance, if goods, the prime cost of which, including premiums and commissions, is 4,500*l.*, are valued in the policy at 5,000*l.*, and it should turn out that of these goods only two-thirds, or 3,000*l.* worth, were ever really shipped on board, the assured, in case of loss, would only recover the same proportion of 5,000*l.*, the sum valued, that 3,000*l.* is of 4,500*l.*, *i.e.*, two-thirds, or 3,333*l.* 6*s.* 8*d.* (*m*).

"The valuation," says Lord Ellenborough, "in case of goods, looks to all the goods intended to be loaded; and, in case of freight, it looks to the freight upon all the goods the ship is intended to carry on the voyage insured: and if, by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part; and so if, by the perils insured against, the freight of part only of the goods to be carried be lost, the assured can only recover, in respect of that loss, according to

(*k*) Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757; The Main, [1894] P. 320.

(*l*) Shawe *v.* Felton (1801), 2 East, 109; Burnand *v.* Rodocanachi (1882), 7 A. C. 333, per Lord Selborne.

(*m*) Phillips, s. 1196.

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the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation" (*n*).

Rule illustrated by case of a policy on freight; Forbes *v.* Aspinall.

346. Accordingly, in the case from which these remarks are taken, insurance having been made on freight "at and from Hayti to Liverpool," valued at 6,500*l.*, and it appearing that the vessel was lost off the coast of Hayti, when the freight of only fifty-five bales of cotton was at risk, which formed but a small part of the cargo intended to be shipped on board her, and on which the freight was valued, the Court would not allow the assured to recover the whole amount of the valuation, but only such a proportion of it as the fifty-five bales bore to the full cargo intended to be loaded, and on which the freight was estimated (*o*).

By policy on goods; Rickman *v.* Carstairs.

Again, in the case of a policy on homeward cargo, it appeared that at the time of the loss, which was total, a considerable proportion of the homeward cargo was not on board, and that which was shipped was not equal to the value in the policy. At the same time enough of the outward cargo still remained on board to make up the amount named in the valuation. As this, however, was not covered by the policy, the Court, adopting the principle that the underwriter is only bound by the valuation when the whole of the intended cargo is on board, held that the assured was entitled to recover, not the whole amount of the insurance, but only such proportion of it as the value of the homeward cargo, the freight of which was at risk at the time of the loss, bore to a full homeward cargo (*p*).

Tobin *v.* Harford.

Under a time policy on ship valued at 2,000*l.*, and on cargo valued at 8,000*l.*, containing all the clauses proper to the barter trade on the coast of Africa, outward cargo to be considered homeward interest twenty-four hours after arrival at first port or place of trade, the ship reached Kinsembo with a cargo on board worth 6,226*l.*, of which part was there dis-

(*n*) In Forbes *v.* Aspinall (1811), 13 East, 327. See the judgment of Blackburn, J., in Tobin *v.* Harford (1864), 34 L. J. C. P. 40.

(*o*) Forbes *v.* Aspinall, at p. 323.

(*p*) Rickman *v.* Carstairs (1833), 5 B. & Ad. 651.

charged to the value of 3,952*l.*, and then without loading other cargo, after being more than twenty-four hours at Kinsembo, sailed for Congo with the residue, and was lost on the way. The assured claimed 8,000*l.* in respect of the "cargo," interpreting that word in the policy as signifying any goods on board at the time of the loss. The Court, however, held that the valuation in the policy was of a substantially full cargo, and that the plaintiff could only recover, as for an average loss, an aliquot part of that sum, corresponding to the proportion which the goods on board bore to a full cargo, and that if this proportion could not be found, the underwriters would be liable as upon an open policy underwritten for 8,000*l.* (*q*). Sect. 346.

Denoon *v.* Home and Colonial Ass. Co.

Similarly under a policy "upon chartered freight, valued at 7,000*l.*, at and from Sydney to Calcutta and London," the remainder of the voyage was abandoned at Calcutta on account of the bankruptcy of the charterers, and the vessel took 360 coolies and part cargo of rice for Mauritius. Thereupon the voyage described in the policy was altered by indorsement, and it was further indorsed as follows:—"The within interest is now declared to be on freight valued at 2,000*l.*" The subscription of 1,000*l.* by the defendants remained unaltered. When near Mauritius the vessel was wrecked; there was a total loss of the rice and of the freight of it; the greater part of the coolies were saved, and their passage-money was paid, but some were lost, and with them their passage-money. The question was what under this policy in these circumstances the assured was entitled to recover.

The Court, after holding that the word "freight" did not, as was contended by the defendants, include the passage-money, held further that inasmuch as there was not a full cargo on board or any estimation in the policy of what the freight of a full cargo would have been, the policy must be dealt with as an open policy, and, consequently, that the assured was entitled to recover in the proportion of 1,000*l.*

(*q*) Tobin *v.* Harford (1864), 32 L. J. C. P. 134; in error, 34 L. J. C. P. 37; 13 C. B. N. S. 791; 17 C. B. N. S. 528.

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to 2,000*l.*, or one-half of the whole freight on board, not exceeding 1,000*l.*, that is, one-half of 1,412*l.*, being in fact 706*l.* (*r*).

In the United States.

These principles have received abundant illustration in the Courts of the United States. Thus, where seventy-four mules were insured, valued at 11,000 dollars, and only thirty-five mules were actually shipped, the assured, in case of loss, was only allowed to recover thirty-five 74th parts of 11,000 dollars (*s*).

Practical difficulties in applying this rule.

347. As to the rule thus well established, there is yet in many cases a difficulty about its practical application, arising out of the question, "what is a cargo, sufficient to entitle the jury to say, that that has been shipped to which the valuation in the policy refers?" (*t*).

In case of average loss.

A difficulty was also at one time felt as to the principle upon which the amount of loss should be adjusted, but the following satisfactory solution of it, suggested in the argument in Rickman *v.* Carstairs, has since been accepted and sanctioned with the approval of the Court of Common Pleas and of the Exchequer Chamber (*u*). The passage is this:—"Even supposing the policy to be opened, the valuation will not be altogether inoperative; for it will prevent any dispute as to the value of the whole contemplated cargo. Thus, if a valued policy on sugar be opened, on the ground of only four-fifths of the intended cargo having been shipped and lost, the underwriter will pay, not a value to be now put on the lost sugar, but four-fifths of the sum underwritten" (*x*).

Where, however, it is impossible to ascertain the proportion which the cargo actually shipped bears to that intended to be

(*r*) Denoon *v.* Home and Colonial Ass. Co. (1872), L. R. 7 C. P. 341. See further, as to this case, *ante*, § 252b.

(*s*) Brook *v.* Louisiana Ins. Co. (1826), 4 Martin, N. S. 640, 681; 2 Phillips, s. 1196; and other cases there cited.

(*t*) Per Parke, J., in 5 B. & Ad. 660; and see the judgment, per Blackburn, J., in Tobin *v.* Harford (1864), 34 L. J. C. P. 37.

(*u*) Tobin *v.* Harford (1864), 32 L. J. C. P. 134, 136; 13 C. B. N. S. 791; in error, 34 L. J. C. P. 37.

(*x*) 5 B. & Ad. 662.

shipped, it does seem to follow from the cases already cited that the valuation will be inoperative. Sect. 347.

Valuation of ship is immaterial in questions of constructive total loss.

348. As we have seen (*y*), sect. 27 (4) of the Marine Insurance Act, 1906, declares that "unless the policy otherwise provides (*z*), the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss." The question, in order to ascertain whether a wrecked or stranded ship is so damaged as to entitle the assured to recover as for a total loss, upon giving due notice of abandonment, is not, will the cost of repairs exceed the value in the policy? but, will the cost of repairs exceed the ship's value when repaired? (*a*). "When this test has been applied, and the nature of the loss thus determined, the quantum of compensation is then to be fixed. In an open policy the compensation must then be ascertained by evidence. In a valued policy the agreed total value is conclusive: each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss" (*b*).

Effect of the valuation where there is a double insurance.

349. As we have already seen, sect. 32 (2) of the Marine Insurance Act, 1906, in which the results of double insurance are set out, provides that:—

> (a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit (*c*), provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(*y*) *Ante*, § 338.

(*z*) The "Institute" Clauses provide that "in ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value."

(*a*) See *post*, § 1124.

(*b*) Opinion of the Judges in the House of Lords in Irving *v.* Manning (1847), 6 C. B. 422, supporting the previous decisions of Cambridge *v.* Anderton (1824), 2 B. & Cr. 691; Allen *v.* Sugrue (1828), 8 B. & Cr. 561; Young *v.* Turing (1841), 2 M. & G. 593; Manning *v.* Irving (1850), 1 C. B. 168. See Mar. Ins. Act, 1906, ss. 67, 68, *ante*, § 338.

(*c*) Newby *v.* Reed (1763), 1 W. Bl. 416.

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(b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured.

Where the valuation is the same in both policies, there is little difficulty. The assured cannot recover in the whole more than the valuation, although the subject insured be proved to be really worth more (*d*). For instance, if he have insured his vessel in one policy for 3,000*l*., and in another for 4,000*l*., and the valuation in each be 6,000*l*., he cannot recover in the aggregate more than 6,000*l*., even though he prove the vessel to be really worth 7,000*l*. or more (*e*). He may, however, proceed first on whichever of the two policies he pleases, and then recover on the other policy the deficiency up to the 6,000*l*., leaving the underwriters on the two to adjust between themselves all questions of contribution. In the instance we have given, it appears that he would have a good claim for a return of premium in respect of the 1,000*l*. insured in excess of what he is entitled to recover.

Effect of several insurances on the same subject-matter, where the policies contain different valuations.

350. As, however, the valuation is only conclusive between the parties to the same policy, difficulties arose in cases where the assured had protected his interest in the subject of insurance by two or more valued policies containing different valuations.

The first reported case of this kind is Bousfield *v.* Barnes (*f*). A vessel was valued in one policy at 8,000*l*., and insured for 6,000*l*.; in another policy she was valued at 6,000*l*. and insured for 600*l*. A total loss took place, and the underwriters on the first policy paid 6,000*l*., being the whole sum insured. The owners then brought an action on the second policy, and proved the real value of the vessel to have exceeded 8,000*l*. Lord Ellenborough, in answer to a

(*d*) Mar. Ins. Act, 1906, ss. 67, 68; *ante*, § 338.
(*e*) Irving *v.* Richardson (1831), 1 Mood. & R. 153; 2 B. & Ad. 193; Morgan *v.* Price (1850), 4 Exch. 615.
(*f*) (1815), 4 Camp. 228.

claim by the underwriters to treat the 6,000*l*. already received under the first policy as salvage, held that the real value being over 8,000*l*., the plaintiff had therefore an interest to which he might still apply the policy on which the action was brought (*g*). Sect. 350.

351. A similar point arose in Bruce *v.* Jones (*h*), the decision in which case virtually over-ruled that in Bousfield *v.* Barnes. A shipowner had effected four policies on the same ship: the first was for 725*l*. on a valuation of 3,000*l*.; the second was for 500*l*. on a valuation of 3,000*l*.; the third was for 3,450*l*. on a valuation of 5,000*l*.; and the fourth was for 2,400*l*. on a valuation of 3,200*l*. A total loss took place, and the assured received 3,126*l*. under the first three policies. He then sued on the fourth, and the question was how much was recoverable thereon. Willes, J., directed the jury that insurance was a contract of indemnity, and that for the purposes of the action 3,200*l*. must be taken to be the real value of the ship,—that the sum received on the other policies, whatever were the valuations therein, must therefore be deducted from such value, and that the plaintiff was only entitled to recover the difference. The jury having accordingly found a verdict for 74*l*., the plaintiff obtained a rule calling on the defendant to show cause why there should not be a new trial on the ground of misdirection as to the measure of damages. Amongst other contentions put forward on behalf of the plaintiffs, it was urged that the payments made under the other policies must be taken into consideration, if at all, not as payments of so much cash, but merely as payments in respect of proportionate parts of the total loss sustained; so that, for instance, a sum of 500*l*. which had been paid by the underwriters on the first policy, the valuation wherein was 3,000*l*., should be regarded not as a payment of 500*l*. cash, but as a payment of one- Bruce *v.* Jones.

(*g*) In America the case of Kenny *v.* Clarkson, 1 Johns. 385, is to the same effect. Other cases are cited in 1 Parsons, p. 264, where the point is discussed.
(*h*) (1863), 1 H. & C. 769; 32 L. J. Ex. 132.

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Anomalous result.

sixth of a total loss, leaving five-sixths to which the other insurances might be applied (*i*). It was further pointed out that the contention of the underwriters would lead to this surprising anomaly,—that the whole sum recoverable would be less or greater, according as recovery were had in the first instance under policies of the greater or lesser valuation.

The Court (*k*), admitting this anomaly, decided nevertheless that the underwriters were entitled to treat the whole sum received by the assured under the other three policies as salvage, and that the total sum recoverable was the difference between such sum and the agreed value, namely, 74*l.* (*l*).

352. A rule which makes the aggregate sum recoverable on all the policies depend on the order in which recovery thereon is had may be considered unsatisfactory (*m*), and it is clear that an assured might be placed in a very awkward position, if the underwriter on the policy containing the greater valuation were to admit a claim and the underwriter on the policy with the smaller valuation were to contest his liability. Nevertheless, the effect of sect. 32 (2), (a) and (b), of the Marine Insurance Act, 1906, seems to be that the rule laid down in Bruce *v.* Jones is definitely established.

Practice of average adjusters.

353. It is in accordance with the decision in Bruce *v.* Jones (*n*) that in all ordinary cases average adjusters in this country allow an assured to recover to the extent of the highest valuation, provided always that such amount be fully subscribed for in the aggregate. It is recognized, however, that the right of an assured to recover to this extent might be prejudiced, if he were to be so ill-advised or unfortunate as to have previously received payment upon a policy containing a higher valuation.

(*i*) See 1 H. & C. at p. 773.

(*k*) Pollock, C. B., Martin & Channell, BB.

(*l*) See also North of England Ins. Association *v.* Armstrong (1870), L. R. 5 Q. B. 244, *ante*, § 339.

(*m*) See per Cockburn, C. J., in North of England Ins. Association *v.* Armstrong, *supra*.

(*n*) (1863), 1 H. & C. 769; 32 L. J. Ex. 132.

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Adjustment of contribution between underwriters on policies differently valued.

354. The question how the total sum recovered by the assured should finally be apportioned as between the different underwriters, where there are several policies with different valuations, is not solved by the provisions of the Marine Insurance Act, 1906, which relate to the question of contribution (*o*). Nor is there any direct authority or established practice on this point. The difficulty may be well put by a simple illustration. Let us suppose that a ship is insured in two policies, A. and B. In policy A. she is valued at 8,000*l.*, and is insured for 6,000*l.*; in policy B. she is valued at 7,000*l.* and insured for 4,000*l.* A total loss takes place, and the assured, having recourse in the first instance to policy B., recovers under the two policies 8,000*l.* in all. How is the liability under the two policies adjusted as between the respective sets of underwriters? The editors are informed that the average adjuster will probably state the case in the following form (*p*):—

A. If 8,000*l.* pays 8,000*l.*, 6,000*l.* insured would pay	£6,000
B. If 7,000*l.* pays 7,000*l.*, 4,000*l.* insured would pay	4,000
Total	£10,000

But inasmuch as the total sum to be made up is not 10,000*l.* but only 8,000*l.* (*q*), the amount payable by each set of underwriters must be proportionately reduced, so that eventually

A. pays $\frac{6000}{10000}$ of 8,000*l.* =	£4,800
B. pays $\frac{4000}{10000}$ of 8,000*l.* =	3,200
	£8,000

(*o*) Sects. 32 (2) (d), 80, *ante*, § 330. See American Surety Co. *v.* Wrightson (1910), 16 Com. Cas. 37, 54.

(*p*) It is apparent that in cases of total loss this formula has very little utility. The result is based solely on a comparison of the amounts respectively subscribed, without any regard to the valuation in B. policy.

(*q*) There would also be a claim for return of premium on 2,000*l.* over-insured.

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And similarly, to take a case where the loss has been partial only, let us suppose that, upon the same policies, a loss takes place in respect of which the shipowner is entitled to be recouped to the extent of 4,000*l.* Then,

A. If 8,000*l.* pays 4,000*l.*, 6,000*l.* insured would pay	£3,000
B. If 7,000*l.* pays 4,000*l.*, 4,000*l.* insured would pay	2,286
Total	£5,286

Therefore, as before,

A. pays $\frac{3000}{5286}$ of 4,000*l.*, or	£2,270
B. pays $\frac{2286}{5286}$ of 4,000*l.*, or	1,730
	£4,000

In ordinary cases of partial loss, the method above indicated seems to be free from objection. In cases of total loss (*r*), however, as has been already observed, it involves the anomaly that an important part of the contract contained in B. policy, namely, the agreed valuation, is entirely ignored, and that the underwriters on that policy are made to contribute towards a sum in excess of any figure with which they have in any way agreed to be concerned. To such cases a somewhat different method of adjustment, which certainly seems to be free from these objections, is stated by Judge Carver (*s*) to be more properly applied. The sum of 1,000*l.* by which the valuation in A. exceeds that in B. is made to fall on A. alone, and only the balance of 7,000*l.* is treated as the subject of adjustment as between A. and B. This balance of 7,000*l.* is then apportioned between A. and B. according to their subscriptions, that of A. being of course reduced by the 1,000*l.*

Alternative method.

(*r*) The following objection applies also to cases of partial loss so great as to exceed the agreed valuation in any of the contributory policies.

(*s*) See pp. 130—133 of the Report of the Eighteenth Conference of the International Law Association held at Buffalo, U.S.A., in 1899 (Clowes & Sons, Ltd. 1900). Lowndes on Mar. Ins. 2nd ed. s. 38, appears to support the same view.

which he is deemed to have already contributed. In the result it will be found that Sect. 354.

A. pays 1,000*l.* plus $\frac{5}{9}$ of 7,000*l.*	= £4,889
B. pays $\frac{4}{9}$ of 7,000*l.*	= 3,111
	£8,000

Of the two methods suggested, the editors are disposed to prefer that of Judge Carver, who formulates (*t*) the position in the following terms:—

(1.) "In case of partial loss (*u*), the contribution is to be in proportion to the liabilities under the several policies in respect of that loss.

(2.) "In case of total loss, so much of the amount paid under any policy, as is ascribable to the part of the valuation therein which is covered by other policies, is to be contributed to by those policies in proportion to their liabilities in respect thereof."

355. The valuation is stated in sect. 27 (3) of the Marine Insurance Act, 1906 (*x*) to be conclusive of the insurable value of the "subject intended to be insured." It must therefore be understood that the valuation in the policy is not necessarily the whole estimated value of the subject of insurance, but only of the interest the assured has in such subject.

The valuation in the policy is only a valuation of the interest of the assured in the subject of insurance.

Hence, where insurance was made on goods "valued at 19,000*l.*," of which the assured owned four-ninths, it was contended that the valuation was intended for the entire property; and, accordingly, that the interest of the assured was to be taken as four-ninths of that sum; but the Court

(*t*) Marine insurance proposals in Report of Buffalo Conference at p. 178, as amended for the Rouen Conference, 1900.

(*u*) The partial loss, however, ought not to exceed the valuation in any of the contributory policies; if it does, the adjustment should be regulated by the rule which follows.

(*x*) *Ante*, § 338. See also sect. 26 (3) of the Act, *ante*, § 252b, which provides that the policy "shall be constructed to apply to the interest intended by the assured to be covered."

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said, "We must take it that the value insured is the value of the assured's interest" (*y*).

Valued policies on ship and freight.

356. From the difficulty of proving the insurable value of the ship in case of loss, almost all policies on ship are valued. The value is generally calculated in this country by estimating the ship's worth to her owner at the outset of the risk, including stores, outfit, and money advanced for seamen's wages, taking care to cover the whole with premiums and commissions (*z*).

However much the ship may be damaged by wear and tear, and consumption of her stores and provisions at the time of loss, even though the loss takes place at the very termination of a long voyage, yet the valuation so calculated determines the amount recoverable in case of loss (*a*).

Shipowner, in case of total loss, often receives more than an indemnity.

As, moreover, it is frequently the practice in this country to value the freight also by a separate policy at its gross amount, without any deduction of the expenses of earning it, it is very clear that upon this principle, in case of loss, the shipowner receives far more than an indemnity.

(*y*) Feise *v.* Aguilar (1811), 3 Taunt. 506. See New York and Cuba Mail SS. Co. *v.* Royal Exch. Ass. (1907), 154 Fed. R. 315, in which the Circuit Court of Appeals held that the valuation in a time policy on freight was not intended to cover prepaid freight, but only the freight at the risk of the assured at the time of the loss.

(*z*) Stevens on Average, 190. So long as the ship is comparatively new, the owner, in estimating her worth, has regard principally to what she cost him, making allowance for her earnings; as she gets older the tendency is to consider her more and more as a freight-earning machine, and her worth as the present value of her future freights plus her breaking-up price. See Lowndes on Marine Insurance, 2nd ed. p. 13; Gow, Mar. Ins. p. 74. As to the valuation of a ship as "part of the going concern of a business," see *ante*, § 343.

(*a*) Shawe *v.* Felton (1801), 2 East, 109. When the valuation in the policies is less than the real value of the vessel, the insurances are sometimes supplemented by an "increased value policy," under which the shipowner is insured for an amount additional to that insured by the ordinary policies: for policies of this kind, see Holt Hill (Sailing Ship) Co. *v.* U. K. Marine Mutual Ins. Ass. (1919), 35 T. L. R. 367; Holman *v.* Merchants' Mar. Ins. Co., [1919] 1 K. B. 383. See also, *post*, Vol. II. § 1005, n. (*f*).

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357. For example, suppose a ship chartered for a four months' voyage to be worth to her owner, in the port of loading, including rigging, &c., 2,000*l.*; provisions, 80*l.* more; petty expenses at port of loading, 18*l.* additional; seamen's wages, paid in advance to the extent of one-half, 75*l.*; making altogether, 2,173*l.*; add a premium on this sum at 3 per cent. and premium on premium, viz., 67*l.* 4*s.*, and the sum which the assured would be entitled to receive on the policy on ship in case of a total loss is 2,240*l.* 4*s.*

So much for the policy on ship; but now as to the freight. Suppose the gross freight for the whole voyage, without deducting the expenses of earning it, to be 650*l.*; premium at 3 per cent., &c., 20*l.* 2*s.*, making together 670*l.* 2*s.*, which is the amount recoverable for freight, calculated according to the principle observed in this country in respect of open policies. Therefore the amount recoverable in respect of ship and freight under the two policies is 2,910*l.* 6*s.*

In order to show how much this exceeds an indemnity, let us see what the shipowner would net in case the ship arrived and full freight was earned. Taking the wear and tear of the ship for the four months' voyage at the moderate sum of 100*l.*, the ship would be worth to her owner on arrival (2,000*l.* - 100*l.*) 1,900*l.*

Then as to freight, taking the expenses at the port of destination to be 25*l.*, and the seamen's wages for the last two months to be 75*l.*, these two items payable out of the gross freight of 650*l.* would reduce the net amount of freight to 550*l.* The sum, therefore, that the shipowner would net by the ship's safe arrival earning freight would be, for the ship, 1,900*l.*; for the freight, 550*l.*; making the total net value of the ship and freight to the owner on safe arrival, 2,450*l.* But in case of total loss he would receive 2,910*l.* 6*s.*, *i.e.*, he would be a gainer by the total loss of his ship to the extent of 460*l.* 6*s.* (*b*)—"a great inducement indeed to many," as

(*b*) A seaman's wages, in case of wreck or loss of ship, are now payable for the full time of service prior thereto, unless barred by proof that he has not exerted himself to the utmost to save ship, &c.; the

Sect. 357. Benecke exclaims, "to convert a partial into a total loss!" (*c*).

Valued policies on freight.

358. Notwithstanding the theoretical difficulties attendant on the practice of insuring ship and freight separately (*d*), freight is still regularly insured in separate policies, and valued therein at a sum sufficient to cover its estimated gross amount.

In the United States.

But freight, as well as other subjects, may be valued even above its gross amount; and in one case in the United States the Court are reported to have said, "The parties agree that the freight shall be valued at a sum which eventually proves to be three times the value of the carriage of the goods, but we do not perceive that the estimate was made unfairly"; and it was adjudged that the underwriters should pay a loss according to the valuation (*e*).

Where the voyage is made up of distinct stages, and there is but one valuation.

The following question has arisen, and been a good deal discussed in the Courts of the United States:—

Suppose a policy to be on time, or on a voyage having intermediate stages, at each of which freight is earned and becomes due, independently of the circumstance of the vessel's arriving at subsequent stages; suppose, also, that the freight of the whole voyage, or for the whole time, is valued in gross—is this valuation to be applied to the aggregate amount of all the freights, or to the amount of each severally?

Phillips, after a learned examination of the authorities, states the result to be "in favour of such valuation being applied to the freight successively pending on the separate passages, and not to the aggregate freight for all the

Merchant Shipping Act, 1894, ss. 157, 158, re-enacting similar provisions in the Merchant Shipping Act of 1854. The difference, therefore, would not now be quite so great as stated in the text.

(*c*) Principles of Indem. c. ii. "As to Insurances on Ships," from which the whole of the above calculations are taken.

(*d*) As to which, see Benecke, Pr. of Indem. c. ii. pp. 57—60; c. iv. pp. 133—136; and Dallas, C. J., in Case *v.* Davidson (1816), 2 Brod. & B. 387.

(*e*) Coolidge *v.* Gloucester Marine Ins. Co. (1819), 15 Mass. R. 341; cited 2 Phillips, s. 1267.

passages" (*f*). He concludes that the doctrine applicable to the subject is that "a valuation of freight in a time policy, or one for successive passages, is presumed to be of that successively pending;" but this presumption, he thinks, may be rebutted by showing that the valuation is applicable to the aggregate amount of the successive freights. Sect. 358.

If there is any provision in the charter-party suspending the earning of freight till the completion of the homeward passage (as was frequently the case with ships chartered for the voyage out and home in the East India Company's trade), and the freight for the whole voyage be valued at a gross sum, it seems that the whole sum valued may be recovered whether the loss take place on the passage out or home (*g*).

Modern use of valued time policies on freight.

Freight is now frequently insured in valued policies, which are intended by both parties to be of constant effect during the whole period or voyage covered, quite independently of the ship's engagements. Thus it is one of the Institute Clauses in Freight Policies both for a voyage or for time that "in the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered" (*h*), and Club Insurances on freight contain a similar provision. The effect of such an insurance is obviously to entitle the shipowner to receive a fixed sum in the event of a total loss, not necessarily of any freight at all, but of his ship; and this is no doubt the intention of the parties also. The rule appears to make a policy framed in accordance therewith a contract of insurance by way of gaming and

(*f*) 2 Phillips on Ins. s. 1208. See New York and Cuba Mail SS. Co. *v.* Royal Exch. Ass. (1907), 154 Fed. R. 315, *ante*, § 355, note (*y*).

(*g*) Williams *v.* London Ass. Co. (1813), 1 M. & S. 318.

(*h*) See Appendix B. In Coker *v.* Bolton, [1912] 3 K. B. 315, at p. 320, Hamilton, J., said that in his opinion this clause was introduced for the purpose of meeting the hardship that had long been felt to exist, where a shipowner, who had given notice of abandonment and consequently lost his right to the freight subsequently earned, was precluded from suing on the policy on freight.

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wagering, void therefore under sect. 4 of the Marine Insurance Act, 1906. Be this as it may, the object of the members of the Association is not to gamble with one another, but in this indirect way to increase the amount receivable in case of total loss of hull, which in their actual policies on hull they may have found it convenient to under-assess.

Valued policies on goods.

359. Valued policies on goods are stated by Stevens to have originated in insurances on colonial produce, of which, as no invoice could be had (no purchase having been made), a valuation was necessarily adopted such as would indemnify the planter in case of loss. The practice, being found very convenient on account of its enabling the merchant to include in the valuation a fair mercantile profit on his goods, which he could not do by an open policy, was extended to classes of goods to which the original reasons for its adoption would not apply.

Specific valuations.

When the cargo consists of different kinds of colonial produce, as sugars, coffees, tobacco, &c., it is more usual, because more convenient for the purpose of adjustment in case of loss, to value each species of produce separately; as "on sugars valued at 500*l*., on coffee valued at 600*l*.," or "on 100 hogsheads of sugar valued at," &c. Sometimes the valuation is at so much per hogshead, tierce, barrel, bale, hundredweight, &c. This is followed in most instances with appropriate clauses, "to pay average on each species, as if separate interests, separately insured," or "to pay average on each 10, 15, 20 hogsheads, &c., succeeding numbers, as if separately insured" (*i*). We shall see hereafter that the purpose of these specific insurances is in case of a partial loss to enable the assured to recover notwithstanding the memorandum clauses, and that the single word "effects" (*k*), or "goods" (*l*), describing the subjects of insurance, does

(*i*) Stevens on Average, 186, 224, 225; Benecke, Pr. of Indem. 158, 159.

(*k*) Duff *v.* Mackenzie (1857), 3 C. B. N. S. 16; 26 L. J. C. P. 313.

(*l*) Wilkinson *v.* Hyde (1857), 3 C. B. N. S. 30; 27 L. J. C. P. 116.

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not prevent the policy being construed distributively, when such word is descriptive of various kinds of goods or articles (*m*). It is quite otherwise if such word be descriptive of a homogeneous cargo only, such as linseed (*n*) or rice (*o*), notwithstanding it is packed in separate bags or packages; and the effect of such a policy is not altered by indorsement afterwards of a declaration of the ship, and of the packages and their separate value (*p*).

When goods are valued at so much per lb., this must be understood of the lb. of the place where the policy is made (*q*).

Goods "to be hereafter declared and valued."

360. When the assured expects goods from abroad, but does not know the kind or the amount, he generally procures a floating policy to be effected "on goods to be hereafter declared and valued."

Such declaration before loss is not a condition precedent to the right of the assured to recover; yet "unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration" (*r*).

Valuation must be made and communicated to underwriter before loss.

Under a policy in this form, a clerk of the assured wrote out and signed a declaration of interest and value on a separate piece of paper, which he wafered to the policy, but it did not appear that this had been shown to the underwriter before the loss was known, and Lord Ellenborough held there was no declaration, and consequently that it was an open policy (*s*).

(*m*) Cator *v.* Great Western Ins. Co. of New York (1873), L. R. 8 C. P. 552.

(*n*) Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300.

(*o*) Entwistle *v.* Ellis (1857), 2 H. & N. 549; 27 L. J. Ex. 105.

(*p*) *Ibid.*

(*q*) Stevens on Average, 186; 2 Phillips, s. 1199.

(*r*) Mar. Ins. Act, 1906, s. 29 (4), *ante*, § 185. See Craufurd *v.* Hunter (1798), 8 T. R. 13, 15, n.; Gledstanes *v.* Royal Exchange Ass. Co. (1864), 34 L. J. Q. B. 30.

(*s*) Harman *v.* Kingston (1811), 3 Camp. 150. See per Mellor, J.: "It may be important that both parties should know as to value, but the risk is quite a different question;" Cockburn, C. J.: "There must

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As we have seen elsewhere, a mistake made in declaring may be corrected without the assent of the underwriters, if made in good faith (*t*).

Applied to the proceeds or returns of the outward cargo.

Questions have arisen in the United States whether a valuation in a policy on goods for the voyage out and home applies to the proceeds or returns purchased by the sale of the outward cargo. This is a question of intention, and consequently to be determined upon a construction of the instrument in view of the circumstances of the case. "In the absence of any collateral considerations," says Phillips, "I conclude the preferable doctrine to be, that a valuation of the outward cargo in a policy for the round voyage is to be presumed to be a valuation of its whole proceeds for the return voyage or for subsequent passages" (*u*).

Premium.

Generally speaking, a valuation at a round sum is taken to include the premium, and this whether the valuation be on the subject in gross, or by the weight, measure, or piece, except where the contrary appears from the language of the policy, or from the scale of the valuation (*x*).

A stipulation as to rate of exchange does not make a valued policy.

361. Where goods are expected from abroad, and no value is put upon them in the policy, but it is only stipulated that the coin of the foreign port of loading at which they are invoiced shall be reduced into our own money, at so many shillings the dollar, livre, rupee, &c., it seems that this ought not to be taken as a valued, but as an open policy; for it contains no fixed valuation of the goods, but only an ascertainment of the value in our money of the foreign currency

be an agreement as to valuation;" Gledstanes *v.* Royal Exchange Ass. Co. (1864), 34 L. J. Q. B. 30, 31.

(*t*) Mar. Ins. Act, 1906, s. 29 (3), *ante*, §§ 185, 187.

(*u*) See McKim *v.* Phœnix Ins. Co. (1807), 2 Wash. Circ. Court R. 89; Haven *v.* Gray (1815), 12 Mass. R. 71; Whitney *v.* American Ins. Co. (1824), 3 Cowen, 210; 5 Cowen, 712; 2 Phillips, ss. 1197, 1198; 1 Parsons, 270.

(*x*) This is the received doctrine in the United States; 2 Phillips, s. 1201. The learned author cites Mayo *v.* Maine Fire and Marine Ins. Co. (1815), 12 Mass. R. 259, where the Court concluded, from the scale of valuation merely, that the premium was not intended by the assured to be included.

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in which their invoice value is expressed. Accordingly it has been held in America, that the invoice value, thus calculated, must have the premium added to it, in order to ascertain the insurable value, just as in an open policy (*y*).

By sect. 72 of the Marine Insurance Act, 1906—

Apportionment of valuation where different kinds of property covered.

> (1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act (*z*).
>
> (2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods (*a*).

Thus, in the case of damage to goods, the insurable value of the different kinds of goods having been ascertained, the valuation is applied to each kind in the same proportion; and the percentage of damage sustained by any one kind of goods must then be applied to their portion of the value, in order to ascertain the amount due thereon from the underwriter.

(*y*) Ogden *v.* Columbian Ins. Co. (1813), 10 Johnson's R. 273, cited 2 Phillips, s. 1201. Benecke thought otherwise, but the rule in the text seems preferable. Pr. of Indem. 159.

(*z*) See s. 16, *post*, § 365.

(*a*) The provisions of this section are based on a rule of the Association of Average Adjusters. In one case in the United States the judges were equally divided in opinion whether a valuation in the lump on ship, cargo and freight in one policy, without specifying how much on each, was not void for uncertainty. Stocker *v.* Harris (1807), 3 Mass. R. 415; 2 Phillips, s. 1203. Arnould was of opinion that the valuation may be set aside, if it be impossible to ascertain, by the invoice or otherwise, in what way the valuation was intended to be apportioned on different parts of the cargo: 2nd ed. Vol. I. p. 376. It is, however, unlikely that a case will occur which cannot be settled by applying the alternative rule in sub-sect. (2).

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If only part of the interest at risk is valued, it is easy to ascertain what amount that is not valued is covered, by deducting the amount of the valuation from the sum insured.

Rule of adjustment where different subjects of insurance are separately valued in one policy, and only one subject is put at risk.

If several articles be insured at one sum, with a distinct valuation on each, as supposing ship and cargo insured for 5,500*l.*, calculating the ship at 1,500*l.*, and no part of the cargo to be taken on board, so that the risk on that never attaches; then, if the ship be lost, the assured shall recover such proportion of the sum insured as 1,500*l.*, the value put upon the ship, bears to 5,500*l.*, the value put upon the whole (*b*). The mere fact, however, that goods are valued at a certain sum, of which a certain portion is expressed to be in respect of advanced freight, does not necessarily prevent the whole valuation from being applied to the goods alone (*c*).

Of open policies.

362. In an unvalued or open policy the value of the interest at risk is not fixed in the policy, but is estimated by a certain standard, and in case of loss is made out by proof.

Estimation of interest.

As will presently appear, the amount of insurable interest in all open policies is the sum which measures its worth to the assured at the commencement of the risk, *plus* the charges of the insurance (*d*). The indemnity contemplated by this mode of estimation puts the assured as nearly as possible in the same position as he was in at the outset of the adventure, and before effecting the insurance, without paying any regard to the profit he may have missed making, or to the wear and tear which his property has or would have sustained.

Premium and premium thereon should be included.

It is clear that, upon this principle of indemnity, the charges of insurance should include the premium paid upon it, and also the premium upon the premiums down to the total extinction of the risk; otherwise the sum received by the assured in case of loss, as an indemnity, will not really

(*b*) Amery *v.* Rodgers (1794), 1 Esp. 208.

(*c*) Thames and Mersey Co. *v.* Pitts, [1893] 1 Q. B. 476.

(*d*) Sect. 13 of the Mar. Ins. Act, 1906, declares that "the assured has an insurable interest in the charges of any insurance which he may effect."

put him in the same position he was in before effecting the insurance. Sect. 362.

For example, suppose goods, the invoice price of which, together with shipping charges, amounts to 1,000*l.*, to be insured at 5 per cent.; it is plain that the merchant, by insuring 1,050*l.* is not fully covered; for the premium for insuring 1,050*l.* at 5 per cent. will be 52*l.* 10*s.*, and the whole sum at risk would thus be 1,052*l.* 10*s.*, while all that could be recovered, in case of a total loss upon the above supposition, would be 1,050*l.*; it is plain, therefore, that the assured, who wishes to be completely protected from loss, must go further, and insure the premium of the premiums, down to the extinction of the risk.

Practical rule.

363. The simplest practical rule for ascertaining the sum necessary for this purpose is as follows:—the premium being contained in the sum which the underwriter pays, the assured for his indemnification can clearly only receive that sum deducting the premium; hence, every 100*l.* meant to be insured must be so insured minus the premium. As this residue is to 100*l.*, so is the amount of interest intended to be insured to the sum required to be insured in order fully to protect it. Thus, suppose the amount of interest intended to be insured (no matter whether in ship, freight or goods, for the rule now under consideration extends to all alike) to be 1,000*l.* and the premium to be 5*l.* 5*s.* per cent.

Then, according to the rule, from the sum of	£100	0	0
Deduct premium	5	5	0
Leaves	£94	15	0

Then, as 94*l.* 15*s.* is to 100*l.*, so will 1,000*l.* be to the sum required to be insured, in order completely to cover the interest at risk, or about 1,055*l.* (*e*).

But besides the premium and premiums of premium, it is requisite also to cover the expenses of the policy; *i.e.*, the

(*e*) Stevens on Average, 193; Benecke, Pr. of Indem. 119, 120.

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stamp duty and the broker's commission, if effected by a broker (*f*). We have therefore, as before, on 100*l*., premium 5*l*. 5*s*., stamp duty, say 6*d*. (in case of a policy for twelve months), and the broker's commission ½ per cent.; *i.e.*, 5*l*. 15*s*. 6*d*. is to be deducted from the 100*l*., and the proportion is, as 94*l*. 4*s*. 6*d*.:100*l*. :: 1,000*l*. to the sum required to be insured, that is 1,062*l*.

Whatever be the subject-matter insured, whether ship, freight, goods, or profits, as the premium and the premium upon premium are always thus included in estimating the amount of the insurable interest, it follows, that in case of a stipulation for a return of premium on a certain contingency, the whole premium is, nevertheless, to be added in estimating the amount of the interest; since the assured may in the result be liable to pay the whole premium, or, which comes to the same thing, he may not be entitled to a return of any part of it (*g*).

Adjustment on open policies in cases of total and partial loss.

364. In case of total loss, the assured under an open policy is entitled to recover to the full extent of the value thus calculated, supposing the sum insured to amount to so much (*h*). In cases of partial loss the percentage of damage done to the subject insured having been first ascertained, the assured is entitled to recover the same percentage of the insurable value calculated as above; it being, of course, in every case understood that the underwriter is only proportionably liable upon the particular sum he has himself agreed to insure (*i*).

Thus, if an underwriter has insured 200*l*. on an open policy on goods, the estimated insurable value of which is 1,000*l*., and the ascertained amount of sea-damage 10*l*. per cent. on

(*f*) The modern practice, however, is to include broker's commission in the premium: see per Channell, J., in United States Shipping Co. *v.* Empress Ass. Co., [1907] 1 K. B. 259, 262.

(*g*) 2 Phillips on Ins. s. 1221.

(*h*) Mar. Ins. Act, 1906, ss. 67, 68, *ante* § 338.

(*i*) This is the rule in cases of particular average on goods: Mar. Ins. Act, 1906, s. 67. In case of ship there is no calculation of percentage of damage: the underwriter pays his proper proportion of the repair bill: Mar. Ins. Act, 1906, s. 69.

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what they would have fetched at the port of delivery had they arrived there sound, the underwriter pays as his share of the indemnification 10*l*. per cent. on the sum he has insured, *i.e.*, 20*l*.; in the same way, in case of total loss, he would have paid 200*l*. If the aggregate of the sums insured equals the whole amount of insurable value, the assured receives 10*l*. per cent. on 1,000*l*., *i.e.*, 100*l*.; if it is less than this, he is his own insurer for the part uncovered by the policy (*k*), if more, it is an over-insurance.

Proof of interest at risk.

The mode of proving the amount of insurable interest under an open policy in case of loss is;—for the goods, by the production of the invoice, bill of lading, policy, &c.;—for the ship, by the production of reports and estimates of surveyors, bills of sale, &c.;—for the freight, by the production of the manifest, bill of lading, charter-party, &c.

Measure of insurable value in an open policy—

365. The rules which are followed in estimating the value of the subject-matter insured for the purposes of an open policy are thus set out in sect. 16 of the Marine Insurance Act, 1906:—

> Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—
>
> (1) In insurance on ship, the insurable value is the value, at the commencement of the risk (*l*), of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole (*m*). **on ship;**

(*k*) Mar. Ins. Act, 1906, s. 81, *post*, § 1215.

(*l*) The words "at the commencement of the risk" are unfortunate. In a policy "at and from" a particular port, the risk may well commence before her outfit, provisions, or stores are put on board (see *post*, § 475), and before the necessary disbursements are made.

(*m*) The items hereby expressly included were not, in the opinion of certain learned judges of the Court of Appeal, included, prior to the Act, in an insurance simply on "ship." See Roddick *v.* Indemnity Mutual Ins. Co., [1895] 2 Q. B. 380. It was probably only by reason

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The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured (*n*), and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade (*o*):

on freight;

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured (*p*), plus the charges of insurance (*q*).

of the general words "tackle, apparel, ordnance, munition, artillery, boat and other furniture," which form part of the ordinary English policy, that such items were covered. There is a discrepancy between this provision and rule 15 of the 1st schedule to the Act, in which money advanced for seamen's wages is not included in the items covered by the term "ship" in the ordinary policy. On this point there is no judicial authority before the Act, but in Stevens on Average, p. 190, it is stated that such advances are included, and Stevens' statement was adopted by Arnould (2nd ed. Vol. I. p. 381; 7th ed. § 365) and by McArthur (Ins. p. 67). See generally *ante*, §§ 218—221, for what is covered by a policy on "ship."

(*n*) Ordinarily the coals and engine stores are provided by the shipowner, whether the vessel be under charter or not. Sometimes, however, the ship is let to a charterer, on the terms that the latter is to supply the coals and stores on his own account, and in this case they are not covered by an insurance effected to protect the shipowner's interest. It is not easy to see why the words "if owned by the assured," assuming them to be necessary here, were not also inserted after the words "provisions and stores for the officers" in the preceding paragraph of the sub-section.

(*o*) These words possibly alter the law as to whaling, and other similar voyages. See *ante*, § 219.

(*p*) When during the voyage or time for which the insurance was effected there are successive shipments of goods, the question will arise whether or not the whole amount of the insurance must be applied to the freight at the risk of the assured at the time of the loss. If, for instance, a shipowner having at the commencement of the insured voyage only 500*l*. freight at risk, takes on board at an intermediate port additional cargo, the freight of which is the same in amount, will he, in the event of the whole cargo being lost, recover 1,000*l*. on his freight policy, or only 500*l*., the amount at risk at the commencement of the voyage? The result, it is apprehended, will in each case depend on the intention of the assured when he effected the insurance, and the wording of the policy. See Mar. Ins. Act, 1906, s. 26 (3), *ante*, § 251 *et seq.*; and see also *ante*, §§ 245, 246, 258, and *post*, §§ 367, 519.

(*q*) See per Lord Ellenborough, Forbes *v.* Aspinall (1811), 13 East, 326; Palmer *v.* Blackburn (1822), 1 Bing. 61; United States Shipping Co. *v.* Empress Assurance Corporation, [1907] 1 K. B. 259; [1908] 1 K. B. 115 (see § 262, note (*u*), *ante*); Stevens on Average, 192. The same rule appears most generally to obtain in the United States, though in some of the States the insurable value of freight is taken to be two-thirds of its gross amount. See 2 Phillips, s. 1238. It is obvious that the rule by which gross freight is payable in case of a loss may in many cases give the assured much more than a mere indemnity. In United States Shipping Co. *v.* Empress Ass. Corporation, *supra*, Channell, J., held that in a charterers' policy on freight the commission for obtaining the charter could not be included in the valuation.

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(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole (*r*).

on goods;

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance (*s*).

or other subjects of insurance.

The prime cost of goods is generally evidenced by the invoice price, but is not conclusively fixed by it (*t*). In the United States it has been laid down on several occasions, that the market price of the goods at the commencement of the risk, is the true basis of calculation, and that the prime cost or invoice price furnishes no satisfactory rule of indemnity in any case where it exceeds, or is less than, this market value. "Suppose," says Washington, J., "the property to be destroyed within an hour after the risk has commenced, what is it the owner loses? Precisely as much as it is worth, or would have commanded in the market at the time and place of shipment. If the

The invoice, and not the market price of the goods at the port of shipment.

(*r*) See Usher *v.* Noble (1810), 12 East, 646; Tuite *v.* Royal Exchange Co. (1747), 1 Park, 224, 225; 1 Marshall, 232; Stevens on Average, 178 *et seq.*; Benecke, Pr. of Indem. 12—14; 2 Phillips, s. 1232.

(*s*) The application of this rule to a policy on profits may have a curious result when the amount to be earned depends on fluctuating market prices. Thus, if goods could only have been sold at a loss at the time of shipment, but would have realized a profit if sold at the time of the loss or of their expected arrival, can the assured recover nothing on an open policy on profits? Moreover, the rule also seems inapplicable to a policy on commissions, when the amount thereof will depend on the sale of the goods during the voyage or upon arrival.

(*t*) 2 Phillips, s. 1229.

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property cost him less than it was worth when shipped he loses (in case of total loss) as well the first cost as the increased value for which he is entitled to claim indemnity from the insurer" (*u*). In theory this is unquestionably true, but as a practical rule, the prime cost, as evidenced by the invoice price, is by far the most convenient standard.

Invoice price in foreign money.

366. When the invoice price of goods shipped from a foreign port, where there is no current rate of exchange, is expressed in the currency of the foreign country to which such port belongs, the true mode of ascertaining the insurable value is to estimate what would be the worth of the foreign money in which the invoice value is expressed, supposing that it had been shipped in specie, instead of the goods, to the port of destination: *i.e.*, the invoice value of the goods is to be ascertained by calculating what the foreign coin in which it is expressed would be worth to the consignee of the goods, after paying the premium of its insurance, the freight and other expenses of its transportation (*x*).

On the other hand, if there is a current rate of exchange at the foreign port of loading, the most equitable measure of the insurable value of the goods appears to be the rate of the exchange at the commencement of the risk (*y*).

Thellusson v. Bewick.

In one case, however, in this country, Lord Kenyon acted upon a different rule; a policy was effected in September, 1791, on sugar shipped from a French port: at the time of effecting the policy, the exchange in England on the French crown of 3 livres was 24*d.*; at the time of settling the loss, in January, 1792, it had fallen to $7\frac{3}{4}d.$ Lord Kenyon held that as in case the exchange had risen the assured would have had the benefit of the rise, so in case of a fall they

(*u*) See 2 Phillips, s. 1229, citing Carron *v.* Marine Ins. Co. (1811), 2 Wash. C. C. R. 468. In one case the invoice value was taken, though higher than the actual cost to the assured. See *ibid.*; Coffin *v.* Newburyport Marine Ins. Co. (1812), 9 Mass. R. 436.

(*x*) See Magens on Ins. vol. i. p. 41, s. 40; Benecke, Pr. of Indem. 119.

(*y*) 2 Phillips, s. 1231.

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must submit to the loss; and he decided that the insurable value of the sugars must be estimated and the loss paid upon the rate of exchange at the time of the adjustment, *i.e.*, at $7\frac{3}{4}d.$ the French crown (*z*).

Goods purchased by barter.

If the goods are purchased by barter in a foreign port, with which there is no mode of estimating the rate of exchange, the French Code provides that the amount of interest shall be the cost and charges of the goods given in barter (*a*), by which word "charges" is meant the expenses of transporting and shipping them (*b*).

Drawback.

When goods are entitled to a drawback on exportation, a question has been raised whether in estimating the insurable value of such goods under an open policy the amount of this drawback is to be deducted. The Courts of the United States have held that it is not, on the ground that, though it may enter into the estimate of the value of the goods for exportation, it is no part of their actual market price at the port of departure (*c*); and these decisions seem conformable to sound principle (*d*).

Of policies to cover fluctuating interest.

367. Where the provisions of the policy show that it is intended to cover any interest that the assured may have at risk within the limits of the time or the voyage for which the policy is effected, the amount of insurable interest fluctuates at different periods of the risk, and the loss must be apportioned between the parties in the proportion which the sum insured bears to the amount of insurable interest on board at the time of loss.

Crowley *v.* Cohen.

For example, the plaintiffs, barge-masters, having several

(*z*) Thellusson *v.* Bewick (1793), 1 Esp. 77. The rate of exchange at the commencement of the risk appears a preferable standard. In France the rule is to value the goods at the rate of exchange current at the time of subscribing the policy. Code de Commerce, art. 338.

(*a*) Code de Commerce, 339.

(*b*) Benecke, Pr. of Indem. 119.

(*c*) See these cases collected, 2 Phillips, s. 1235.

(*d*) Weskett says that when goods are entitled to a bounty on exportation the bounty is to be deducted, but the other seems the better rule. See Weskett's Digest, art. "Fish," No. 1.

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The facts were that within the time limited in the policy one of the thirty boats mentioned in the margin of the policy had sunk in the canal, with 1,700*l*. worth of goods on board of her, which was the loss in respect of which the action was brought; and that at the time of the loss every one of the thirty boats named in the margin had carried goods to the amount of 12,000*l*. and upwards, so that about 360,000*l*. worth of goods had been carried to and fro by the boats named in the policy between the commencement of the risk and the loss in question.

Under these circumstances the underwriters contended:—

1. That as soon as goods to the amount of 12,000*l*. had been carried by all the boats, or, at all events, by each boat, the policy was exhausted.

2. That, supposing the policy not to be so limited, still the underwriters were liable only for that proportion of the loss which 12,000*l*., the sum insured, bore to the whole amount of the goods carried by all the boats during the year for which the policy was effected (say 360,000*l*.); for that must be taken as the whole insurable interest of the assured.

The Court, however, as to the first point, held that it was

plainly inconsistent with the object of the policy and the real nature of the transaction, which was "in effect equivalent to a fresh insurance taking place at the time when each boat started, and governing all that were then afloat,—only that instead of a renewed insurance the object was attained by a continuing policy." As to the mode of calculating the indemnity, the Court held that the whole value of the goods afloat at the time of the loss must be taken, and the plaintiffs recover such a proportion of the loss as 12,000*l*. might bear to the value of all the property on board all the boats at the time of the accident, supposing that value to exceed 12,000*l*.; if not, then the plaintiffs would be entitled to the whole amount lost (*e*).

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The true measure, therefore, of the insurable interest in such a policy is the amount at risk at the time of the loss (*f*).

Joyce v. Kennard.

368. In another case, the policy being differently framed, and indeed not properly a marine policy at all, there was a different result. The policy, an ordinary Lloyd's policy, was "lost or not lost at and from all or any of the wharves, banks, quays and places of arrival and departure in the river Thames, and any merchant or steam vessel of any description therein, comprising the whole extent of the said river, from Wandsworth downwards to the Victoria Docks, including all or any intermediate docks and wharves, and *vice versâ* until on board any merchant or steam vessel, barge or boat, or otherwise landed at any wharf, &c. The risk to commence on the 25th September, 1869, and to terminate on the 24th September, 1870, including both days, upon any kind

(*e*) Crowley *v.* Cohen (1832), 3 B. & Ad. 478. The same principle was laid down by Story, J., in a similar case in the United States. See Columbian Ins. Co. *v.* Catlett (1827), 12 Wheaton, 383; 2 Phillips, s. 1228.

(*f*) Where the master of a ship had insured his effects by a time policy, Pickford, J., held that the policy covered all his effects at the time of the loss, including the clothes and watch which he was at that time wearing on shore: Anstey *v.* Ocean Mar. Ins. Co. (1913), 19 Com. Cas. 8.

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of goods and merchandise in craft of every description, &c. The ship, and goods, and merchandise, &c., by agreement, &c., are and shall be valued at on all goods and produce as interest may appear." The sum stated in the margin was 2,000*l.* At the bottom of the policy was written as follows:—"To cover and include all losses, damages, and accidents, amounting to 20*l.* and upwards, in each craft, to goods carried by Messrs. Joyce, as lightermen, or delivered to them to be waterborne, either in their own or other craft, and from (*sic*) which losses, damages, and accidents, Messrs. Joyce may be liable or responsible to the owners thereof, or others entrusted. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription." The defendants underwrote this policy for 100*l.*

During the continuance of the risk in this policy, a loss, damage, or accident, within the meaning of it, had occurred to goods loaded on board one of the assured's craft, called the "Lord Cardigan," to the amount of 1,100*l.*, for which the assured were liable to the owners thereof and which they had paid. The total value of the goods at the time on board the "Lord Cardigan" was 2,906*l.*, and the total value of the goods on board that and the other barges at the same time was 20,000*l.* and upwards.

The Court said this was not an ordinary marine policy, but a policy of a mixed nature, by which the defendant indemnified the plaintiffs against any liability to the extent of the sum underwritten, which they might incur, as carriers, to the owners of the goods entrusted to them. It was, therefore, held, on the language of the policy, that the defendant was liable for the full amount underwritten by him (*g*).

Cunard SS. Co. *v.* Marten.

In another case (*h*) the plaintiffs, having agreed to carry a cargo of mules under a contract without a negligence clause,

(*g*) Joyce *v.* Kennard (1871), L. R. 7 Q. B. 78. See also Ursula Bright SS. Co. *v.* Arnsinck (1902), 115 Fed. R. 242.

(*h*) Cunard SS. Co. *v.* Marten, [1902] 2 K. B. 624; [1903] 2 K. B. 511.

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effected an insurance with the defendant against "liability of any kind to owners of mules up to 20,000*l.*, owing to the omission of the negligence clause in contract." The insurance was made by the ordinary form of Lloyd's policy, and Walton, J., and the Court of Appeal held that it was not a policy on the mules, but a contract of indemnity under which the plaintiffs were entitled to recover in full any loss, up to 20,000*l.*, which they might incur.

Holman *v.* Merchants' Mar. Ins. Co.

In a recent case (*i*) a vessel, which was insured by ordinary policies for 39,000*l.* and valued therein at the same sum, was further insured by an increased value policy for 1,855*l.* The latter policy was stated to be "upon increased value of hull, machinery, &c.," and contained a marginal clause which declared that the insurance was against the risks of total loss and was "to include also any liability which may attach to the shipowner in consequence of the hull and machinery being valued for contribution to general average or salvage charges at more than the insured valuation. . . ." During the currency of the policy the shipowner became liable in respect of salvage services and general average expenditure for a total sum exceeding 13,000*l.*, but by reason of the valuation of the vessel in the salvage action and her contributory value in the general average adjustment both largely exceeding 39,000*l.*, the amount which he recovered under the ordinary policies was only 8,260*l.* It was contended for the assured, on the authority of Joyce *v.* Kennard and Cunard SS. Co. *v.* Marten, that the policy was a contract of indemnity against liability and that he was entitled to recover the full amount of the insurance; but Sankey, J., held that the policy was only an insurance on the *res* with the ordinary ancillary clauses, and that the insurers were only liable for the excess amounts of the salvage and general average in the proportions which 1,855*l.* have to the total excess valuation and the total excess contributory value respectively.

(*i*) Holman *v.* Merchants' Mar. Ins. Co., [1919] 1 K. B. 383.

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Measure of indemnity in insurances against liabilities.

368a. Sect. 74 of the Marine Insurance Act, 1906, declares that—

> Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

The preceding section affords some examples of insurances against liabilities. Other express insurances against liabilities are contained in the suing and labouring clause and the running-down clause, which will be discussed hereafter (*k*).

General provisions as to measure of indemnity.

A general provision of the Act which has some bearing on the valuation of insurable interests is contained in sect. 75, as follows:—

> (1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.
>
> (2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

(*k*) See Vol. II. §§ 792 *et seq.*, §§ 864 *et seq.*

CHAPTER XIV.

THE VOYAGE INSURED.

SECT.

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Deviation and Change of Voyage 370, 371
Description of the Voyage insured ..... 372—375

Of the voyage insured, and the voyage of the ship. Difference between time and voyage policies.

369. USUALLY the risk undertaken by the underwriter is defined by certain limits of time or certain points of locality specified in the policy as the limits or termini of the risk (*a*). When the risk is limited by time, the policy is called a time policy; when by local termini, it is called a voyage policy (*b*).

Termini of a voyage policy.

In voyage policies, of which we are now treating, the *terminus a quo*, or place at which the risk commences, is usually, in the common policies on ship, the port of departure; in the common policies on goods, the port of loading, which frequently, but not necessarily, is the same place. The *terminus ad quem*, or point at which the risk ends, is the port of the ship's destination, or the port or ports of the cargo's discharge.

The voyage insured.

That which is limited or described in the policy, by these termini, is the voyage insured (*viaggium*); a technical term, which must be carefully distinguished from the actual voyage of the ship (*iter navis*) (*c*). The distinction is important.

The voyage insured (*viaggium*) is a transit at sea from the *terminus a quo* to the *terminus ad quem* in a prescribed course

(*a*) 2 Emerigon, c. xiii. p. 39; 2 Benecke, System des Assecuranz, c. viii. p. 203, ed. 1807.

(*b*) Mar. Ins. Act, 1906, s. 25 (1), *ante*, § 9.

(*c*) Casaregis, Disc. 67, No. 31, as cited 2 Emerigon, c. xiii. s. 5, p. 60.

Sect. 369. of navigation (*iter viaggii*), which is never set out in any policy, but virtually forms part of all policies, and is as binding on the parties thereto as though it were minutely detailed.

The voyage of the ship.

The voyage of the ship (*iter navis*) is the course of navigation on and in which the ship actually sails.

If the ship, in fact, sails in the prescribed course from the *terminus a quo* to the *terminus ad quem*, the voyage of the ship and the voyage described in the policy are identical.

Deviation.

370. If the ship, without entirely abandoning the prosecution of the voyage described in the policy (*viaggium*), yet voluntarily, and without justifying cause, departs from the prescribed course of that voyage (*iter viaggii*), this is a deviation, and the underwriter is liable for no loss occurring after the point (frequently called the dividing point) at which the ship first quits the prescribed course (*d*).

Abandonment, or change of voyage.

If the ship either originally sail on a different voyage from that described in the policy, or if, after sailing, she entirely abandons all intention of prosecuting the voyage described in the policy, this is an abandonment or change of voyage, which avoids the policy from the moment the intention of so abandoning it is definitely formed (*e*); for it is an elementary principle in this branch of insurance law that the underwriter cannot be liable for a loss which does not take place in the course of prosecuting the very voyage described in the policy (*f*).

Illustrations of the distinctions between— the voyage insured and the voyage of the ship.

371. The following simple illustrations may serve to place these distinctions in a clearer point of view:—

1. As to the voyage insured, and the voyage of the ship.

(*d*) Mar. Ins. Act, 1906, s. 46, *post*, § 376.

(*e*) Mar. Ins. Act, 1906, ss. 43, 44, 45, *post*, § 380. The learned author of this work used the terms "change" and "abandonment" of voyage indifferently, as applicable in either case. In the Mar. Ins. Act "change of voyage" denotes only an abandonment thereof after the risk has attached; see sect. 45 (1). No special term is used to describe the abandonment of the voyage before the risk has attached.

(*f*) Roccus, No. 18, cited 2 Emerigon, c. xiii. p. 39.

Sect. 371. Suppose the ship to sail under a charter-party on a voyage from London to Sydney and back; a merchant who expects goods to be sent by her on her homeward voyage from Sydney to London, effects a policy on them on board the ship for a voyage "at and from Sydney to London": in this case, the voyage of the ship is the round voyage from London to Sydney, out and home: the voyage insured, or rather (for this is the more accurate mode of expression) the voyage on which the subject is insured, is only the home voyage from Sydney to London.

2. As to deviation and abandonment or change of voyage.

Between a deviation and change of voyage.

A ship insured on a voyage from London to Cadiz, sails from London with the intention of proceeding, not to Cadiz, but to Jamaica, or after sailing some distance with an intention of proceeding to Cadiz, changes that intention, and resolves to proceed to Jamaica.

In either case, as the voyage insured ceases to exist directly the purpose of prosecuting it is finally abandoned, any loss which may accrue afterwards does not take place in the course of prosecuting the voyage described in the policy; that is, not under those conditions on which the underwriter agreed to be responsible: the assured, therefore, ceased to be protected by the policy from that time (*g*). Even though, in the case supposed, the loss may take place while the ship is still sailing on the common course which leads indifferently either to the original *terminus ad quem* (Cadiz), or the substituted port of destination (Jamaica), yet the underwriter is equally freed from liability, for the voyage insured is broken up, not by altering its course, but by altering its termini (*h*).

Again, supposing the ship to have been insured (say from London to Jamaica), and the prescribed or customary course

(*g*) 3 Boulay-Paty, Droit Mar. tit. x. s. 9, p. 415.

(*h*) Si avant le départ, la destination était changée, le voyage sera rompu et l'assurance sera nulle, *etiamsi intra limites itineris destinati navis se contineat*. Casaregis, Disc. 67, No. 24; 2 Emerigon, c. iii. s. 11, p. 82; confirmed by Woolridge *v.* Boydell (1778), 1 Dougl. 16; Way *v.* Modigliani (1787), 2 T. R. 30.

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of such voyage to be to sail to the south of St. Domingo, instead of which the ship, without any clause in the policy permitting her so to do, or without any necessity, or justifying excuse, sails to the north of that island: this is a deviation. Here the course actually taken by the ship (*iter navis*) differs from the prescribed course of the voyage insured (*iter viaggii*); the risk run is different from that which the underwriter agreed to take upon himself; and he is, therefore, liable for no loss that takes place after the ship has passed the dividing point at which the track to Jamaica by the south of St. Domingo branches off from that by the north (*i*).

Description of the voyage insured in the policy.

372. The voyage insured must be accurately described in a voyage policy; that is, the local limits of the risk, the *terminus a quo,* or port where the voyage is to commence, and the *terminus ad quem*, or port where it is to conclude, must be each of them specified in the policy, which will be vitiated by any material failure in this respect (*k*). Thus, if the *terminus ad quem* or port of ultimate destination be left in blank, even though this were done for the purpose of deceiving the enemy, and private instructions were given to the captain as to the port for which the ship was really destined, the policy is nevertheless void (*l*).

How the limits of the termini must be ascertained.

Where there is any doubt as to the precise mercantile limits of any place named in the policy, as one of the termini of the voyage, such doubt, as we have already seen, must be cleared up by the evidence of mercantile men (*m*).

(*i*) The whole subject of deviation and abandonment of voyage will be considered more at length in the next chapter; meanwhile the attention of the student may be directed to the thirteenth chapter of Emerigon's great work, an admirably arranged magazine of legal learning and accurate thought. Boulay-Paty, in his Cours de Droit Mar. vol. iii. tit. x. s. 9, has done little more than copy his distinguished predecessor.

(*k*) A terminus may, however, be described in general terms, as "at and from her port of loading" within a specified area, or "to any port in the Baltic," as in Uhde *v.* Walters (1811), 3 Camp. 16.

(*l*) Stamp Act, 1891, s. 93; Molloy, book ii. c. 7, s. 14, cited 1 Marshall on Ins. 328.

(*m*) *Ante*, Chap. III., on the construction of the policy.

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Thus, such evidence has been admitted to prove that the Gulf of Finland is, in the mercantile world, considered to be within the Baltic (*n*), and that Mauritius, although regarded by geographers as belonging to Africa, yet, in the common acceptation of mercantile men, is to be considered one of the East Indian Islands (*o*).

The proper course of the ship need not be described.

373. This description of the voyage insured by its termini is all that is necessary in the policy; it is not requisite, and in practice is never attempted to describe the track which the ship ought to take, for this, being fixed by general mercantile usage, is considered to be familiar to all mercantile men, and is as binding upon the parties to the policy as though it were inserted therein. The termini of the voyage insured must, however, be so clearly specified in the policy, that by means thereof, aided by a knowledge of the course of navigation prescribed by mercantile usage, both parties may know clearly when the subject of insurance will be within the protection of the policy.

Leave to touch at any place between the termini must be specially given.

Moreover, if it be desired that the ship should have the power of putting into any intermediate ports or places, the permission to do so must be clearly expressed in the policy by a clause in which the ports where, and the purposes for which, it is desired that the ship should have this power, must be accurately set forth. Of these clauses and their construction we shall treat at large elsewhere, and will here notice merely the more ordinary modes of describing the termini of the voyage insured.

Distinction between insuring "from" and "at and from" the *terminus a quo.*

374. As appears from the common printed form of policy, the voyage insured is in this country generally made to commence, not simply "from," but "at and from" the *terminus a quo*. The reason for this is, that, under an insurance simply from the *terminus a quo*, the voyage insured, and consequently the risk, does not commence until the ship

(*n*) Uhde *v.* Walters (1811), 3 Camp. 16.

(*o*) Robertson *v.* Clarke (1824), 1 Bing. 445. See note at the end of the report, p. 451, *ibid.*

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actually sails on her voyage from that port; whereas, under the mode of insurance commonly adopted by virtue of the word "at" the ship is protected during the whole time that she is in the harbour of the *terminus a quo* preparing for the voyage insured (*p*).

Insurances for a round voyage.

375. Ships are very frequently insured in one policy and at one fixed premium for the round voyage out and home. In such cases the form generally adopted is to insure "at and from" the home port of loading "to" the out port of discharge, "and at and from" such out port (naming it), or "and at and from thence," back again to the home port or any other port of discharge which the parties may agree to name.

The voyage insured one and entire.

When the ship is thus insured for a voyage out and home, although she makes two separate passages (*itinera*), *i.e.*, from the home to the out port and then back again, yet the voyage insured (*viaggium*) is one and indivisible, and the underwriter is responsible for any loss that may happen in the whole course of its duration. The voyage insured is one, though the passages made by the ship are several.

This principle, which is incontestably established in the law of marine insurance, is thus expressed by Casaregis: *Falsum est omnino in casu nostro quod itus et reditus considerari debent pro diversis viagiis, sed pro unicâ tantum navigatione vel viaggio. Quia viaggium vel navigatio, cum sit nomen juris ac universale, potest complecti plura itinera* (*q*).

However complicated the voyage of the ship may be rendered by liberty given to touch and stay at intermediate ports, or by being broken up into a variety of successive stages, yet the voyage insured, if comprised between two specified termini and insured for one entire premium, is one

(*p*) Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 545; Forbes *v.* Wilson (1800), 1 Marshall, Ins. 148; 1 Park, 472.

(*q*) Disc. 67, No. 28, cited 2 Emerigon, c. xiii. s. 3, p. 52. For an illustration of this in our own jurisprudence, see Bermon *v.* Woodbridge (1781), 2 Dougl. 781.

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and indivisible (*r*). Thus, where a ship was insured "at and from" Honfleur to the Coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back again to Honfleur, at a premium of 11 per cent., Lord Mansfield and the Court of King's Bench determined, on great consideration, that as the premium here was entire and indivisible, so it was one voyage and one entire risk (*s*).

(*r*) 2 Emerigon, c. xiii. s. 3, p. 52.

(*s*) Bermon *v.* Woodbridge (1781), 2 Dougl. 781.

CHAPTER XV.

DEVIATION AND CHANGE OF RISK (*a*).

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Of the general doctrine of deviation.

376. In almost all voyages, as we have already seen, experience and usage have prescribed a certain course of navigation, as the safest, directest, and most expeditious mode of proceeding from one of the termini to the other. The course thus prescribed is the lawful course of the voyage insured: and, being a matter of general mercantile notoriety, is presumed to have been contemplated by the parties to the policy at the time of entering into their contract, and is, therefore, considered as much to form part of the policy, as though it were in express terms set forth therein.

An implied condition of the policy that there shall be no deviation.

In every contract of insurance by a voyage policy, the meaning of the parties is, in law, taken to be that the assured shall enjoy the protection of the policy, only as long as he strictly pursues this regular course of the voyage insured, and carries it on to its termination with all safe, convenient, and practicable expedition (*b*). It is only upon this condition,

(*a*) The subject of this chapter affects voyage policies only. In a case on a fire policy on a ship while in a dock, it was suggested by Blackburn, J., that a departure from the prescribed locality would only suspend the risk until the ship returned to the locality—not terminate it, as in the case of a voyage policy. Pearson *v.* Commercial Union Ass. Co., in the Ex. Ch. (1873), L. R. 8 C. P. 548, 549; *S. C.*, in the House of Lords (1876), 1 App. Cas. 498.

(*b*) 3 Kent, Com. 312.

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never expressed, but universally implied, that the underwriter agrees to indemnify the assured; any failure, therefore, to comply with it, alters the nature of the risk which the underwriter has assumed, and frees him from liability for subsequent loss (*c*). This tacit understanding not to depart from the lawful course of the voyage insured is technically called an implied condition not to deviate (*d*).

Implied condition that there shall be no delay.

This implied condition extends as well to the time in which the voyage insured ought to be completed, as to the track or course of navigation by which it ought to be pursued. The understanding implied in the contract between the parties is not only that the ship, in sailing between the termini of the voyage insured, shall follow the course which custom has prescribed; but also that she shall commence and complete the voyage with that reasonable expedition which the underwriter has a right to expect (*e*).

Mar. Ins. Act, s. 42.

The law on this subject is thus stated in sects. 42, 46, 47 and 48 of the Marine Insurance Act, 1906:—

Delay in attachment of risk.

> Sect. 42.—(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.
>
> (2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition (*f*).

(*c*) 2 Emerigon, c. xiii. s. 16, p. 98. For the effect of a deviation on a fire policy on a ship, see n. (*a*), *ante*.

(*d*) Cf. 2 Emerigon, c. xiii. s. 15, p. 94; 2 Benecke, System des Assecuranz c. viii. s. 2, p. 234; 3 Kent, Com. 312. The language of Emerigon is marked with all his usual terseness and perspicuity. "Le navire change de route lorsqu', au lieu de suivre la voie usitée, il en prend une différente, sans perdre toutefois de vue l'endroit de sa destination"; *loc. cit.* Phillips defines deviation in more comprehensive terms, as "the enhancing or varying from the risks insured against." 1 Phillips, s. 977.

(*e*) 3 Kent, Com. 315.

(*f*) As to delay in the commencement of the risk, see *post*, §§ 479, 483.

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Sect. 46. Deviation.

Sect. 46.—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

Sect. 47. Order of ports of discharge.

Sect. 47.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation (*g*).

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation (*h*).

Sect. 48. Delay in voyage.

Sect. 48. In the case of a voyage policy, the adventure must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable (*i*).

(*g*) See *post*, §§ 394, 395.

(*h*) See *post*, § 393.

(*i*) Hitherto the word "deviation" has in legal language been used to include delay. See Hartley *v.* Buggin (1781), 2 Park, Ins. 652; 3 Dougl. 39; and Company of African Merchants *v.* British and Foreign Mar. Ins. Co. (1873), L. R. 8 Ex. 154, where it was held that delay was covered by a plea of deviation. See also Hyderabad (Deccan) Co. *v.* Willoughby, *infra;* Thames & Mersey Mar. Ins. Co. *v.* Van Laun, [1917] 2 K. B. 48, note, followed in Hood *v.* West End Motor Car Packing Co., [1917] 2 K. B. 38 (C. A.). As the word "deviation" in its proper sense implies the idea of space or locality, it is an unhappy

Sect. 376. Deviation clause.

A clause by which the underwriter agrees to hold the assured covered in case of deviation, or of change of voyage, at an extra premium, is now commonly inserted in policies (*k*), and is one of the Institute Clauses (*l*). Such a clause, though it provides that notice must be given of a deviation, can be invoked after a loss (*m*); and where the clause stipulated that due notice should be given on receipt of advice of a deviation, and the assured, knowing that his ship had been lost, only gave notice many months later, Hamilton, J., thought that as nothing could have been done on receipt of the notice, it was given sufficiently early (*n*). Even when the clause does not expressly require notice to be given, it has been held by the House of Lords that it is an implied term of the contract that notice shall be given within a reasonable time after the assured has been advised of the deviation (*o*).

Sect. 31 (2) of the Marine Insurance Act, 1906, provides that—

> Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

use of the term to make it cover delay, which refers to time; and there is no need for the fiction that an unjustifiable delay amounts to a deviation. In the Mar. Ins. Act, 1906, deviation is not defined as including delay.

(*k*) See Hyderabad (Deccan) Co. *v.* Willoughby, [1899] 2 Q. B. 530; Simon, Israel & Co. *v.* Sedgwick, [1893] 1 Q. B. 303, *post*, § 380, n. (*d*), § 387; Maritime Ins. Co. *v.* Stearns, [1901] 2 K. B. 912. It is apprehended, notwithstanding that in the Mar. Ins. Act of 1906 the term "deviation" does not cover delay, that the term ought in the deviation clause still to be construed, as in Hyderabad (Deccan) Co. *v.* Willoughby, and in Thames & Mersey Mar. Ins. Co. *v.* Van Laun, [1917] 2 K. B. 48, note, to cover delay, in accordance with its well-established legal meaning. See note (*i*), *supra*.

(*l*) See Institute Voyage Clauses, Appendix B.

(*m*) Greenock SS. Co. *v.* Maritime Ins. Co., [1903] 1 K. B. 367, 374; Mentz, Decker & Co. *v.* Maritime Ins. Co., [1910] 1 K. B. 132; 15 Com. Cas. 17.

(*n*) Mentz, Decker & Co. *v.* Maritime Ins. Co., *supra*. *Sed quære:* see Thames & Mersey Mar. Ins. Co. *v.* Van Laun, *infra*.

(*o*) Thames & Mersey Mar. Ins. Co. *v.* Van Laun, [1917] 2 K. B. 48, note. The House of Lords held that a notice given fourteen days after receipt of information was not given within a reasonable time. See also Hood *v.* West End Motor Car, &c. Co., [1917] 2 K. B. 38.

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The additional premium ought to be such as it would have been reasonable to charge at the time of the deviation or change of voyage, if the parties had then been aware of it (*p*).

Not necessary that risk should be increased.

377. It is not necessary to prove that the risk has been enhanced by the delay, or deviation. The underwriter only undertakes to indemnify the assured upon the implied condition, that the risk shall remain precisely the same, as it appears to be on the face of the policy, as interpreted by usage. Directly, by the act of the assured or his agents, this risk is in any degree varied, even though it be not increased, the underwriter's liability ceases by the breach of the condition on which alone he engaged to be liable: it is on this ground that every voluntary and unnecessitated departure from the prescribed course of the voyage, by which the risk is varied, has been held to be a deviation, whether the risk be thereby increased or not (*q*).

The loss need not be connected with the deviation.

On the same principle it was held not to be necessary, in order to discharge the underwriter, that the subsequent loss should be shown to be in any, even the remotest, degree connected with the prior deviation; the ship after the deviation may have returned in perfect safety to the direct course of the voyage, without having sustained the slightest injury in consequence of her departure from it; and yet on the ground that the risk incurred was thereby varied from the risk insured, the underwriter was held to be discharged from his liability for any loss subsequent to the deviation (*r*).

Deviation does not avoid the policy *ab initio*.

378. Deviation does not, however, like unseaworthiness, discharge the underwriter from liability on the policy, *ab initio*; he still remains liable for all loss incurred prior to the

(*p*) See Greenock SS. Co. *v.* Maritime Ins. Co., [1903] 1 K. B. at p. 375; Mentz, Decker & Co. *v.* Maritime Ins. Co., [1910] 1 K. B. at p. 135.

(*q*) Hartley *v.* Buggin (1781), 3 Dougl. 39, Lord Mansfield's judgment.

(*r*) Elliot *v.* Wilson (1776), 4 Br. Pr. Cas. 470; Davis *v.* Garrett (1830), 6 Bing. 716. See the principle expounded by Lord Campbell, C. J., in Thompson *v.* Hopper (1856), 6 E. & B. 948; 26 L. J. Q. B. 22.

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deviation. The reason is, that the implied condition of seaworthiness relates to the state of the ship at the commencement of the risk, and is a condition precedent to the underwriter's liability on the policy; the implied condition not to deviate relates to the conduct of the ship in the course of the voyage, and cannot by relation be carried back, so as to exempt the underwriter from liabilities incurred prior to its being broken (*s*).

Intention to deviate does not discharge the underwriter.

There must, as we have already seen, be an actual deviation, in order to discharge the underwriter; a mere intention to deviate, never executed, is not sufficient (*t*).

The deviation must be voluntary.

Moreover, the departure from the usual course of the voyage must be voluntary, in order to make it a deviation (*u*); but it will be considered voluntary if it take place through the gross ignorance of the captain (*x*).

Notice to underwriter of intended deviation.

379. As the description of the voyage by its termini implies the condition that the regular course of the voyage will be pursued, it seems to follow that notice to the underwriter of an intention to depart from the usual course (no liberty to do so being given by the policy) will not prevent the underwriter from maintaining that such departure is a deviation from the voyage insured (*y*).

No implied waiver of a prior deviation.

It has even been held that if the underwriters insure a ship for a voyage, after she has sailed on it, and after notice that

(*s*) See Green *v.* Young (1702), 2 Salk. 444; Hare *v.* Travis (1827), 7 B. & Cr. 14.

(*t*) Mar. Ins. Act, 1906, s. 46 (3), *supra*, § 376; Kewley *v.* Ryan (1794), 2 H. Bl. 343; Thellusson *v.* Fergusson (1780), 1 Dougl. 361.

(*u*) Mar. Ins. Act, 1906, s. 49 (1) (b), *infra*, §§ 424a, 425.

(*x*) Phyn *v.* Royal Exch. Ass. Co. (1798), 7 T. R. 505.

(*y*) It has been held in the Court of Appeal that under a bill of lading contract it is a deviation to proceed to a port out of the regular course of the voyage, though notice of an intention to do so was given to the shipper of goods at the time when the bill of lading was given. Leduc *v.* Ward (1888), 20 Q. B. D. 475. Phillips considers that the underwriter ought not to be allowed to set up the defence of deviation, on the ground that it would be a palpable fraud on his part to subscribe and receive the premium, intending at the same time to avoid payment of a loss by alleging a deviation represented to be intended. 1 Phillips, s. 1041.

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Distinction between a deviation and abandonment of voyage.

† 380. The definition of what constitutes deviation requires that it should be distinguished from what is called abandonment or change of voyage. The great distinction between a deviation and a change or abandonment of voyage is, that in the former the original voyage, as described in the policy, is not given up or lost sight of, while in the latter it is.

† "A deviation," says Chancellor Kent, "is not a change of the voyage, but of the proper and usual course of performing it. The voyage insured is never lost sight of in cases of deviation, actual or intended. If, however, the original place of destination be abandoned, in order to get to another port of discharge, the voyage itself becomes changed, because one of the termini of the voyage is changed. The identity of the voyage is gone, and a new and distinct voyage is substituted" (*a*).

Provisions of Mar. Ins. Act as to abandonment of voyage.

The results of the abandonment of the insured voyage are thus stated in sects. 43, 44 and 45 of the Marine Insurance Act, 1906:—

Alteration of port of departure.

> Sect. 43. Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

(*z*) Redman *v.* Loudon (1814), 3 Camp. 503; *S. C.*, 5 Taunt. 462; 1 Marshall, R. 136. The contrary has been ruled in the United States. Coles *v.* Marine Ins. Co. (1812), 3 Wash. C. C. R. 159. Phillips supports the American decision. See 1 Phillips, s. 1041. Maclachlan agrees with the English decision, but seems to suggest that the policy might be rectified. Arnould, 6th ed. vol. i. p. 452. As to rectification, see *ante*, § 41.

(*a*) In New York Firem. Ins. Co. *v.* Lawrence (1816), 14 Johnson's R. 46, and 3 Kent, Com. 317. The editors submitted, in the seventh edition of this work, that even though the intention of ultimately proceeding to the *terminus ad quem* of the voyage be not given up, the departure from the usual course may be so great that the voyage is really different from that described in the policy. This seems to be the view of Parsons (Ins. vol. ii. p. 41), of Phillips (vol. i. s. 992), and of Buller, J., in Way *v.* Modigliani (1787), 2 T. R. 30, 32, and perhaps of Arnould himself. See *post*, § 382, note (*n*). Sect. 45 of the Mar. Ins. Act, 1906, however, seems to make the change of destination the only test of a change of voyage.

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Sailing for different destination.

> Sect. 44. Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach (*b*).

Change of voyage.

> Sect. 45.—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.
>
> (2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

Definition of a change of voyage.

As we have already pointed out (*c*), the expressions "change" and "abandonment" of voyage have commonly been used indifferently when, either before or after the commencement of the risk, the assured abandons all thought of proceeding to the port of destination originally prescribed by the policy. In the Marine Insurance Act, 1906, however, the term "change of voyage" is only used to denote an abandonment of the voyage after the risk has attached, and it is now, therefore, advisable to use it in this restricted sense. For this restricted use there was some authority before the Act (*d*).

(*b*) It is submitted that in the case of a policy "at and from" a place, sect. 44 must be read together with sect. 45, *i.e.*, if the voyage was abandoned after the time when, according to ordinary principles, the risk has commenced "at" the *terminus a quo*, the case is one of change of voyage. Consequently the underwriter is liable for any loss which may have occurred "at" the *terminus a quo* before the voyage was changed, and the assured is not entitled to a return of premium, as he would be if the case were governed by sect. 44.

(*c*) *Ante*, § 370, note (*e*).

(*d*) See Simon, Israel & Co. *v.* Sedgwick (C. A.), [1893] 1 Q. B. 303, in which case a clause holding the assured covered at an extra premium in case of "change of voyage," was held to be inoperative where the ship sailed for a *terminus ad quem* other than that mentioned in the policy. So also, in Maritime Ins. Co. *v.* Stearns, [1901] 2 K. B. 912, Mathew, J., held that "change of voyage" in the deviation clause did not cover delay in the attachment of the risk.

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There is, however, no necessity to limit the use of the term "abandonment of the voyage," which may with propriety be employed, whether the voyage was given up before the risk could attach or after its attachment.

Effect of change or abandonment of voyage.

The effect of an abandonment of the voyage is to discharge the underwriter from all liability on the policy from the moment the purpose of so abandoning the voyage is definitely formed (*e*). Hence, if the purpose be fixed before the commencement of the risk, the policy is void *ab initio*, and the risk never attaches; if it be not formed till after the risk attaches, the underwriter is discharged from all liability for losses which may accrue subsequently to its having been formed, although such loss may take place while the ship is still on the track common both to the voyage insured and to that which is substituted for it (*f*).

Definition of an intention to deviate.

An intention to deviate, on the other hand, may be defined to be a purpose to depart from the true course of the voyage without giving up the design of ultimately proceeding to the *terminus ad quem;* however decisively such an intention may be formed, yet the underwriter remains liable for all loss incurred prior to its being actually carried into effect; *i.e.*, as long as the vessel is on the direct course of the voyage insured, and before she has reached the dividing point (*g*).

(*e*) So Arnould, 2nd ed. vol. i. p. 397. The Marine Insurance Act, 1906, s. 45 (2), uses the word "manifested."

(*f*) See 2 Emerigon, c. xiii. ss. 11 and 14, pp. 82, 92. Both the sections here referred to must be consulted in order to discover that the French law is identical with ours on the present subject. In the former of these sections the learned author discusses what he calls "*le voyage rompu avant le départ;*" in the second "*le voyage changé.*" See also 2 Benecke, System des Assecuranz, 314—325. In the United States the Court of Errors, in a case of N. Y. Firemen's Ins. Co. *v.* Lawrence (1816), 14 Johns. 46, reversing the decision below, held that the voyage was changed from the moment the master had determined upon a new destination, although he had not entered upon the altered route when his ship was captured. 1 Phillips, s. 966, where the author offers reasons against the decision.

(*g*) See Woolridge *v.* Boydell (1778), 1 Dougl. 16 (*a*); Thellusson *v.* Fergusson (1780), 1 Dougl. 361; Kewley *v.* Ryan (1794), 2 H. Bl. 343.

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Cases illustrating difference between abandonment of voyage and intention to deviate. Woolridge *v.* Boydell.

381. The following case well illustrates the difference between an abandonment of the voyage and an intention to deviate:—A ship, insured "from Maryland to Cadiz," cleared out for Falmouth, in this country, gave bonds to land her cargo in Great Britain, and sailed with the intention of making Falmouth her port of destination: she was captured while on the common course both to Falmouth and Cadiz. It was contended that this was a mere case of intended deviation. The Court, however, said that it was a change of voyage; that on which the vessel sailed was different from the voyage insured, and they accordingly held the underwriter not to be liable for the loss, though it had taken place before the ship passed the dividing point (*h*). Lord Mansfield thus distinguished the case from that of an intended deviation:—"In all cases of that sort the *terminus a quo* and *ad quem* are certain and the same; but in the present case the *terminus ad quem* has been altered, for there was no intention of going into Cadiz at all."

Cases of intended deviation.

On the other hand, the principle that, if the *terminus ad quem* be not abandoned, a mere intention to deviate, not carried into effect, still leaves the underwriter liable for all loss that takes place before the ship has passed the dividing point, is illustrated by the following cases (*i*):—

Thellusson *v.* Fergusson.

The master of a vessel insured "from Guadaloupe to Havre" had, in pursuance of his instructions, formed the intention of sailing first to Brest, as the safest way, in time of war, of getting to Havre, which latter place still continued the port of the ship's ultimate destination; this was held to be a mere intention to deviate, leaving the underwriter liable for the loss of the ship before she had reached the dividing point at which the course to Brest diverges from that to Havre (*j*).

(*h*) Woolridge *v.* Boydell (1778), 1 Dougl. 16 (*a*).

(*i*) Foster *v.* Wilmer (1746), 2 Str. 1249; Carter *v.* Royal Exch. Ass. Co., cited *ibid.;* Thellusson *v.* Fergusson (1780), 1 Dougl. 361; Kewley *v.* Ryan (1794), 2 H. Bl. 343; Heselton *v.* Allnutt (1813), 1 M. & S. 46; Hare *v.* Travis (1827), 7 B. & Cr. 15.

(*j*) Thellusson *v.* Fergusson (1780), 1 Dougl. 361. If the master

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Kewley *v.* Ryan.

So, where a vessel insured from "Granada to Liverpool" took out clearances for Cork, at which place the master was instructed and intended to put in, though bound ultimately for Liverpool, and the ship was lost before reaching the dividing point, the Court held that the voyage continued the same; the design of putting into Cork being only an intention to deviate, which could not discharge the underwriter from the loss (*k*).

Hare *v.* Travis.

Goods were insured from Liverpool to London, but the master had taken in goods for Southampton, and did put in there. The Court held this a deviation which discharged the underwriters from subsequent loss, but not from loss occurring before the ship diverged from the course of her voyage to London in order to go into Southampton (*l*).

A ship driven by stress of weather into a port to which she intended to deviate.

Where a ship sailed with an intention to deviate by putting into an intermediate port, but before she turned off for that purpose was overtaken by a storm and driven into that very port, this was held no deviation, and of no effect on the underwriter's liability (*m*).

Test of distinction between intention to deviate and to abandon the voyage.

382. It is sometimes a matter of very nice discrimination to draw the line between an intention to deviate and an abandonment of the voyage; the test in all cases is whether the *terminus ad quem*, specified in the policy, remains the ultimate place of intended destination; if it does, then the design, though formed before sailing, of putting into any other port, or taking an intermediate voyage, in the way to such ultimate place of destination, does not amount to an abandonment of the voyage (*n*).

acted *bonâ fide* and reasonably for the purpose of avoiding capture, the insurance would have remained in force even after the ship left the direct course to Havre. See *post*, § 432.

(*k*) Kewley *v.* Ryan (1794), 2 H. Bl. 343.

(*l*) Hare *v.* Travis (1827), 7 B. & Cr. 14.

(*m*) Kingston *v.* Phelps (*circa* 1795), cited 7 T. R. 165; so held also in the United States, Hobart *v.* Norton (1829), 8 Pick. Mass. R. 159.

(*n*) Arnould's words were "does not necessarily amount to a change of voyage"; and the word "necessarily" suggests that he did not think the test mentioned in the text under all circumstances conclusive. See, however, the editors' note, *ante*, § 380.

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Heselton *v.* Allnutt.

In one case, where the voyage insured was "from Heligoland to Memel," it appeared that the ship sailed with a preponderating purpose to proceed to Memel, but with orders to go into Gottenburg to learn whether it would be safer to proceed to Memel or to Anhalt; and the ship was afterwards captured in sailing from Heligoland to Gottenburg, while on the direct course both to Anhalt and to Memel. Lord Ellenborough held that there was only an intention to deviate to Gottenburg, and that the contingent purpose of going to Anhalt was not a change of voyage, and consequently that the underwriters were not discharged (*o*). His Lordship considered that, as the original port of destination had not been definitively abandoned, there had, in this case, been "a good inception of the voyage under a fluctuating purpose."

Thames & Mersey Mar. Ins. Co. *v.* Van Laun.

382a. In a case decided shortly before the Marine Insurance Act came into force, the House of Lords seem to have gone beyond the previous authorities in expressing the view that the insured voyage had been abandoned (*p*). The respondents had contracted to deliver a cargo of Australian cattle at a port in Northern China for the use of the German Government, though not by direct agreement with the Government, there being two intermediate contractors. The cattle under the contract were to be shipped in October; but the respondents only shipped them in November. In the bills of lading, Taku was made the port of delivery, and the master was given power, if Taku was unsafe by reason of ice, to land the cattle at any other safe port. The respondents effected two policies of insurance with the appellants on the cattle against mortality during transit. One policy was expressed to be from Australia "to the vessel's port or ports of discharge in China," and gave leave for the ship "to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes." The

(*o*) Heselton *v.* Allnutt (1813), 1 M. & S. 46.

(*p*) Thames & Mersey Mar. Ins. Co. *v.* Van Laun (1905), now reported [1917] 2 K. B. 48 n. The editors' summary of the very complicated facts of the case is based on the policies and a verbatim transcript of Kennedy, J.'s, judgment at the trial.

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other policy was for a voyage from Australia "to China Ports"; it contained a similar license clause and an additional clause which gave liberty "to proceed to and call at any ports or places on this side and beyond the port of destination backwards and forwards for all purposes." On the 16th December, 1900, the vessel arrived at Wei-hai-Wei, where the master heard that Taku was blocked by ice. He was ordered by the assured to wait for further instructions. The German Government had previously intimated that in consequence of the delay in shipment they would not accept the cattle, and fruitless negotiations followed between all the parties concerned. At the same time the assured were also making inquiries as to the possibility of disposing of the cargo by sale afloat at Wei-hai Wei or at Vladivostok. On the 25th December the master, being in want of water, went to Chefoo. Legal proceedings having been taken in Germany, the Court on the 2nd January, 1901, authorized the sale of the cattle without prejudice to the rights of the parties, and on the 3rd the assured telegraphed to the master to proceed to Shanghai. The ship arrived at Woosung on the 6th, and was kept there by the agents of the assured until the 16th, when by the agents' order she was taken up to Shanghai and at once commenced to land the cattle. During all this time there was great mortality among the cattle, and on the 26th, owing to an outbreak of rinderpest, the authorities ordered their discharge to be stopped, and the cattle remaining on board to be thrown into the sea. The action having been brought to recover for the loss of the cattle, Kennedy, J., held that there was a deviation, by reason of the delay at Wei-hai-Wei while the assured were trying to find a way out of the financial complications in which they were involved and were discussing the feasibility of selling the cargo afloat or sending the cargo to Vladivostok or elsewhere. He considered, however, that there was no proof of such a formal or definite intention not to send the cargo to a Chinese port of destination as would amount to an abandonment of the insured voyage. On the ground of delay and other grounds the learned judge gave

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judgment for the defendants (*q*). This decision was reversed by the Court of Appeal (*r*), but was restored by the House of Lords. Lord Halsbury, L. C., said that there was a clear deviation, and that he would be prepared to find as a fact that the voyage was abandoned, and that the real object of keeping the master waiting for orders was to see whether the cattle could not be disposed of to greater advantage than by attempting to deliver them in pursuance of bills of lading. Lord Macnaghten and Lord James concurred in this judgment, and expressly stated that in their opinion the voyage had been abandoned. Lord Robertson also concurred in the Lord Chancellor's judgment. Lord Davey agreed with Kennedy, J., that there had been a deviation, and inclined, though less strongly than the other Law Lords, to the view that the detention of the ship at Wei-hai-Wei amounted to an abandonment of the voyage. "It is often a nice question on the facts," he said, "whether an interruption of the voyage amounts to a deviation only or is a change of voyage. The usual test is whether the ultimate *terminus ad quem* remains the same. In the present case it may be doubted whether the detention of the ship at Wei-hai-Wei and Chefoo, not for any purpose connected with or for the purposes of the voyage insured, but for the reason and under the circumstances disclosed by the evidence, did not amount to an abandonment of that voyage. It may be that Shanghai was a port to which the master might have taken the ship when he found that the port of Taku was ice-bound, but he went there and was, in fact, ordered to go there for a purpose different from that contemplated in the original voyage."

The Lords appear to have been of opinion, though without deciding the case on this ground, that as regards a policy on cargo, the abandonment of the intention to deliver the cargo under the bill of lading contract amounts to a change of voyage, although the assured has not given up the intention

(*q*) There is an epitome of his judgment in the Shipping Gazette, 2nd April, 1903.

(*r*) See Shipping Gazette, 10th Nov., 1903.

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of landing the goods at a port which is covered by the description of the *terminus ad quem* in the policy. For this proposition the Marine Insurance Act, 1906, does not afford any support. Section 45 of the Act, the only section which deals with the point, says that there is a change of voyage where after the commencement of the risk the destination of the ship is voluntarily changed from the destination contemplated by the policy—not the destination contemplated by the contract between the cargo-owner and the shipowner (*s*).

A forced intermediate voyage has no effect. Driscol *v.* Passmore.

383. The forced interposition of an intermediate voyage will not discharge the underwriters if there be no abandonment of the original adventure, but the ship be lost while prosecuting it (*t*).

A ship was insured on a round voyage "from Lisbon to Madeira, from Madeira to Saffi on the coast of Africa, in ballast, and thence back to Lisbon with a cargo of wheat," and an insurance on the freight of the wheat "from Saffi to Lisbon" was effected on a representation that the ship, which was then at Madeira, was about to pursue her voyage to Saffi immediately. Instead, however, of doing this, the captain was forced by his crew, alarmed by reports of Moorish cruisers, to take the ship back from Madeira to Lisbon. On his arrival at Lisbon the charterers insisted on his taking the ship direct from that port to Saffi in ballast, which he accordingly did, loaded a cargo of wheat at Saffi, and was captured while sailing on his homeward passage from Saffi to Lisbon. In an action on the freight policy, the Court were clearly of opinion that there had been no abandonment of the original adventure; and, moreover, that as, when taken, she

(*s*) In Kynance SS. Co. *v.* Young (1911), 16 Com. Cas. 123, Scrutton, J., refused to restrict the duration of the voyage described in the policy by reference to the charter-party. The ship was insured for a voyage to a port or ports of discharge in South America, while the charter-party only provided for a discharge at one port. The shipowner and the charterer afterwards agreed to have the cargo discharged at two ports, and the learned judge held that a loss on the voyage from the first to the second port was covered.

(*t*) See Mar. Ins. Act, 1906, s. 49 (1) (b); *post*, § 424a.

was sailing from Saffi for Lisbon, the voyage actually insured in the freight policy, the underwriters were not discharged (*u*). Sect. 383.

In general an intermediate voyage discharges the underwriter.

384. If, however, the ship, without justifying cause, after accomplishing part of her voyage insured, sails on a distinct intermediate voyage, not allowed by the usage of trade, and neither subordinate to nor connected with the voyage contemplated as the principal object of the contract, she will be considered as having, for the time at least, given up all intention of proceeding to her primary destination, and the underwriter will be discharged from all loss that may take place after she has engaged on such intermediate voyage, although the captain may still intend ultimately to proceed to the original *terminus ad quem* (*v*).

Way *v.* Modigliani.

How strictly this rule is enforced appears from the following case:—A ship, insured "at and from the 20th October, 1783, from any ports in Newfoundland to Falmouth or her port or ports of discharge in England," sailed on the 1st of October from her port in Newfoundland to fish on the Banks, where she continued fishing till the 7th, on which day she sailed from the Banks to England. On the 20th October she was sailing on a course common both to a voyage from the Banks to England and from Newfoundland to England, and on this course she continued until and at the time of the loss for which the action was brought.

Buller, J., held, that as the voyage insured was from Newfoundland to England direct, and that on which the ship sailed was from Newfoundland to the Banks, and then to England, the ship had never sailed on the voyage insured, and the policy had never attached (*x*). Ashhurst, J., held,

(*u*) Driscol *v.* Passmore (1798), 1 B. & P. 200.

(*v*) Bottomley *v.* Bovill (1826), 5 B. & Cr. 210; see also Hamilton *v.* Sheddon (1837), 3 M. & W. 49.

(*x*) Way *v.* Modigliani (1787), 2 T. R. 30; see *ante*, § 380, note (*a*). Phillips and Benecke doubt the decision on the same ground, viz., that the *terminus a quo* of the risk was the 20th of October, before which day the vessel was "on the specified voyage": but was she so? She was on the same *iter*, but not on the same *viaggium*. See Benecke, System des Assecuranz, vol. ii. p. 331; and 1 Phillips, s. 992.

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that either the ship sailed on a different voyage, or there had been a deviation. The grounds on which the remaining judge, Grose, J., decided do not appear clearly in the report.

Evidence of intention to abandon voyage.

385. Whether, in point of fact, the intention to abandon the original destination of the voyage had been definitively adopted at the time of the loss is sometimes a nice question of evidence, and the fact of sailing does not necessarily enter into the determination of it (*y*). The conduct of the assured while the ship is still in port may be such as, in case of a policy "at and from," will alter his relations with the underwriter entirely.

"When a person," says Lord Eldon, "is insured 'at and from' a port, the probable continuance of the ship in that port is in the contemplation of the parties to the contract. If the owners, or persons having authority from them, change their intention, and the ship is delayed in that port for the purpose of altering the voyage and taking in a different cargo, the underwriters run a different risk, if such change of intention is not to affect the contract" (*z*).

Tasker v. Cunningham.

The case alluded to was this:—A British ship, being expected to arrive in Cadiz with a cargo of fish, her owners sent instructions to their agents there to ballast the ship, after she had discharged her cargo, with salt, and procure freight for her, if possible, to Clyde. When the ship arrived, the French army had got possession of the saltpans round Cadiz, so that no salt could be procured. The agents thereupon wrote to the owners that they had resolved, with the concurrence of the captain, to despatch the ship to Liverpool to load with salt for Newfoundland. The owners accordingly insured the ship "at and from Cadiz to her port or ports of discharge in St. George's Channel, including Clyde." Much time having been spent in discharging the fish at Cadiz the

(*y*) For a good illustration of this, see Hall *v.* Brown (1814), 2 Dow, 367, a case which stands too much on its own particular circumstances to be of any value except as an illustration.

(*z*) 1 Bligh, 100.

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agents, thinking that the ship would arrive too late at Newfoundland if sent first to Liverpool for salt, resolved, after consulting with the master, to load the ship with what salt they could procure at Cadiz, and despatch her direct for Newfoundland. They again wrote to the owners of this proposed alteration. About a week after the date of this last letter, the ship, while still in the bay of Cadiz, and before she had entirely discharged the fish, or taken any steps towards commencing the direct voyage from Cadiz to Newfoundland, was taken by the French and burnt where she lay.

Upon this state of facts, the Scotch Court three times decided that the ship, when so destroyed, was still under the protection of the policy; but the House of Lords finally reversed their decision on the ground that a fixed determination had been formed to abandon the voyage insured before the loss took place (*a*).

What is evidence of a definite intention to change the voyage.

Lord Eldon, in the course of his judgment, said: "It appears throughout the correspondence that the captain and the agents had taken upon themselves to direct and alter the destination of the ship with the acquiescence, at least, of the owners. . . . Undoubtedly a mere meditated change does not affect a policy; but circumstances are to be taken as evidence of a determination; and what better evidence can we have than that those who were authorized had determined to change the voyage? In my opinion the voyage was abandoned, and I have the highest authority in Westminster Hall to confirm that opinion" (*b*).

Rule in the United States as to effect of change of voyage.

386. In the United States it was decided by the Supreme Court of New York, and in the Court of Errors, against the opinion of Chancellor Kent, that the assured may recover for any loss which may happen before the determination to change the voyage is manifested by some act whereby the risk insured against is affected and changed; and that consequently, though all intention of proceeding to the *terminus*

(*a*) Tasker *v.* Cunningham (1819), 1 Bligh, 87.

(*b*) *Ibid.* 99, 102.

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ad quem may have been entirely abandoned at the time of loss, yet, if the vessel be lost before she reach the dividing point, this must be regarded as having only the same effect as an intention to deviate, and will not discharge the underwriter from antecedent loss (*c*).

But the English rule seems better founded on principle.

This decision appears entirely irreconcilable with the principle which has been either admitted or acted on in all the English cases, and is affirmed in the Marine Insurance Act, 1906, viz., that the identity of the voyage depends on its termini, and that directly the intention has been deliberately formed of abandoning the *terminus ad quem* of the original voyage, the vessel is sailing on a new voyage, and is out of the protection of the policy (*d*).

Abandonment is not retrospective in effect.

On the other hand, it is clearly implied in the provisions of the Act that the underwriter will be liable for all loss incurred prior to the manifestation of a definitive purpose of abandoning the original voyage, and that it is only where the purpose of changing the voyage has been fixed before the commencement of the risk that it can avoid the policy *ab initio*.

Change of voyage where both sea and land transit.

387. Where a marine policy on goods covered a land transit following a sea voyage, the Court of Appeal has held that to determine whether the policy ever attached, the *terminus ad quem* of the sea voyage only must be taken into consideration. Therefore, where the insurance was on goods from the Mersey to any port in Spain this side of Gibraltar, and thence by inland conveyance to any place in the interior, and the goods destined for Madrid were shipped to a port on the east side of Gibraltar, they held that the risk had never attached (*e*).

(*c*) Lawrence *v.* Ocean Ins. Co. (1814), 11 Johns. 240; N. Y. Firemen's Ins. Co. *v.* Lawrence (1816), 14 Johns. 46; cited 1 Phillips, Ins. s. 966, where the learned writer, who erroneously states that Chancellor Kent's judgment was concurred in by the rest of the Court, dissents from it.

(*d*) See 3 Kent, Com. 317, where the English rule is approved.

(*e*) Simon, Israel & Co. *v.* Sedgwick (C. A.), [1893] 1 Q. B. 303.

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The policy contained a clause, now very common, to the effect that deviation or change of voyage was to be held covered at a premium to be arranged; but the Court held that this stipulation did not apply, as the ship had never sailed on the voyage insured, and the policy, therefore, had never attached (*f*).

What is not change of voyage.

388. The mere fact of taking in goods, and clearing out for a different port to that named in the policy, as the *terminus ad quem*, does not *per se* amount to a change of voyage; for this may have been done with the design of putting into such port in the way to the original terminus, and of ultimately carrying out the original adventure. In this case it would be a mere intention to deviate, and not a change of voyage; and the assured would still be liable for all loss incurred before passing the dividing point (*g*). So, *à fortiori*, it is no change of voyage for a ship insured to two or more named ports of discharge to take in goods and clear out for only one of them (*h*).

Shortening the voyage.

With regard to shortening the voyage, it appears that a ship insured to several successive ports may terminate the voyage at one of the nearer ports without vitiating the policy (*i*); but it is otherwise if, being insured to a single port, she sail with a fixed purpose not to go beyond a nearer port not contemplated in the policy. Thus, Emerigon, after stating it as a general principle that a mere shortening of the voyage will not avoid the policy, adds, "provided that, at the outset, the voyage insured was not abandoned (*rompu*) by a change of destination" (*k*).

(*f*) Simon, Israel & Co. *v.* Sedgwick (C. A.), [1893] 1 Q. B. 303.

(*g*) 2 Emerigon, c. xiii. s. 14, p. 92; Henkle *v.* Royal Exch. Ass. Co. (1749), 1 Ves. Sr. 317; Planché *v.* Fletcher (1779), 1 Dougl. 251; Kewley *v.* Ryan (1794), 2 H. Bl. 343.

(*h*) Marsden *v.* Reid (1803), 3 East, 572.

(*i*) Mar. Ins. Act, 1906, s. 47, *ante*, § 376.

(*k*) See 2 Emerigon, c. xiii. s. 11, Voyage entièrement rompu avant le départ. See also the very lucid commentary of M. Estrangin on Pothier, Appendix, c. v. s. 3, p. 471.

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Middlewood *v.* Blakes.

389. The case of Middlewood *v.* Blakes, though it more properly belongs to the doctrine of concealment, may, in consequence of the discussion to which it has given rise, be conveniently mentioned here. In that case it appeared that usage in respect of the voyage insured (from London to Jamaica) left the captain, on arriving at a certain point, the choice of one of three tracks (one to the north, and two to the south of St. Domingo), all equally leading to the *terminus ad quem*. In the particular case the captain, by orders from his owners (not communicated to the underwriter), took the northernmost track in order to touch at Cape Nicola Mole, a port in that track, but out of the direct course from London to Jamaica; but while still pursuing a direct course to Jamaica, and before having turned off to make Cape Nicola Mole, the ship was lost by capture. On these facts, Lord Kenyon told the jury that in his opinion the underwriter was discharged, "because at the time the ship was captured she was bound to a different place to that to which she was insured" (as she had not abandoned Jamaica as the ultimate *terminus ad quem*, this seems hardly correct), "and with a view to which the captain, under compulsion of his orders, had taken this particular track, and was not left at liberty to exercise his judgment at the dividing point for the benefit of all concerned, as the underwriters had a right to insist on." The jury found for the underwriter, being, as they stated, unanimously of opinion "that the concealment of the intention to go to St. Domingo vitiated the policy." Lord Kenyon, Ashhurst, J., and Grose, J., supported the verdict on the ground of concealment; they thought the circumstance, "that the discretion of the captain had been taken away," ought to have been communicated. Lawrence, J., thought this ground not tenable. Had the ship been lost before reaching the dividing point of the three tracks, he should have held the underwriters bound, on the ground that there would then have been only an intention to deviate; as she was lost after passing that point, he thought them discharged, and on the following ground:—"When the ship

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came to the dividing point she was subjected to a risk, for which the underwriters did not make themselves responsible, for at that moment they were entitled to have the benefit of the captain's judgment, whether he would go to the north or to the south" (*l*).

Cases of deviation irrespective of the clauses giving a liberty to touch and stay.

390. In proceeding to examine more in detail the various decided cases by which the doctrine of deviation has been illustrated in English jurisprudence, we will confine our attention, in the first instance, to those instances of deviation which consist in a local divergence from the direct course of the voyage, and do not specially turn on the construction of the clauses giving a liberty "to touch, stay, or trade."

In the absence of any usage the ship must sail direct.

In the absence of any usage or stipulation to the contrary, the contract is invariably understood to be that the ship should proceed from one terminus of the voyage insured to the other, in a direct course, with all due expedition, and without touching at any interjacent port, or pursuing any intermediate adventure. Anything that she does to the contrary of this without such justification as shall be considered hereafter, or without leave expressly given in the policy, however trifling in extent or duration, is a fatal deviation, although the ship afterwards return to her proper course without having sustained the slightest damage in consequence of having thus departed from it (*m*).

(*l*) Middlewood *v.* Blakes (1797), 7 T. R. 162. For an elaborate discussion of this case, see 2 Duer on Ins. pp. 491—498. Judge Duer considers that the case cannot be put as one of deviation. He says that the majority in the Court of King's Bench placed their decision upon the true ground; but also considers that the case may be put on the ground of change of risk; for "where the master is bound to deviate, the voyage on which he sails is different in its very inception from that which the policy describes and is meant to cover" (p. 497). "I confess," says Arnould, "it appears better, on the whole, to rest the decision where the majority of the Court put it, on the ground of concealment." 2nd ed. vol. i. p. 408, n. Applying the provisions of sect. 46 of the Mar. Ins. Act, 1906, to the facts of the case, there does not seem to have been a deviation at the time of the loss, but only a possible intention to deviate.

(*m*) See Fox *v.* Black (1767), 2 Park, 620; Townson *v.* Guyon (temp. Lord Mansfield), *ibid.*; Clason *v.* Simmonds (1741), cited 6 T. R.

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Effect of usage.

391. Where, however, by the usage of trade it is customary in the course of the voyage insured to stop at interjacent ports, though out of the direct course, it is no deviation to stop there, though leave for that purpose be not expressly reserved; for, upon the principles already developed, such stopping is considered to be a regular part of the voyage insured, and to have been contemplated by the parties to the policy. It takes place in the words of the Marine Insurance Act, 1906, s. 46 (2) (b) (*n*), in the "usual and customary course" of the voyage. But for this purpose the usage must be precise, clear, and established. Thus, when all ships sailing through the Sound had to stop at Elsinore to pay the Sound dues, this was no deviation, though no liberty so to stop was reserved in the policy (*o*).

But a stoppage at the Isle of Man by a ship insured from Liverpool to the West Indies was held not to be justified by proof that ships insured on that voyage had occasionally, but not customarily, stopped there before (*p*). So in the United States, two instances of stopping at an intermediate port, not named in the policy, by other ships engaged in the same trade was held inadequate to prove a usage or justify a departure from the direct course (*q*).

On the same principle, in the East India and Newfoundland trades it was repeatedly held to be no deviation to engage in intermediate voyages, although no liberty was given in the policy so to do (*r*). In fact, where the termini only of the

533; Parr *v.* Anderson (1805), 6 East, 202; 3 Kent, Com. 312. Phillips says (vol. i. s. 989) that the law does not regard such inconsiderable circumstances as "a delay of an hour, or a deviation of a mile." There is much to be said in favour of his rule, but his statement is not borne out by the authorities. Even if the rule "*De minimis*," &c. can be applied in questions of deviation, it must be remembered that a deviation which may be of no importance in the case of a steamer may greatly affect the voyage of a sailing ship. See *post*, § 560.

(*n*) *Ante*, § 376.

(*o*) Cormack *v.* Gladstone (1809), 11 East, 347.

(*p*) Salisbury *v.* Townson, Millar, Ins. 418.

(*q*) Martin *v.* Delaware Ins. Co. (1808), 2 Wash. R. 254; Condy's Marshall, 186, n.

(*r*) As to the East Indian trade, see Salvador *v.* Hopkins (1765), 3

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voyage insured are indicated by the policy, and the parties to the contract have done nothing else towards indicating its course, the sole guide in determining what that course should be is mercantile usage; and nothing can be considered a deviation which only follows that course which usage has sanctioned.

Where the policy expressly excludes or is inconsistent with the usage.

392. Where, however, the policy itself, besides indicating the termini of the voyage, specifically designates the course which the ship shall take in sailing between them, such directions must be followed with the most scrupulous and literal exactness, and the slightest failure to comply with them will amount to a fatal deviation (*s*).

Hence, where liberty is given in the policy to touch at any one specified intermediate port, it will be a deviation to put into any other than that named in the policy, though calling at such port may be sanctioned by usage apart from the policy, and though neither the risk nor premium would have been increased had such port been substituted for that named in the clause. *Expressio unius est exclusio alterius.*

Elliott *v.* Wilson.

It seems to have been usual for vessels sailing from Carron for Hull, in going down the Firth of Forth, to touch at different places for the purpose of taking in and delivering goods, particularly at Burrowstowness, Leith and Morrison's Haven. A merchant desirous of insuring goods on a voyage from Carron to Hull directed his broker to effect an insurance with liberty in the policy "to call as usual" (which would have enabled the ship to touch at all or any of the three places above mentioned); instead of this the broker, contrary to the directions of the merchant, and without his knowledge, insured them from "Carron to Hull, with liberty to call at Leith." The premium was the same as though the general liberty to call as usual had been inserted in the policy.

Burr. 1707; Gregory *v.* Christie (1784), 3 Dougl. 419; 1 Park, 104; 1 Marshall, Ins. 273; Farquharson *v.* Hunter (1785), 1 Park, 105; 1 Marshall, Ins. 274. As to the Newfoundland trade, see Vallance *v.* Dewar (1808), 1 Camp. 503; Ougier *v.* Jennings (1800), *ibid.* 505, n.

(*s*) Mar. Ins. Act, 1906, s. 46 (2) (a), *ante*, § 376.

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The ship on her voyage passed by Leith, but put into Morrison's Haven, and afterwards, without damage, got safe again into the direct course of the voyage from Carron to Hull, and had been proceeding on such course for about a day, when she was overtaken by a storm and wrecked, with a total loss of the cargo.

The Scotch Courts, upon this state of facts, decreed that the underwriters should pay the loss, but the House of Lords reversed their judgment, on the ground that putting into Morrison's Haven, under a policy which contained no liberty so to do, but, on the contrary, gave express permission to put into another named port, was a deviation, discharging the underwriters from all further liability (*t*).

When the ship must take ports in their geographical order.

393. As is stated in sect. 47 (2) of the Marine Insurance Act, 1906—

> Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary (*u*), proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

Clason *v.* Simmonds.

Thus where a ship, insured on a voyage "from London to her ports of discharge within the Straits (of Gibraltar) as high as Messina," sailed on her voyage, with a freight for Marseilles, but with instructions to go also to Genoa, Leghorn and Naples, and on arriving off Marseilles, her first port of discharge in geographical order, was prevented by contrary winds from putting in there, and therefore proceeded first to Genoa and then to Leghorn, from which latter

(*t*) Elliot *v.* Wilson (1776), 4 Brown's P. Cases, 470.

(*u*) The decisions do not help to explain the effect of the words "sufficient cause to the contrary." A reference is probably intended to sect. 49 (1) of the Act, *post*, § 424*a*, in which the causes which excuse a deviation are set out; but then one would expect the same term to be used as in sect. 46 (1), *ante*, § 376, viz., "lawful excuse." Moreover, an express reference does not seem necessary in order to make the provisions of sect. 49 (1) applicable.

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place she was making her way back to Marseilles, when she was captured; a special jury found this sailing back to Marseilles to be a deviation, which determined the policy from the moment of her leaving Leghorn (*x*).

When the policy determines the order of the ports.

394. Again, as is declared in sect. 47 (1) of the Marine Insurance Act, 1906—

> Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but in the absence of any usage or sufficient cause to the contrary (*y*) she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not, there is a deviation.

Beatson *v.* Haworth.

Thus: A ship, insured on a voyage "at and from Fisherow to Gottenburg, and back to Leith and Cockenzie," was on her homeward passage, with goods on board both for Leith and Cockenzie (*z*). Cockenzie lies nearer to Gottenburg than Leith, and is about a mile and a half out of the direct course between the two; there appeared to be no settled course of trade as to the order of calling at the two places on such a voyage as this. The ship put first into Cockenzie, and in coming out was stranded and lost. Upon these facts the Court held that, as the termini of the intended voyage were in terms described in the policy, and as there was no regular and settled course known to all traders different from that so described, the ship was guilty of a deviation by putting

(*x*) Clason *v.* Simmonds (1741), 6 T. R. 533, *in notis*. The ship had also put in at Falmouth to load tin, which was also contended to be a deviation, and so held by the Chief Justice; in fact, it appears very doubtful on what precise ground the case was decided. See 1 Phillips on Ins. s. 1010. Sir Vicary Gibbs puts it on the ground that the assured had fixed upon Genoa for his port of discharge by passing Marseilles and proceeding to Genoa; and that, having done so, the ship was not warranted in returning to a port she had once passed, but was bound to take the remaining ports in the order of their succession. Andrews *v.* Mellish (in error) (1814), 5 Taunt. 502.

(*y*) See note (*u*), *supra*, § 393.

(*z*) See Lord Ellenborough's remarks on this case in Marsden *v.* Reid (1803), 3 East, 577.

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first into Cockenzie, and the underwriter was discharged from his liability (*a*).

A ship insured to several ports need not visit them all.

It is not, however, necessary that a ship thus insured to several successive named ports of discharge, should sail to all the ports so named. She may omit any or only sail to one; the only limitation is, that if she visits more than one, she must take them in their due order. Thus, where a ship was insured "from Liverpool to Palermo, Messina and Naples," Lord Ellenborough held the true construction of the insurance to be that the assured might drop any of the places named, but that if he went to more than one he must take them in the order named in the policy (*b*).

Summary and rule.

Generally speaking, therefore, where there are several ports of discharge, the ship must take them either in the order in which they are named in the policy, or, if not named, then in the geographical order of their distance from the port of departure. If, however, long and uniform usage have established a different order, the geographical order may be disregarded and the other observed. It has been even intimated that the order fixed by usage overrules that specified in the policy (*c*). "This," said Arnould, "appears more doubtful," and sect. 47 (1) of the Marine Insurance Act, 1906, does not make it clear whether it is obligatory or only permissive to observe the order established by usage.

(*a*) Beatson *v.* Haworth (1796), 6 T. R. 531; see also Marsden *v.* Reid (1803), 3 East, 571, 577. Phillips suggests (vol. i. s. 1012) that in such a case, considering the relative position of the ports to each other and to the port of departure, the order in which they are visited should be regarded as indifferent. He considers it absurd that, even where there is no usage, it should in all cases be necessary to follow either the geographical order or the order in the policy. So far as English law is concerned, the controversy is, however, ended by the Mar. Ins. Act, 1906.

(*b*) Marsden *v.* Reid (1803), 3 East, 572. Same rule in the United States. See Kane *v.* Columbian Ins. Co. (1807), 2 Johnson, R. 264; and see other cases illustrating the same point, cited 1 Phillips, Ins. s. 1010.

(*c*) Beatson *v.* Haworth (1796), 6 T. R. 531, and Gairdner *v.* Senhouse (1810), 3 Taunt. 16, are cited by Arnould, but no judicial opinion on the point can be extracted from them.

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395. In all cases the ports must be visited in the direct course of the voyage insured; and, generally speaking, it will be a deviation, after having once touched at one of such ports, to revisit it or to sail backwards and forwards from one to the other, unless express liberty for that purpose be inserted in the policy (*d*), or unless it appear from the terms of the policy that the purposes of the voyage as described necessarily involve such a liberty (*e*).

To revisit is to deviate, unless justified by the policy.

Thus, in the United States a ship insured on a West India voyage to any one of the islands, "and a market," was held to be justified in seeking a market at the different islands, without regard to their geographical order, and even in touching at the same port once and again, if done with the *bonâ fide* intention of finding a market (*f*).

Policy from a named terminus, and "other port or ports" not named.

396. Where a ship is insured "at and from" some one named port of departure, and "other port or ports," to a fixed terminus, it depends entirely on the language of the clause and the true construction of the policy, whether it be a deviation for the ship to depart from the direct course between the first-named port of departure and the *terminus ad quem* for a purpose connected with the main object of the voyage insured.

Bragg *v.* Anderson.

Thus, a ship insured on a homeward voyage "at and from Martinique and all or any of the other West India Islands to London," sailed to take in her cargo at St. Domingo, a place very wide of the direct course of a voyage from Martinique to London; this was yet held to be no deviation: "For in order to make it so," said Sir J. Mansfield, "you must read the insurance to be, not at and from Martinique and all or any other of the West India Islands, but 'at and from Martinique and such of the West India Islands as lie between Martinique and London'" (*g*).

(*d*) Gairdner *v.* Senhouse, *supra*.

(*e*) Mellish *v.* Andrews (1813), 2 M. & S. 27; *S. C.* (1814), 5 Taunt. 496, in error.

(*f*) Deblois *v.* Ocean Ins. Co. (1835), 16 Pick. R. 303. See 1 Phillips, Ins. s. 1014.

(*g*) Bragg *v.* Anderson (1812), 4 Taunt. 229.

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Lambert v. Liddard.

So it was held no deviation for a ship insured "at and from Pernambuco or any other port or ports in the Brazils, to London," after touching at Pernambuco, and finding no cargo there, to sail to St. Salvador, another port in the Brazils, in order to obtain one, although St. Salvador lies 500 miles to the south of Pernambuco, and therefore in a direction opposite to the course from Pernambuco to London. Gibbs, C. J., said that if the insurance had been at and from Pernambuco or any other port in the Brazils, there might have been something in the objection, as it might then have been contended that, by electing Pernambuco as the port of loading, the assured could not go to another without a deviation; but that the alternative being, any other port or ports, there must have been an intention of sending her to more than one (*h*).

Ashley v. Pratt.

A ship was insured "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom." The ship sailed from Liverpool for the coast of China, discharged part of her outward cargo at the Chinese port of Tonghoo, and proceeded to Manilla, where she discharged the residue. At Manilla, finding freights low, the captain took on board only a tenth part of a cargo and sailed back for Tonghoo with the intention of there completing his homeward cargo and sailing thence direct for England, but on this passage the ship was lost. Tonghoo is quite out of the direct course from Manilla to England. The Court of Exchequer, however, held this to be no deviation, for the words "from thence" in the policy meant not "from Manilla" only, but applied to "ports or places in China and Manilla, all or any" (*i*).

Port and ports—meaning of.

397. It may become a question, under a policy to or from "port A. and a port or ports in B.," of considerable nicety,

(*h*) Lambert *v.* Liddard (1814), 5 Taunt. 480; 1 Marshall, R. 149.

(*i*) Ashley *v.* Pratt (1847), 16 M. & W. 471; affirmed in error, 1 Exch. 257; *S. C.*, 17 L. J. Exch. 135.

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whether a particular place be a port within the meaning of the policy, so as to excuse what would otherwise be a deviation. The cases show that usage may justify the application of this term to an anchorage in an open roadstead, though it may be an inconvenient place for loading or discharging cargo (*k*).

Harrower v. Hutchinson.

In one case where the alleged port was a roadstead or bay formed by headlands, and open to the east and north-east, without any other artificial formation than a jetty or pier attached to a slaughter-house, and vessels loading there were obliged to lie off in the roadstead a quarter of a mile from the jetty, and to load by means of craft,—this place although frequented only by coasters trading to Buenos Ayres, and not at all by vessels loading for Europe, and although it was unknown to underwriters as a place of loading, was nevertheless held by a majority in the Exchequer Chamber to be a port within the meaning of the policy (*l*).

As in this last case the vessel was obliged to sail back to Buenos Ayres to complete her cargo and obtain her clearances, it was argued that such sailing back was evidently not contemplated by a policy "from a port or ports of loading to a port or ports of call and discharge in the United Kingdom," and consequently was a deviation; but the Court of Queen's Bench held that the language of the policy permitted the ship to go from port to port and back to the same port until she had completed her cargo (*m*).

Everything, in these cases, depends upon the meaning of the parties, as ascertainable, first from the terms of the policy, and, if these leave the matter still doubtful, then upon extrinsic evidence.

(*k*) See *post*, § 485.

(*l*) Harrower *v.* Hutchinson (1870), L. R. 5 Q. B. 584; affirming on this point the decision of the Court of Queen's Bench (1869), L. R. 4 Q. B. 523.

(*m*) In the Exchequer Chamber, Cleasby, B., held that the policy did not cover a voyage back to Buenos Ayres. The other judges gave no decision on this point, the Court holding unanimously that the policy was void for concealment.

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Brown v. Tayleur.

Thus, where a ship was insured "at and from her port of loading in North America to Liverpool," it was held a deviation for the ship, after having taken in part of her loading at a place situated in one creek of a bay, to go afterwards to another place, lying eight miles off, on another creek of the same bay, to take in the rest; for the terms of the policy clearly showed that the underwriter did not mean to run the risk of loading the ship at two such distant places, and there was no evidence to show that the two places were considered by the mercantile world as forming parts of the same port (*n*). If, indeed, the ship were at a particular quay on a river, as at Liverpool, and merely removed to another quay, a mile or two off, that would not be a deviation, for there the ship would be all the time at one port or place; but it is a deviation if she removes to a different town or different place of habitation, which might itself be a port of loading (*o*).

Deviation in relation to the clauses giving a liberty to touch and stay.

† **398.** We next come to cases of deviation decided on the construction of those special clauses in the policy, by which liberty is given to the ship "to call," or "to touch," or "to touch and stay," or "to touch, stay and trade," either at certain specified ports, or "at all ports whatsoever, for all purposes whatsoever," &c.

Classes under which the cases range themselves.

These cases are generally divisible into two classes.

† 1st. Those in which the question is, whether the ship was justified, under the policy, in originally putting into the port at all; and this question mainly turns upon the two following points, viz.:—(a) Was the port one which, on the true construction of the policy, was within the course of the voyage as contemplated by the parties? (b) If so, was the purpose for which it was visited connected with, and in furtherance of, the main scope and object of the adventure?

† 2ndly. Supposing the ship to have been thus justified in originally visiting the port, as nothing which she does during the period of her lawful stay there, though foreign to the

(*n*) Brown *v.* Tayleur (1835), 4 A. & E. 241.

(*o*) Per Patteson, J., Brown *v.* Tayleur (1835), 4 A. & E. 249.

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purposes of the adventure, and not specifically permitted by the policy, will be held to discharge the underwriter, unless it substantially varies the risk; the only question is, whether the trading, &c. at such port has, in fact, varied the risk originally assumed by the underwriter?

Formerly the exact words of the clauses were chiefly considered.

† **399.** Formerly, it appears to have been supposed that a great deal turned on the exact words of the clauses, without reference to the real scope and purpose of the adventure, as discoverable from the whole language of the policy. Thus, a liberty "to touch" was supposed to have a different meaning from a liberty "to touch and stay"; and a ship, insured under a policy containing only the former clause, was considered to have no power thereby conferred on her of trading in the port at which she had touched, though such trading was obviously contemplated as part of the adventure (*p*).

Present rule.

The Courts, however, conformably to the good sense of the matter, now hold that the liberty conferred by these words must depend upon the real object which the parties had in view when they inserted the clause in the policy.

Urquhart v. Bernard.

Thus, in the case of a ship insured "at and from Madeira to Santos, with liberty to touch at the Cape de Verd Islands," where it appeared from communications made to the underwriters, before effecting the policy, that the parties intended the ship to take in salt at one of the Cape de Verd Islands, she was held entitled to do so under the mere liberty to touch there (*q*).

Metcalfe v. Parry.

So, where a ship was insured from "Antigua to England," with an extensive "liberty to touch" at all or any of the West Indian Islands, Gibbs, C. J., held that as the main object of the voyage plainly appeared to be that the ship should go about from island to island seeking freight, the bare liberty "to touch" included a liberty to stay and take goods, and therefore that the ship's remaining two months

(*p*) Urquhart *v.* Bernard (1809), 1 Taunt. 450, 455, where Sir J. Mansfield said he could not find the distinction anywhere defined.

(*q*) Urquhart *v.* Bernard (1809), 1 Taunt. 450.

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In short, wherever it appears to have been clearly contemplated by the parties, or necessary to the purposes of the voyage insured, that the ship should trade where she has liberty merely to touch, her doing so will not be deemed a deviation.

What ports may be visited, and for what purposes.

400. We now revert to our classification of the cases illustrative of these principles of interpretation, and first take those in which the question is whether the ship was originally guilty of a deviation in visiting or staying at any given port.

Present rule.

Whatever may be the language of the clause, or however extensive its terms, it cannot convey a liberty of touching at any port out of that which, on the true construction of the policy, appears to have been the understood course of the voyage, nor of putting into any port within the limits of the voyage for purposes unconnected with the real objects of the adventure (*s*).

The true points of inquiry, then, are—1st. Was the port at which the ship touched a port in the course of the voyage as understood by the parties? 2nd. Was the purpose for which she so touched there *bonâ fide* connected with the main object of the adventure?

In general only ports in the direct course may be visited.

401. In the Marine Insurance Act, 1906, Schedule I., the first point is dealt with in Rule 6 of the Rules for the construction of a policy in the ordinary form in these terms—

> In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

(*r*) Metcalfe *v.* Parry (1814), 4 Camp. 123.

(*s*) This is but another instance under the general rule which restrains the effect of general terms to things *ejusdem generis*, or otherwise to matters of a tenor consistent with the context.

Sect. 401. Unless, therefore, upon the true construction of the policy, it appears manifest that the parties had a different meaning, it may be taken as a general rule that a liberty to touch and stay, though conceived in very extensive terms, can only confer a power of visiting such ports as lie in the usual and direct course between the termini of the voyage insured (*t*). This inference is insurmountably strong if there be anything in the language of the policy expressly favouring such an interpretation.

Lavabre *v* Wilson.

Thus, a ship was insured on an East Indian voyage, "out and home," "with liberty to touch in the outward or homeward-bound voyage at the Isles of France and Bourbon, and at all or any other place or places what or wheresoever"; and with a stipulation "that it should be lawful for the said ship in this voyage to touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope, without being deemed a deviation." Lord Mansfield, in the course of argument, intimated a clear opinion that the general words were, by the expressions "in the outward and homeward-bound voyage," and "in this voyage," qualified and restrained so as to mean "all places whatsoever in the usual course of the voyage to and from the places mentioned in the policy" (*u*).

Hogg *v.* Horner.

Upon the same principle, where a ship was insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever," Lord Kenyon was of opinion that the liberty given by this policy must be confined to ports to the northward of Lisbon, and in the direct course of a voyage thence to England; and he held accordingly that the ship was guilty of deviation in sailing to Faro, a port to the southward of Lisbon, although she sailed

(*t*) In cases on charter-parties it has been held, that a deviation clause, however wide its terms, must be construed with reference to the main object of the contract. See Margetson *v.* Glynn, [1893] A. C. 356; Leduc *v.* Ward (C. A.) (1888), 20 Q. B. D. 475; and Morrison & Co. *v.* Shaw, Savill & Co., [1916] 2 K. B. 783.

(*u*) Lavabre *v.* Wilson (1779), 1 Dougl. 284.

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there to complete her cargo—a purpose connected with the voyage insured (*x*).

Ranken *v.* Reeve.

So, where a ship was insured "at and from Africa to the Canaries, Madeira and Lisbon, with liberty to touch, stay and trade at all ports," &c. "in the voyage," it was held that, after having once moored at anchor for twenty-four hours in a port in Africa, so as to give an inception to the risk, she could not then proceed to the southward, but only northward, towards Europe, the object being only to protect deviations in the direct course of the voyage insured (*y*).

Gairdner *v.* Senhouse.

So, where a ship was insured "at and from London to Trinidad and the Spanish main," with liberty "to call at all or any of the West Indian Islands and Settlements," Sir J. Mansfield expressed a clear and undoubted opinion that this liberty of calling must be confined to places taken in the direct and customary course between the termini of the voyage insured, and therefore could not be held to protect the ship, after having once sailed southward as far as Demerara, in then sailing up northward to Martinique and St. Thomas's, unless, indeed, very satisfactory evidence were given that such was a customary course on such voyages as those insured in this policy (*z*).

The purposes of the voyage may require a wider construction of the clause.

402. Where, however, upon the true construction of the whole policy, it plainly appears that the parties could not have intended to give this limited effect to these clauses, they will be held to confer a power of visiting any ports within the scope of the policy, although they may lie wide of the usual and direct course between the termini of the voyage, and even, under very special circumstances, in a diametrically

(*x*) Hogg *v.* Horner (1797), 2 Park, 626; 1 Marshall, 184; Arnould (2nd ed. vol. i. p. 420) calls this "certainly a strong decision," but it is in accordance with the tenor of modern decisions. In the case of Ashley *v.* Pratt (1847), 16 M. & W. 471; 1 Exch. 257, which he appears to consider as of a contrary effect, it must be remembered that the words of the policy were peculiarly wide, and were construed as giving peculiarly wide powers of deviation.

(*y*) Ranken *v.* Reeve (1814), 2 Park, 627.

(*z*) Gairdner *v.* Senhouse (1810), 3 Taunt. 16.

opposite direction; provided that they be visited for some purpose connected with the prosecution of the adventure contemplated by the policy. Sect. 402.

Bragg *v.* Anderson.

Thus, where a trading ship was insured on a homeward voyage "at and from Martinique, and all or any other of the West Indian Islands, to London," with liberty "in that voyage to touch and stay at any ports or places whatever," it was held to be no deviation under this policy for the ship, after sailing from Martinique, to put in for a cargo at one of the West Indian Isles (St. Domingo), which lay very wide of the direct course of the voyage from Martinique to London. Mansfield, C. J., said, "There is no getting over these words; instead of 'all' you must substitute the words 'some of the West Indian Islands, such as lie between Martinique and London.' That would make quite a new agreement" (*a*).

Metcalfe *v.* Parry.

So, where a ship was insured "at and from Antigua to England, with liberty to touch at all or any of the West Indian Islands, Jamaica included"; and the ship, in order to complete her homeward cargo, put into St. Kitts, which lies wide of the direct course of the voyage from Antigua to England; it was contended that this was a deviation; but Gibbs, C. J., ruled decisively that it was not, for, by including Jamaica, which lies at least 500 miles wide of the direct course of the voyage from Antigua to England, it plainly appeared to be the meaning of the parties that the islands might be touched at without regard to their lying on or off such direct course, and that the ship was to go about, if necessary, from island to island, for the purpose of seeking freight (*b*).

Baltic risks in the time

403. Many instances occurred, during the pressure of

(*a*) Bragg *v.* Anderson (1812), 4 Taunt. 229; see also Lambert *v.* Liddard (1814), 5 Taunt. 480. In the case of Violett *v.* Allnutt (1811), 3 Taunt. 419, the ship put into Penzance, where she had express liberty given her "to touch for any purpose whatever," in order to complete her cargo, and was afterwards lost there while waiting for a wind: the Court were clear this was no deviation.

(*b*) Metcalfe *v.* Parry (1814), 4 Camp. 123. This decision was not questioned. See also Barclay *v.* Stirling (1816), 5 M. & S. 6.

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of Napoleon's Continental system.

Napoleon's Continental system, of a liberal interpretation of such clauses in those adventures generally called "Baltic risks": not because the Courts in such cases were guided by any peculiar principles of interpretation, but because the troubled and shifting nature of our relations with the different ports in the Baltic, under the political circumstances of the time, was such as to render the voyages then insured for those seas more vague in their objects and less definite in their limits.

Rucker v. Allnutt.

Goods were insured "at and from London to any port or ports in the Baltic, backwards and forwards, &c., with leave to touch and stay at any ports or places for all purposes whatever"; and, by another clause, "particularly with leave to wait for information off any ports or places." The ship went into the port of Carlshamn to wait for information; while there an embargo was laid on her, and the goods were seized and confiscated. At the trial Lord Ellenborough intimated an opinion that the words reserving liberty to wait off any port for information abridged the liberty of "touching and staying for all purposes," and the jury accordingly found for the underwriters. On motion for a new trial Lord Ellenborough altered his view of the case, and, with the concurrence of the Court, directed a new trial, principally on the ground that obtaining information as to the political state of the Baltic ports was a necessary purpose intimately connected with the prosecution of such a voyage as that which was insured, in which no fixed ports of discharge were named, and the ship could not venture to proceed to any without first learning whether they were friendly or hostile (*c*).

Mellish v. Andrews.

So, where a ship was insured "at and from London to the ship's discharging port or ports in the Baltic," with liberty "to touch at any port or ports for orders or any other purpose," it was held no deviation for the ship, before she had fixed upon her port of discharge, to call for orders twice at the same port (*d*). In this case, as Lord Ellenborough remarked,

(*c*) Rucker *v.* Allnutt (1812), 15 East, 278.

(*d*) Mellish *v.* Andrews (1813), 2 M. & S. 27. On the former trial of the same case Lord Ellenborough thought this was a deviation, especially as the policy did not contain the words "backwards and forwards" (see Mellish *v.* Andrews (1812), 16 East, 312); but in his judgment in 2 M. & S. he states that the non-introduction of these words could make no difference under the circumstances.

(*e*) 2 M. & S. 34.

(*f*) Andrews *v.* Mellish (in error) (1814), 5 Taunt. 496.

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"the adventure is stated to be a voyage all over the Baltic, the object of the adventure was that the assured should call as often as necessity required, and there is nothing in the nature of the thing which makes calling again at the same port absurd or contrary to what may be presumed to have been the intention of the parties" (*e*). When this case came before the Court of Error, the judgment of Lord Ellenborough was affirmed; but Sir Vicary Gibbs, who delivered the judgment in error, laid great stress on the point that no port of discharge had been fixed on when the ship put in a second time for orders; had this been otherwise, he thought she would then have been obliged to take the ports in their order of succession; as it was, he was of opinion that, under the terms of the policy, "the assured had a right to go backwards and forwards from port to port for orders as to his port of discharge until his port of discharge was fixed" (*f*).

Other case of extensive liberty to touch. Armett v. Innes.

404. The two following decisions proceed upon, and perhaps in some degree extend, the same principle:—

A convict ship was insured on a voyage "at and from London to New South Wales, and at and from thence to the ship's loading port or ports in the East Indies, Persia, China, or elsewhere, forwards and backwards, and backwards and forwards, as well on this side as on the other side of the Cape of Good Hope, until her safe arrival at her final port of discharge in Great Britain," with leave for the ship "in the voyage insured to proceed and sail, to touch and stay, at any ports or places whatsoever and wheresoever, and for any purpose whatsoever, without being deemed a deviation." The ship, after arriving at New South Wales and discharging her convicts there, sailed in ballast to Batavia, where she took in

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a cargo of iron for Sourabaya, sailed to that port, discharged her iron there and took in a cargo of rice for the Mauritius; at the Mauritius she unloaded part of the rice, intending to load there a cargo of cotton for England, but, being on survey found unseaworthy, was broken up there and sold.

The jury found at the trial that the ship had not touched at too many places, nor stayed there an unreasonable time, but had pursued the usual course on a voyage of this description. The defendant, however, contended that the having touched at these different ports for the purpose not only of loading, but also of discharging goods, was under the terms of this policy a deviation, but the Court held it was not so (*g*). Park, J.: "The terms contained in the policy cannot be more general and extensive. The vessel might sail and touch at any ports or places whatsoever, for any purposes whatsoever. Is not trading a purpose? If an underwriter enters into a covenant of this kind it is his own fault."

Hunter v. Leathley.

The next case shows that, if consistent with and in furtherance of the general purposes of the voyage, the ship, under such a liberty, will be justified in calling and taking goods on board at a port which lies even directly out of the usual course from the *terminus a quo* to the *terminus ad quem*.

A merchant here, having reason to expect a shipment of goods on his account from some of the ports of the Indian Archipelago, without, however, knowing of what nature they were, at what port to be loaded, or by what ship to be sent, effected a policy on goods generally on board of some one out of four different ships named in the policy (with leave to declare his interest more particularly, as it might thereafter appear), upon a voyage "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain or Holland," &c., "with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia (*h*), or elsewhere, and also with permission to touch and stay at any ports or places in any direction and for any purpose necessary or otherwise, particularly Singapore, Penang, Malacca, Batavia, the Cape of Good Hope and St. Helena, and to take on board, discharge, reload and exchange goods and passengers, without being deemed a deviation."

(*g*) Armett *v.* Innes (1820), 4 J. B. Moore, 150.

(*h*) It was expressly found by the special case that the nearest port or place in Persia was more than 1,000 miles out of the direct course of a voyage from either Singapore, or Penang, or Malacca, or Batavia, to Europe.

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Under this policy the ship took in part of her cargo at Batavia, and then proceeded to Sourabaya (another port in Java, lying 400 miles to the eastward of Batavia, and directly out of the course from Batavia, or any other of the four ports mentioned in the policy, to Europe), where she took on board the remainder of her cargo and returned with it to Batavia, whence she sailed for Europe and was afterwards lost by the perils of the seas.

The Court of King's Bench held that this putting into Sourabaya for the purpose of completing her cargo was no deviation; and the Court of Exchequer Chamber confirmed their judgment (*i*).

Lord Tenterden remarked that, from the circumstances of the case and the terms of the policy, the object of the assured plainly appeared to be to protect himself against loss, whatever kind of goods might be sent him, at whatever port they might be loaded, and by whatever ship they might be sent; that the underwriter accordingly, by subscribing such a policy, must be understood to have intended to afford a protection equally extensive, if the language of the policy would admit of such a construction (*k*). In the opinion of the two Courts, the very extensive powers given by the policy, the order in which the four places named stood in the policy (*l*), and the mention of Persia, more than a thousand miles out

(*i*) Hunter *v.* Leathley (1830), 10 B. & C. 858; *S. C.*, confirmed in error (1831), 7 Bing. 517; *S. C.*, at N. P., Ll. & Wels. 244.

(*k*) See 10 B. & C. 871.

(*l*) The geographical order is—(1) Penang; (2) Malacca; (3) Singapore; (4) Batavia. The order in the policy is—(1) Singapore; (2) Penang; (3) Malacca; (4) Batavia.

Sect. 404. of the direct course of the voyage, showed that a voyage in the direct geographical course was not intended.

The purpose of the visit must be within the scope of the voyage.

† **405.** Even though the port visited may be within the terms of the policy, yet the question still remains, whether the purpose for which it was visited was within the scope of the adventure contemplated by the policy; otherwise the visit will be a deviation.

However extensive may be the language of the clauses, "the permission to stay 'for any purpose whatever,' must be for some purpose within the scope of the adventure" (*m*). "The liberty in the policy must always be construed with reference to the main scope of the voyage insured" (*n*).

Williams v. Shee.

† Thus, where goods were insured "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load and exchange goods, without being deemed a deviation," Lord Ellenborough held that, notwithstanding the extensive terms in which this liberty was conceived, the ship, which had sailed with convoy, was guilty of a deviation by putting in to Madeira for the purpose of unloading goods and taking on board wines (which did not form part of the subject of the insurance), and there delaying for that purpose till after the convoy had proceeded on the voyage (*o*).

Hammond v. Reid.

† A ship was insured "at and from Para to New York," during her stay there, and at and from thence to Para, "with leave to call at all or any of the Windward and Leeward Islands on her passage to New York, with leave to discharge, exchange and take on board the whole or any part of any

(*m*) Per Gibbs, J., in Langhorne *v.* Allnutt (1812), 4 Taunt. 510, 519; see also Rucker *v.* Allnutt (1812), 15 East, 278; Thames & Mersey Mar. Ins. Co. *v.* Van Laun, *ante*, § 382a.

(*n*) Per Lord Ellenborough in Williams *v.* Shee (1813), 3 Camp. 469.

(*o*) Williams *v.* Shee (1813), 3 Camp. 469; see also Redman *v.* Loudon (1813), *ibid.* 503, which was a policy on the same ship for the same voyage, without the clause, and in which it was admitted there had been a deviation.

cargo and cargoes at any ports or places she might call at or proceed to, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation and without prejudice to this insurance." Under this extensive liberty, the ship, after sailing from Para, on her passage to New York, put into St. Thomas's and St. Bartholomew's, two of the Leeward Islands, not for any purpose connected with the voyage insured, but in order to obtain information for the shipowner whether the state of the market in those islands was such as to make it worth his while to send goods out there in another vessel of his, on a separate adventure, from New York. The Court held that, although these islands were undoubtedly within the language of the policy, yet putting into them for a purpose wholly unconnected with the voyage insured, and which had reference to some new adventure, subsequently to be undertaken in another vessel, was a deviation (*p*). Sect. 405.

Solly v. Whitmore.

† A ship was insured on an outward voyage, "at and from Hull to her port or ports of loading in the Baltic or Gulf of Finland, with liberty in the said voyage to touch and stay at any ports or places whatever, for all purposes, particularly at Elsinore, without being deemed a deviation." The ship's intended port of loading was Pillau; before sailing, however, she had taken goods on board for Elsinore and Dantzic, and on her voyage she stopped at both these places, in order to deliver those goods, and was afterwards lost before reaching Pillau: the Court held, under this policy, that the stopping to deliver goods, being a purpose wholly foreign to the main object of the voyage insured, was a deviation. "If," said Abbott, C. J., "the ship had gone into Elsinore or Dantzic, to see if she could get a cargo, that would have been a purpose connected with the voyage, and consequently would not have been a deviation. But the vessel, in fact, went into those ports for the purpose of delivering goods, which

(*p*) Hammond *v.* Reid (1820), 4 B. & Ald. 72.

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was wholly unconnected with the object of the voyage insured" (*q*).

Laing *v.* Union Mar. Ins. Co.

A ship was insured from Haiphong, in Tonquin, to any ports or places in any order in Japan, "with leave to call at any ports or places in or out of the customary route in any order for all purposes." She went from Haiphong to Hongay, where she loaded a cargo of coals for Hongkong, and was lost between Hongay and Hongkong. Mathew, J., held that the loss was not covered by the policy. There was no direct trade, he said, between Tonquin and Japan, and the underwriter was entitled to assume that the ship would go in ballast straight to Japan, calling at "ports or places" for purposes incidental to a voyage from Tonquin to Japan (*r*).

Company of African Merchants *v.* Brit. & For. Mar. Ins. Co.

A ship was insured "at and from Liverpool to the west and (or) south-west coast of Africa, during her stay and trade therein, and back to a port of call or (and) discharge in the United Kingdom." The vessel, after she had completed her loading for the return voyage, stayed a month on the African coast for the purpose of earning salvage; she was damaged while in that employment, and was afterwards totally lost on the voyage home. It was held that salvage, in the absence of usage, could not be construed to be a purpose within the licence contained in the policy, and consequently that the risk had been substantially varied by what had been done (*s*).

An intermediate voyage not connected with that insured is not covered.

406. In like manner, although the words of the clause are of the most extensive nature, the ship will not be protected by such a policy if, at the time of loss, she be on an intermediate voyage, not subordinate to or connected with the voyage or voyages contemplated by the parties as the principal objects of the contract (*t*) (unless sanctioned by a well-established usage).

Bottomley *v.* Bovill.

A ship was insured "at and from London to New South

(*q*) Solly *v.* Whitmore (1821), 5 B. & Ald. 45. It is somewhat difficult to reconcile this case with Armett *v.* Innes, *ante*, § 404.

(*r*) Laing *v.* Union Marine Ins. Co. (1895), 1 Com. Cas. 11.

(*s*) Company of African Merchants *v.* Brit. & For. Mar. Ins. Co. (1873), L. R. 8 Exch. 154. Whether and how far purposes of salvage will justify deviation is considered *post*, § 434.

(*t*) Bottomley *v.* Bovill (1826), 5 B. & Cr. 210.

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Wales, and at and from thence to all ports or places in the East Indies and South America," with liberty "to proceed and sail, to touch and stay at any ports whatsoever, &c., for all purposes whatsoever, particularly to trade and sail backwards and forwards and forwards and backwards." Under this policy the ship sailed from London with convicts for New South Wales, and soon after arriving there the captain received orders from his employers to proceed from New South Wales to the East Indies. Before this, however, he had entered into engagements for a voyage to New Zealand and back again to New South Wales, and accordingly sailed on this voyage, intending to return to New South Wales, and then to sail, as directed by his employers, for the East Indies. On his way back, however, from New Zealand, his ship was lost, and the underwriters resisted payment, on one ground, amongst others, that as New Zealand lay entirely out of the course of the voyage from New South Wales to the East Indies, the sailing thither was a deviation, even under the extensive terms of this policy, and the Court, on the principle already stated, held that it was so (*u*).

Hamilton *v.* Sheddon.

Upon the same principle, where an insurance was effected on goods on board a ship which, as appeared upon the face of the policy, was meant to act as a tender to other ships employed in the palm oil trade on the African coast, the Court held that it was a deviation for a ship so insured to sail away from the Benin river (where she had been for some time acting as a tender) to Cameroons with the cargo of one of the oil ships which had gone ashore at the bar of the Benin river, although the policy contained the most extensive liberty to touch and stay (*x*), because instead of her sub-

(*u*) Bottomley *v.* Bovill (1826), 5 B. & Cr. 210.

(*x*) The policy was "at and from Liverpool to any port or place of loading and trade on the African coast and islands during her stay and trade there, and at and from thence to her port or ports of discharge in the United Kingdom, with leave to call at all ports and places, backwards and forwards and forwards and backwards, in any order, for any purpose, without being deemed a deviation; and with liberty also for the said ship in the said voyage to proceed and sail to and touch and stay at any ports or places whatsoever, and to load, unload, reload, sell,

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sidiary duties as tender she had assumed the responsibilities of a principal voyage (*y*).

Trading no deviation if it has not caused delay.

407. We now come to the consideration of those cases which establish the position that if the ship under the terms of the policy was justified in originally visiting the port, any trading during her lawful stay, although foreign to the main purposes of the adventure, is not a deviation unless it causes additional delay or otherwise substantially varies the risk.

Formerly the rule was different.

In the earlier cases the contrary was laid down (*z*). Those cases, however, were overruled by the following authorities, which have established the rule stated above.

Cases in the present rule.

Raine *v.* Bell.

Ship and freight were insured "from the ship's loading port or ports on the coast of Spain to London, with liberty to touch and stay at any port or place whatever without being deemed a deviation." The ship was obliged to put into Gibraltar for provisions, and while there the captain also took on board some chests of dollars on freight. The putting into Gibraltar was justifiable, and no additional delay was caused by taking the dollars on board. The Court, therefore, held that there had been no deviation (*a*). Lord Ellenborough also said that the increased temptation to attack caused by taking treasure on board was not such an alteration of the risk as to discharge the underwriter.

Cormack *v.* Gladstone.

So, where a ship was insured "from Stockholm to New York," it was held no deviation for the owner of live stock on board to take in provender for their use, while the ship, as was then customary, was waiting at Elsinore for the purpose of taking convoy and paying Sound dues; the whole

barter, and exchange goods and property, &c., particularly with liberty to tranship," and with a memorandum "that the said vessel might be employed and used as a tender to any other ship or vessel in the same employ."

(*y*) Hamilton *v.* Sheddon (1837), 3 M. & W. 49.

(*z*) See Stitt *v.* Wardell (1798), 2 Esp. 610; Sheriff *v.* Potts (1803), 5 Esp. 96. The latter case may be supposed to have proceeded partly on the principle that *expressio unius est exclusio alterius;* but even then it is overruled by Laroche *v.* Oswin (1810), 12 East, 131.

(*a*) Raine *v.* Bell (1808), 9 East, 195.

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of such provender having been loaded on board before the Sound dues could be paid, so that no additional delay was thereby occasioned (*b*).

It makes no difference whether the policy is on ship or freight, or on goods.

408. In the case of Raine *v.* Bell, where the policy was on ship and freight, Lord Ellenborough expressly reserved his opinion as to the effect of a change in the state of the cargo upon a policy "on goods." The following case resolves this doubt, and shows that it makes no difference whether the policy be on goods or any other subject of insurance.

Laroche *v.* Oswin.

Goods were insured "at and from Gottenburg to a port or ports in the Baltic with liberty, in case of non-admittance, to unload at Carlshamn." After the ship had sailed from Gottenburg with convoy, and while she was lying in Malmoe Roads under orders of the commodore to prepare for sailing, a boat came alongside with some boxes of indigo, which formed no part of the original intended cargo, but were all got on board without any delay to the ship. The Court held this was no deviation (*c*), "for the risk insured was neither enhanced nor varied; but something was done in the course of the voyage which made no difference in either, and therefore was no discharge of the underwriter's liability" (*d*).

Cases in the United States.

The principle of interpretation thus established in English law has received abundant confirmation in the jurisprudence of the United States. Thus, where a ship, under liberty to touch and stay, sold part of her cargo while detained in port by an embargo (*e*), or while waiting for necessary repairs (*f*), or for fear of capture (*g*), such trading was held not to amount to a deviation, because proved to have caused no delay and no variation of the risk.

(*b*) Cormack *v.* Gladstone (1809), 11 East, 347.

(*c*) Laroche *v.* Oswin (1810), 12 East, 131.

(*d*) Per Lord Ellenborough, 12 East, 133.

(*e*) Kingston *v.* Girard (1803), 4 Dall. R. 274; Condy's Marshall, 189; 1 Phillips, s. 999.

(*f*) Kane *v.* Columbian Ins. Co. (1807), 2 Johns. R. 264; 1 Phillips, s. 999.

(*g*) Hughes *v.* Union Ins. Co. (1818), 3 Wheaton, R. 159; 1 Phillips. s. 999.

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Additional delay caused by such trading terminates the risk.

409. In all such cases, however, if additional delay is caused by the trading, it will terminate the risk (*h*). Any act of trading not contemplated by the parties to the policy, and unconnected with the main object of the adventure, is justifiable only on condition that it be completed during the period of her lawful stay, at an allowed port, for a justifiable purpose (*i*).

Aliter, if no additional delay. Warre *v.* Millar.

But, if no additional delay or variation of the risk is caused, the mere fact of putting into a port or place with a twofold purpose, partly connected and partly unconnected with the adventure contemplated by the policy, will not amount to a deviation or terminate the risk. Thus, where a vessel, sailing outwards from London to Grenada, was insured on freight homewards "at and from Grenada to London," and on arriving at the island (where there is but one custom-house) proceeded to deliver her outward cargo in different bays there, and was lost in entering one of these bays for the twofold purpose of delivering the remainder of her outward, and taking in a homeward, cargo, it was held that this was no deviation, but that the underwriters were liable for the loss of the homeward freight (*k*).

(*h*) "It will amount to a deviation" were Arnould's words. See, however, note (*i*) to sect. 48 of the Mar. Ins. Act, 1906, *ante*, § 376.

(*i*) Williams *v.* Shee (1813), 3 Camp. 469. See Company of African Merchants *v.* British and Foreign Mar. Ins. Co. (1873), L. R. 8 Ex. 154. Inglis *v.* Vaux (1813), 3 Camp. 437, was cited by Arnould as an authority for the rule that "even where the delay is partly for a purpose connected with the main objects of the voyage insured, if it be partly for another which is entirely foreign to it, such delay will be regarded as a deviation." Arnould, as his statement of the case shows, only meant that if the master of the ship stayed longer in Antigua than was reasonably necessary to dispose of the outward cargo, so that the real object of his prolonged stay was to procure a homeward cargo, the risk on the outward voyage came to an end. If Lord Ellenborough meant to decide that a stay in port, necessary for the purposes of the insured voyage, puts an end to the risk because the master also utilizes it for the purposes of the succeeding voyage, his decision is entirely opposed to the weight of authority.

(*k*) Warre *v.* Millar (1825), 4 B. & Cr. 538; *S. C.*, at N. P. (1824), 1 C. & P. 237. In this case it was held that the delivery of the outward cargo was a necessary preparation for the homeward voyage, and therefore what was done for that purpose was no deviation. It is clear that the discharge of the outward cargo had occupied time.

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Distinction between Hammond *v.* Reid and Raine *v.* Bell.

410. The line of distinction between the class of cases of which Hammond *v.* Reid (*l*) is the leading authority and those which are governed by Raine *v.* Bell (*m*), though not at first sight obvious, is, in reality, sufficiently clear. In Hammond *v.* Reid, and cases of that class, the ship would not have touched at the port at all except for some purpose totally unconnected with the main object of the voyage insured; and the execution of that purpose was itself the sole cause of the delay. In Raine *v.* Bell, and the cases decided on its authority, the ship had originally put in, and was actually staying at, the port for some purpose connected with the voyage; and, during her justifiable and necessary stay there, some act was done, which, though in itself unconnected with the adventure, and not originally contemplated by the parties to the policy, was held not to be a deviation, because there was no material variation of the risk, and no delay which would not otherwise have occurred. For instance, in Hammond *v.* Reid, the ship would never have touched at St. Bartholomew's at all, except for the purpose,—wholly alien to the object of the voyage insured,—of procuring information for the guidance of another adventure. In Raine *v.* Bell, the ship, when the dollars were put on board, was actually staying at Gibraltar for provisions, without which the voyage insured could not have been prosecuted, and no extra delay or risk was incurred by taking the dollars on board.

Summary of the rules established by the cases.

411. The principles of law, therefore, applicable to the interpretation of these clauses, appear to be,—

1. That the extent of the powers they confer on the ship is to be judged of, not so much by verbal criticism on the terms employed (such as "to call," "to touch," or "to touch and stay"), as by reference to the true scope and nature of the adventure contemplated by the policy.

(*l*) *Ante*, § 405.

(*m*) *Ante*, § 407.

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2. That, however extensive the language of these clauses may be, they can never confer a power of visiting ports out of that which, upon a fair construction of the whole policy, appears to have been the course of the voyage insured as contemplated by the parties; nor can they justify the ship in visiting any port, even though within the local limits of the voyage insured, for any purpose unconnected with the main object of the adventure.

3. If the ship visits an allowed port for an allowed purpose, no trading, breaking bulk, landing, or loading cargo, however alien to the main object of the adventure, will make the visit a deviation if the trading, &c. be completed during the period of the ship's lawful stay in such port without additional delay or substantial variation of the risk.

4. If, however, such trading give rise to delay that would not otherwise have been incurred, it will, on that ground, discharge the underwriter from liability as from the time when the delay began (*n*).

Change of risk by delay.

412. Sect. 48 of the Marine Insurance Act, 1906, declares that—

> In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse (*o*) it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

As the sole ground upon which a deviation discharges the underwriter is that it varies the risk, and as it is evident that the risk may be as much varied by a delay in commencing or prosecuting the voyage as by a local divergence from its prescribed course, the rule was established that every such delay, if unreasonable or unexcused, will discharge the underwriter. In the words of Tindal, C. J., "The voyage in the commencement or prosecution of which any unreasonable delay takes

(*n*) See Mar. Ins. Act, 1906, s. 48, *infra*.
(*o*) See sect. 49, § 424a.

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place, becomes a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with reasonable and ordinary diligence; the risk is altered from that which was intended by all parties when the policy was effected" (*p*).

Delay in commencing the voyage.

413. To begin with the commencement of the voyage, it is clear that, under an insurance "at and from," any unreasonable delay that takes place between the time when the policy attaches on the ship "at" the port, and the time when she sails on her voyage, will discharge the underwriter (*q*). As long, indeed, as she is *bonâ fide* preparing for her voyage, as by repairs, &c., the delay will be held excused, and the underwriter liable; but if all thoughts of the voyage be laid aside, and the ship still kept lying in port, the underwriter is discharged (*r*). So, although the voyage be not abandoned, yet any waste of time or unnecessary delay in port, not excused by justifying cause, nor in any degree connected with the purposes of the voyage insured, is held to vary the risk; as where a yacht lying in Bristol harbour was insured on a voyage "at and from Bristol to London," and did not sail for five months after the policy was effected (*s*).

Delay in the course of the voyage.

414. That an unreasonable delay in performing the voyage insured is equivalent to a deviation (*t*), was expressly ruled by Lord Mansfield, in the case of Hartley *v.* Buggin, in which, the ground of defence being the detention of the ship as a floating slave depôt on the African coast, his Lordship said, "The single point before the Court is, whether there has not

(*p*) Per Tindal, C. J., in Mount *v.* Larkins (1831), 8 Bing. 122.
(*q*) The consequence is the same when the delay takes place before the risk has commenced; see Mar. Ins. Act, 1906, s. 42, *ante*, § 376; but delay, when it prevents the policy attaching, properly belongs to the subject of the chapter on duration of the risk, and is considered there. See *post*, §§ 479, 483.
(*r*) Per Lord Hardwicke in Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 545; Chitty *v.* Selwyn (1742), 2 Atkyns, 359.
(*s*) Palmer *v.* Marshall (1831—1832), 8 Bing. 79, 317.
(*t*) See note (*i*), *ante*, § 376.

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been what is equivalent to a deviation—whether the risk has not been varied, no matter whether the risk has or has not been thereby increased" (*u*). So, where a vessel engaged in the African palm oil trade, with liberty to act as a tender to other ships in the same employ, was kept thirteen months in the Benin river, this was found by the jury to be an unreasonable delay, and the Court refused to disturb their verdict (*x*).

Delay at the termination of the voyage.

A delay at the termination of the voyage insured is, if unexcused and unreasonable, as fatal as though it had occurred in any of its intermediate stages. Thus, where a ship insured "at and from Sierra Leone to London" was delayed in the Thames, off Deptford dockyard, from the 18th to the 27th of February, before she was admitted into the dock to unload her cargo, it was not disputed that this delay, if unexcused or unnecessary, would amount to a deviation at that, as at any other, stage of the voyage (*y*).

When the master of a ship remained in port for several weeks for the purpose of building a house for himself, and waiting the issue of two sealing voyages on which he had despatched another vessel, this was found, on special verdict, to be an unreasonable and unjustifiable delay (*z*).

In short, whenever the delay exceeds a reasonable time, or is incurred for purposes unconnected with the true object of the voyage insured, it will determine the insurance (*a*).

Limit of express leave.

As every special clause contained in the policy must be strictly construed, it follows that, if express permission be given in the policy to delay for a given time specified in the

(*u*) Hartley *v.* Buggin (1781), 2 Park, 652. See, in illustration of the same principle, Phillips *v.* Irving (1844), 7 M. & Gr. 325; see also Pearson *v.* Commercial Union Ass. Co., in the Ex. Ch. (1873), L. R. 8 C. P. 548; in the House of Lords (1876), 1 App. Cas. 498—a case on a fire policy which (although the result might have been different in a voyage policy) is an authority for the principle that a delay on a voyage for a collateral purpose is unjustifiable. The facts of the case are set out *post*, § 509.

(*x*) Hamilton *v.* Sheddon (1837), 3 M. & W. 49; see also Hyderabad (Deccan) Co. *v.* Willoughby, [1899] 2 Q. B. 530.

(*y*) Samuel *v.* Royal Exch. Ass. Co. (1828), 8 B. & Cr. 119.

(*z*) Mount *v.* Larkins (1831), 8 Bing. 108.

(*a*) See Thames & Mersey Mar. Ins. Co. *v.* Van Laun, *ante* § 382a.

policy, that delay cannot lawfully be prolonged. Thus, where liberty was given in the policy "to wait two months at Monte Video if needful," a longer delay than two months was held to discharge the underwriters (*b*).

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Necessary delay for purpose of voyage justifiable.

415. It is only, however, an unreasonable or unexcused delay, *i.e.*, a wilful and unnecessary waste of time, that will put an end to the insurance; if justified by necessity, or incurred *bonâ fide* with a view to the purposes of the voyage insured, the underwriter will not be discharged by the delay, although its absolute duration may be very considerable. "To discharge the policy," says Lord Ellenborough, "there must be a clear imputation of waste of time; mere length of time elapsing between the sailing of the vessel and the underwriting of the policy is not of itself sufficient, for it is capable of explanation" (*c*). "What delay will constitute a deviation," says Story, J., "depends on the nature of the voyage and the usage of trade. That delay which is necessary to accomplish the objects of the voyage, according to the course of the trade, if incurred *bonâ fide*, cannot be admitted to avoid the insurance" (*d*). So, Tindal, C. J., lays it down that the "detention for a reasonable time, for the purposes of the adventure, must be allowed; and whether the delay be reasonable or not must be determined, not by any positive or arbitrary rule, but by the state of things existing at the time at the port where the ship happens to be" (*e*).

Smith *v.* Surridge.

A ship insured on the 15th of May "at and from Pillau to London," and then lying at Pillau, was obliged to be thoroughly repaired there before she could sail on the voyage insured; these repairs were not completed till the end of June, when the water in the harbour had become so low that she could not get over the bar, and she did not actually sail

(*b*) Doyle *v.* Powell (1832), 4 B. & Ad. 267.

(*c*) Grant *v.* King (1802), 4 Esp. 175.

(*d*) In Columbian Ins. Co. *v.* Catlett (1827), 12 Wheaton, R. 383; 1 Phillips, Ins. s. 1002.

(*e*) In Phillips *v.* Irving (1844), 7 M. & Gr. 328.

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till November. Lord Kenyon held that this was not such a delay as to discharge the underwriter (*f*).

Grant v. King.

A policy was effected in August, 1789, on an American ship "at and from Brest to London," against British capture, while she was lying in Brest Harbour, then blockaded by the British. The ship did not sail till March, 1790. It was contended that this delay of nearly seven months discharged the underwriters; but proof having been given that the voyage had never been abandoned, and that the time had been consumed in *bonâ fide* attempting to procure an American crew from England (there being no possibility of doing so in France), a special jury, under the direction of Lord Ellenborough, found for the plaintiff. Lord Ellenborough told the jury that while the vessel was in a fair state of preparation for the voyage it was covered by the policy; but if the voyage was abandoned for a length of time, the underwriters would be discharged. "The question whether there was an abandonment of the original adventure is to be decided," said his Lordship, "from a fair review of all existing circumstances at the time when the voyage might reasonably be presumed to commence. Here the extreme difficulty of obtaining men is to be taken into consideration" (*g*).

When is the delay justifiable?

416. The main point in all these cases is whether the delay was *bonâ fide* incurred with a view to promote and carry out the main objects of the voyage insured. If it was, there is no ground for saying that the voyage was not prosecuted with reasonable despatch.

Schroder v. Thompson.

Thus, where a vessel, chartered for the timber trade between this country and the United States, was insured on a voyage "from London to her loading port in Virginia and back to London," it was held that her waiting fifteen months at Norfolk, her loading port, until an embargo was taken

(*f*) Smith *v.* Surridge (1801), 4 Esp. 25. The detention after the end of June was, of course, unavoidable; the previous delay was a necessary one.

(*g*) Grant *v.* King (1802), 4 Esp. 175.

off, and long enough afterwards to take on board a cargo of lumber there, did not discharge the underwriter, although the ship might have sailed home in ballast immediately the embargo was laid on (*h*). Sect. 416.

Bain v. Case.

So, where the captain of a ship, insured on a trading voyage to all or any ports in the North or South Pacific Ocean, delayed one hundred and nine days at one of the ports in those seas in the hope of getting permission to land her outward cargo, for which purpose he was during that time negotiating with the government, a special jury, under the direction of Lord Tenterden, found that the delay under the circumstances was not unreasonable (*i*).

Phillips v. Irving.

So, where a seeking ship, insured on a trading voyage "at and from London to Bombay and thence to China and back to the United Kingdom," stayed at Bombay for more than six months after she was ready to take in cargo there for the purpose of procuring a remunerative freight, such delay was held to be justifiable, since it was for a purpose strictly connected with the main object of the adventure (*k*).

The law is the same in the United States.

417. In the jurisprudence of the United States the same principle has been illustrated by several decisions, which appear to have proceeded on a very sound application of general rules (*l*). Thus, if a vessel enters a port to dispose of her cargo, it has been decided by Story, J., that the master may stay there a reasonable time for that purpose, though he meets with no success. In the case alluded to, insurance was made on a cargo of flour "from Alexandria to St. Thomas, and two other West Indian ports, and back to the United States"; and the ship on arriving at St. Thomas remained there seventy-two days, during which time the master

(*h*) Schroder *v.* Thompson (1817), 7 Taunt. 462.

(*i*) Bain *v.* Case (1829), 3 C. & P. 496; see also Suydam *v.* Mar. Ins. Co. (1807), 2 Johnson, R. 138; 1 Phillips, Ins. s. 1002.

(*k*) Phillips *v.* Irving (1844), 7 M. & Gr. 325.

(*l*) See 1 Phillips, Ins. s. 1002, and especially Suydam *v.* Mar. Ins. Co. (1807), 2 Johnson, R. 138; Lapham *v.* Atlas Ins. Co. (1833), 24 Pickering, R. 1.

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endeavoured, but with only partial success, to dispose of his outward cargo at the price limited by his instructions: the Court held this delay no deviation, although it was proved that the captain might at once have sold his flour at half a dollar per barrel less than the limited price (*m*).

Remarks of Story, J.

In answer to the argument that the delay to procure the limited price was unreasonable, Story, J., in delivering the judgment of the Court, says: "In almost every voyage of this nature, where different ports are to be visited for the purposes of trade, and to seek markets, it is almost universal to prescribe limits to the price of sales. It cannot be that the master, if entitled to go to a single port only, is bound to sell, at whatever sacrifice, as soon as he arrives at that port, and within that period at which he may unload and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. He is not bound to sell the whole cargo at once, whatever may be the sacrifice, and thus frustrate the projected adventure. He must exercise on this, as in all other cases, a sound discretion for the interests of all concerned. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay, after all reasonable expectations of a change of market were extinguished, such circumstances might probably be left to a jury to infer a delay amounting to a deviation" (*n*).

Deviation by cruising (*o*).

418. On the principle that every unexcused departure from the usual mode of conducting the voyage by which the risk can be varied amounts to a deviation, Lord Kenyon

(*m*) Columbian Ins. Co. *v.* Catlett (1827), 12 Wheaton, R. 383; 1 Phillips, s. 1002.

(*n*) *Ibid.* See also Ellery *v.* New England Ins. Co. (1829), 8 Pickering, R. 14; 1 Phillips, s. 1002.

(*o*) The United States and Spain—the two most important maritime Powers who had not formally adhered to the Declaration of Paris—decided in their late war not to issue letters of marque, and Spain has since formally adhered to the Declaration. The cases on deviation by cruising have, therefore, now little practical importance. The editors only retain them in an abbreviated form because they illustrate principles of general importance.

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Carrying letters of marque without leave not a deviation.

once held that the mere fact of carrying letters of marque without the cognizance or consent of the underwriters on a ship insured on a trading voyage was a fatal deviation; for although she had never made use of such letters, nor ever diverged from the usual track of the voyage, they varied the risk which the underwriter had assumed by giving the assured a temptation to deviate (*p*).

The law, however, as thus laid down must now be considered to be overruled. Lord Kenyon himself, on a subsequent occasion, admitted that the case was decided on principles which were new, and which went to the very verge of the law (*q*), and he refused to extend them to a case where the letters of marque were taken on board without any intention of cruising, but solely for the purpose of more easily procuring a crew (*r*). Later judges have demurred entirely, not only to the law as laid down by Lord Kenyon, but to the principles on which he grounds it. Lawrence, J., says: "If an intention to deviate not carried into effect will not avoid a policy, still less can a temptation to deviate" (*s*). And Lord Ellenborough declared the general opinion in his time to be that a "mere irritation of this sort shall not operate as a deviation" (*t*).

Cruising by a trading ship is a deviation.

419. If a ship on a mere mercantile adventure carries letters of marque with the consent of the underwriters, but without express liberty in the policy so to do, there has been some doubt as to the extent to which she would be justified in departing from the direct course of the voyage insured.

The true principle, said Arnould, appears to be, that no departure from the usual course of the voyage caused by repelling hostile force, or even attacking an enemy's ship, will be held a deviation, provided it can fairly be attributed

(*p*) Dennison *v.* Modigliani (1794), 5 T. R. 580.

(*q*) See 6 T. R. 382.

(*r*) Moss *v.* Byrom (1795), 6 T. R. 379.

(*s*) In Raine *v.* Bell (1808), 9 East, 201.

(*t*) Jarratt *v.* Ward (1808), 1 Camp. 266.

Sect. 419. to motives of self-defence (*u*). If, however, such a vessel, from a desire of profit, cruises, *i.e.*, lies by, or departs from the direct course of the voyage, in hopes of meeting with prizes, that is a deviation (*x*).

Chasing an enemy in self-defence.

420. It is, however, admitted that if an enemy comes in the way she may engage in her own defence, and prosecute the engagement to capture, even though in so doing she may be obliged to depart from the direct course of the voyage (*y*). It appears equally clear that if an enemy comes across her course she may attack and take him from other motives than those of self-defence, if the so doing does not involve any departure from the direct course of the voyage (*z*).

The really doubtful point is, whether a ship so circumstanced has a right to alter her course for the purpose of chasing a strange sail. Lord Mansfield held that the ship has a right to give chase (*a*); but in a subsequent case Lord Ellenborough was strongly inclined to think that if the departure from the course was for the purposes of hostile capture it was a deviation; but if it were *bonâ fide* for the purposes of defence, as by making a show of confidence to deter the enemy from attack, or with a view to obtain some advantage in the conflict, or the like, in that case it was no deviation (*b*).

Law on this point in the United States.

421. The subject has occupied the attention of the Courts of the United States (*c*), and the law has been laid down by

(*u*) The Mar. Ins. Act, 1906, s. 43 (1) (d), *post*, § 424a, provides that a deviation is excused, when reasonably necessary for the safety of the ship or subject-matter insured. Probably, therefore, it is now more correct to say that there is a deviation when a merchant ship, not having leave to carry letters of marque, departs from her course to attack an enemy, but that the deviation may be excusable.

(*x*) Cock *v.* Townson (temp. Lord Camden), 2 Park, 630. As to what constitutes cruising, see Syers *v.* Bridge (1780), 2 Dougl. 527.

(*y*) Jolly *v.* Walker (1781), 2 Park, 630; Parr *v.* Anderson (1805), 6 East, 202.

(*z*) Jolly *v.* Walker (1781), 2 Park, 630.

(*a*) *Ibid.*

(*b*) Parr *v.* Anderson (1805), 6 East, 202.

(*c*) See the cases of Wiggin *v.* Amory (1816), 13 Mass. R. 127;

Sect. 421. Story, J., in the following terms:—"Whether a vessel be commissioned or not, she has a right to repel any attempt of an enemy, and to protect and defend herself by all reasonable precautions against a meditated hostile attack. If a vessel, supposed to be an enemy cruiser, be in sight, and apparently intend to attack a merchant vessel, the master of the latter is bound to exert his best skill and judgment as to the time and mode of his defence; and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to endeavour to make his escape in the first instance; and on failure of this, to meet the enemy. He may lay-to or chase the enemy, if he deem that the most effectual way to secure his object. The only question in cases of this nature is whether what is done is fairly attributable to motives of self-defence or to motives of another nature—such as a desire to profit: if the latter, then it is a deviation" (*d*). The learned Judge further held that delay for the purpose of manning a prize justifiably captured by a merchant ship carrying letters of marque, but without express liberty so to do, was no deviation; for the right to make the capture at all drew after it the right to make the capture effectual, and it would be most mischievous to the interests of trade to discourage men from making a gallant defence, from the knowledge that in no event could they reap a reward for their victory (*e*).

Chancellor Kent, in his Commentaries, speaks of this case as having confided to the captain a pretty enlarged discretion as to the best mode of defence, and one carried to the very verge of the law (*f*); but the decision seems conformable to the spirit of the maritime law, if not to the very letter of the earlier authorities.

Construction of clauses

422. The cases hitherto considered have been principally

Wiggin *v.* Boardman (1817), 14 Mass. R. 12; Haven *v.* Holland (1820), 2 Mason, R. 230; cited 1 Phillips, ss. 1029, 1030.

(*d*) See 1 Phillips, s. 1030.

(*e*) Haven *v.* Holland (1820), 2 Mason, R. 230.

(*f*) 3 Kent, Com. 316.

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giving a liberty "to cruise," &c.

those in which the policy has contained no clauses empowering the ship "to cruise," "to carry letters of marque," &c.

The general rule of construction with regard to all such permissions is that they should be construed strictly, so as not to extend their force beyond the plain meaning of the words in relation to the subject-matter and the intention of the parties, as collected from the whole of the document (*g*). Thus, where a ship was insured "with a liberty to cruise six weeks," this was held to mean six weeks successively from the commencement of the cruise, and not for six weeks at different periods (*h*).

Construction of the clause "with or without letters of marque."

Under such clause may a trading ship alter her course to chase a strange sail?

Again, where a ship, insured on a slaving voyage, "with or without letters of marque," saw a sail which she did not know to be an enemy, about a quarter of a point on her lee-bow, and she altered her course accordingly, and gave chase for about a quarter of an hour, when she abandoned it, and returned into the direct course of the voyage insured, Lord Ellenborough, at the trial, and afterwards in banc, was strongly inclined to think that under the clause in question this was a deviation (*i*).

Exclusive effect of a positive permission.

423. When such clauses contain an express permission to do certain specified things, the principle *expressio unius est exclusio alterius* applies, and the permission cannot be extended to objects not mentioned in the policy.

To man, not to convoy.

Thus, where a ship was insured on a slaving and trading adventure, "with or without letters of marque, with leave to chase, capture, and man prizes," Lord Ellenborough held that this permission did not authorize the captain, after having taken a prize, to shorten sail and lie to in order to keep company with the prize while convoying her to port, although the port to which he was so convoying her was within the

(*g*) Per Lord Ellenborough in Lawrence *v.* Sydebotham (1805), 6 East, 51.
(*h*) Syers *v.* Bridge (1780), 2 Dougl. 527.
(*i*) Parr *v.* Anderson (1805), 6 East, 202. See further as to this case, 2 Park, 632; and see 1 Phillips, ss. 1029, 1030; 3 Kent, Com. 315.

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limits of the voyage insured (*k*). In a similar case, however, in the United States, it has been held, apparently on good grounds, that the mere act of convoying a prize to port under such liberty, is not a deviation unless it involves delay or departure from the direct course of the voyage (*l*).

To "capture, man, and see into port" is not to delay in port.

It has been held that leave to "capture, man, and see into port any enemy's ships," did not authorize the ship to remain in port while a prize was receiving necessary repairs there, but at most to see the prize moored safely, and give the necessary orders for its final destination (*m*).

Cruising restricted in locality.

So, where a ship, insured for the Southern whale fishery, with liberty "to chase, capture, and man prizes, &c., and also to cruise thirty-one days, either together or separate, anywhere and in any latitude on the outward bound passage, on this side of Cape Horn," lay to for nine days, for the purpose of capturing a prize, off a port within the limits of her fishing ground, but on the other side of Cape Horn, the Court held: 1st. That such lying to was not within the liberty to chase, capture, or man, but was a cruising; 2nd. That, as such, it came within the clause giving liberty to cruise for thirty-one days on this side Cape Horn, and, therefore, that having taken place on the other side of Cape Horn, it was a deviation (*n*).

Rule as to acts which change the risk.

424. "From the above cases it has sufficiently appeared," said Arnould (*o*), "that the real ground of the underwriter's discharge is change of risk; any change of risk accordingly, though not arising from any of the causes hitherto considered, will be a good defence to the action, if the underwriter can show it to have arisen from the fault or with the knowledge of the assured, but not otherwise. Thus, where it appeared that three Spanish prisoners of war, who had been taken on board on parole, without the knowledge of the

(*k*) Lawrence *v.* Sydebotham (1805), 6 East, 45.
(*l*) Ward *v.* Wood (1816), 13 Mass. R. 539; 1 Phillips, s. 1030.
(*m*) Jarratt *v.* Ward (1808), 1 Camp. 263.
(*n*) Hibbert *v.* Halliday (1810), 2 Taunt. 428.
(*o*) 2nd ed. p. 450; 6th ed. p. 498.

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Causes that justify a deviation or delay.

424a. Sects. 46 (1) and 48 of the Marine Insurance Act, 1906, declare, as we have seen (*q*), that a deviation or delay "without lawful excuse" discharges the underwriter from liability for subsequent losses. The causes which amount to a lawful excuse are summarized in sect. 49 of the Act, which is as follows:—

(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(a) Where authorised by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(*p*) Toulmin *v.* Inglis (1808), 1 Camp. 421. See 1 Phillips, s. 982, as to this case; and *post*, Part III. Chap. I., "Loss by Barratry." As regards deviation, it seems clear that the fault or knowledge of the assured has no bearing on the question. If the proper course of the voyage has in fact been departed from, the underwriter is discharged (subject to the exceptions in sect. 49 of the Mar. Ins. Act, 1906, *infra*, § 424a). It is submitted that if any act be done by the master which makes the risk a different one from that taken by the underwriter, the latter ought likewise to be discharged whether or not the assured was privy to the act. There cannot, however, be many acts (not amounting to barratry) except deviation or delay, which change the risk in the sense in which this term ought surely to be understood, viz., making the voyage a different one from that insured. It cannot be said that every voluntary act which increases the danger of loss makes the voyage a different one from that insured, and the general principle is that the underwriter is liable for a loss by a peril insured against, even though brought about by the act of the assured himself, unless such act amounts to wilful misconduct. Mar. Ins. Act, 1906, s. 55, *post*, § 775; see Trinder *v.* Thames and Mersey Mar. Ins. Co., [1898] 2 Q. B. 114 (C. A.).

(*q*) See *ante*, § 376.

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(c) Where reasonably necessary in order to comply with an express or implied warranty (*r*); or

(d) Where reasonably necessary for the safety of the ship or subject-matter insured (*s*); or

(e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger (*t*); or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against (*u*).

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch (*x*).

Deviation or delay authorised by the policy.

We have already seen that where the policy gives liberty to call at an intermediate port for the purpose of trading, a delay for such purpose is authorised by the license clause. The "deviation clause," which usually provides that the subject-matter insured shall be held covered in case of deviation on payment of an additional premium (see *ante*, § 376), is also a special term within the meaning of sub-sect. (1) (a).

An involuntary deviation

425. Sect. 49 (1) (b) gives effect to the principle that it is only a voluntary departure from the course of the voyage

(*r*) This is generalized from the decision in Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37, where it was held that a delay at the end of the river stage of a voyage to fit the ship out for the sea portion of the voyage was justifiable: Chalmers & Owen, Mar. Ins. Act, 2nd ed. p. 71. The general rule stated in this sub-section is not laid down in that case.

(*s*) See *post*, § 428.

(*t*) It is now, under sect. 6 of the Maritime Conventions Act, 1911, the duty of the master or person in charge of a ship (so far as he can do so without serious danger to his own vessel and the persons on board of her) to render assistance to every person who is found at sea in danger of being lost. If he fails to do so, he is guilty of a misdemeanour.

(*u*) Ross *v.* Hunter (1790), 4 T. R. 33. Barratry of the crew may also be an excuse within sub-sect. (1) (b).

(*x*) See *post*, § 431.

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or delay is excusable.

A deviation is not excused by the ignorance of the captain.

which discharges the underwriter from all subsequent loss (*y*).

If produced, however, by the ignorance of the captain, however gross, it will not be the less considered a voluntary act (*z*). Hence, where a ship, insured on a voyage "at and from London to Jamaica," with directions to proceed direct to the latter place, was driven out of her course, by strong currents and other circumstances, to a point between the Grand Canary and Teneriffe, from which point the direct course to Jamaica was south-west, but the captain ignorantly bore up for Santa Cruz, which lies thirty miles to the north-west; this was held to be a deviation (*a*).

Deviation caused by moral or physical force, or necessary for the safety of the property at risk.

The general rule, to which effect is given in sect. 49, subsect. (1), (b) and (d), of the Marine Insurance Act, 1906, is that a departure from the course of the voyage, if necessitated either by moral or physical force, or reasonably necessary for the safety of the ship or of the subject-matter insured, will never discharge the underwriter. *Si iter mutaverit magister ex aliquâ justâ et necessariâ causâ, puta ex causâ rejectionis navis, vel ad evitandam maris tempestatem, vel ne inciderit in hostibus, in istis casibus, mutato itinere, tenetur assecurator* (*b*). "There is not, probably, any exception to be met with," says Chancellor Kent, "to the application of the general rule, that if the vessel departs from the usual course of the voyage from necessity, and departs no further than that necessity requires, the voyage will still be protected by the policy" (*c*).

(*y*) Arnould's statement was that it is only a voluntary and unexcused departure from the course of the voyage which amounts to a deviation. The provisions of sects. 46 and 49 of the Act have necessitated a change of language. The Act seems to regard even an involuntary departure from the proper course as a deviation, though excusable by reason of sect. 49 (1) (b).

(*z*) The reason given by Arnould (2nd ed. p. 451) is that it was the fault of the assured not to have appointed a competent captain. This reason seems to the editors both unnecessary and unsatisfactory.

(*a*) Phyn *v.* Royal Exch. Ass. Co. (1798), 7 T. R. 505.

(*b*) Roccus, not. 52, 53, cited 2 Emerigon, c. xiii. s. 15, p. 94; see also 2 Benecke, System des Assecuranz, c. viii. s. 2.

(*c*) In Robinson *v.* Marine Ins. Co. (1806), 2 Johnson, R. 89.

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Must be strictly commensurate with the necessity.

The delay, or departure indeed, must be strictly commensurate with the necessity that justifies it; there must be no waste of time, nor any needless divergence from the course of the voyage (*d*).

Lavabre *v.* Wilson.

426. The following well-known case illustrates this principle:—The "Carnatic," a French East Indiaman, was insured "at and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port or ports of discharge in France." On her arrival at Pondicherry she was found to be so much damaged that it became necessary for her to go to Bengal for repairs, that being the only place where she could be properly repaired. The usual time in which the direct voyage from Pondicherry to Bengal is performed is about six or seven days; but the "Carnatic," by touching and trading at different intermediate ports, consumed six weeks in going to Bengal, and about two months in returning thence to Pondicherry. Lord Mansfield said that, even if necessity were admitted to have been the sole motive for substituting the voyage to Bengal in the place of that to China, still it was incumbent on the assured to have pursued that voyage of necessity directly in the shortest and most expeditious manner, and that the delay in going from Pondicherry to Bengal, and the repeated stoppages by touching at different places, and trading there, were deviations which discharged the underwriter (*e*).

Difficulty in determining when deviation is justifiable or excusable.

427. Though there is no doubt as to the principle of law, there is sometimes a difficulty in ascertaining—(1) what degree of force or constraint will amount to such an unavoidable necessity as, on that ground, to justify a departure from the course of the voyage; (2) what circumstances, short of such unavoidable necessity, will excuse the ship in departing from, or delaying, the usual course of the voyage.

(*d*) Mar. Ins. Act, 1906, s. 49 (2), *supra*, § 424a. See Lavabre *v.* Wilson (1779), 1 Dougl. 284; Hyderabad (Deccan) Co. *v.* Willoughby, [1899] 2 Q. B. 530; see also Phelps *v.* Hill, [1891] 1 Q. B. 605.

(*e*) Lavabre *v.* Wilson (1779), 1 Dougl. 284.

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What is unavoidable necessity?

1. With regard to what amounts to an unavoidable necessity, the following cases have been decided in this country:—

Violence of mutinous crew.

Where the crew of a letter of marque mutinously insisted on the captain's returning home with a prize he had taken, instead of proceeding on the voyage, and, on his remonstrating, forced him to submit; this compulsory return was held not to be such a deviation as to discharge the underwriters (*f*). So where a crew, dreading the attacks of pirates if they pursued their voyage, all left the ship and refused to return to her unless the captain would promise immediately to sail back to the home port: his returning thither in pursuance of such promise was held no deviation (*g*).

Carried out of course by a ship of war.

Where a neutral ship was carried out of her course by a British cruiser, and detained in a port far out of the limits of the policy for about six weeks, this was held to be no deviation, having been caused by overruling necessity (*h*).

Mere orders by a ship of war are not a justifying necessity.

On the other hand, where the master of a merchant ship, while he lay at a port in Iceland taking in his loading, was ordered by the captain of a king's ship to go out to sea and examine a strange sail in the offing bearing enemy's colours, which he did, without any remonstrance on his part, or any threat of force on the other, his so doing was held to amount to a deviation (*i*).

Result.

On the whole, therefore, it appears that when a deviation is sought to be justified on the ground of unavoidable necessity, it must be shown that a degree of force was exercised towards the captain, which either physically he could not resist, or morally, as a good subject, he ought not to resist (*k*).

The principle illustrated in these cases has been followed

(*f*) Elton *v.* Brogden (1747), 2 Strange, 1264.
(*g*) Driscol *v.* Bovil (1798), 1 B. & P. 313.
(*h*) Scott *v.* Thompson (1805), 1 B. & P. N. R. 181.
(*i*) Phelps *v.* Auldjo (1809), 2 Camp. 350.
(*k*) Per Lord Ellenborough, 2 Camp. 351.

and maintained in the decisions of the Courts of the United States (*l*). Sect. 427.

Causes short of actual force or constraint which justify deviation.

428. Where departure from the course has not been caused by force or constraint, moral or physical, it was laid down by Arnould as a general rule, that it cannot be excused unless the state of circumstances be such as to leave the master no alternative, as a reasonable and prudent man, exercising a sound judgment, and acting for the best interest of all concerned, but to depart from, or delay, the usual course of the voyage (*m*). An exception to this principle is that a deviation is allowed for the purpose of saving human life, or obtaining medical or surgical aid.

Deviation solely for the preservation of the cargo.

Sub-sect. (1) (d) of sect. 49 of the Marine Insurance Act, 1906, declares, as we have seen, that a deviation or delay is excused when reasonably necessary for the safety of the ship or subject-matter insured. Therefore it seems clear that a deviation or delay for the safety of the ship is always permissible, and that no underwriter, whether on ship or cargo, or any other subject-matter, can claim to be discharged by reason thereof. If, however, a deviation be made solely for the safety of the cargo, or a part thereof, this sub-section does not excuse it, so far as policies on the ship or on other parts of the cargo are concerned. Yet as between the shipowner and the owners of cargo there are possible cases in which it may be not only justifiable, but even the master's duty, taking into consideration the question of the whole adventure, to put into a near port or to incur some delay in port for the preservation of the cargo, or even of some part thereof (*n*).

(*l*) See Winthrop *v.* Union Ins. Co. (1807), 2 Wash. C. C. R. 7; Lee *v.* Gray (1611), 7 Mass. R. 349; Wiggin *v.* Amory (1816), 13 Mass. R. 123; Kettell *v.* Wiggin (1816), 13 Mass. R. 68; Robertson *v.* Columbian Ins. Co. (1811), 8 Johnson, 491.

(*m*) See Phelps *v.* Hill (C. A.), [1891] 1 Q. B. 605; and Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37. In the latter case it was held to be reasonable for a river steamer, about to perform a sea voyage, to wait for other ships in order to sail in company with them. See also West Rand Central Gold Mines Co. *v.* Rougemont, [1900] 2 Q. B. 346.

(*n*) See Carver, ss. 289—291; the judgment of Hannen, J., in The

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Is sect. 49 of the Mar. Ins. Act, 1906, exhaustive?

If sect. 49 is intended to be an exhaustive summary of the causes which justify a deviation or delay, the policies on the ship or on any portion of the cargo which was not in danger will be vitiated by the fulfilment of this duty. It is possible, however, that sect. 49 ought not to be construed as exhaustive (*o*), and that as regards all the policies on the adventure there is a "lawful excuse" for the deviation or delay within the meaning of sects. 46 and 48 of the Act.

We will now consider the chief cases in which a deviation is considered reasonably necessary for the safety of the property at risk. They may be thus enumerated:—(1) Making a port to refit; (2) or to recruit the crew when generally disabled by sickness, &c.; (3) stress of weather; (4) endeavouring to avoid capture; (5) or to join convoy.

(1) Making a port to refit.

429. *Making a port to refit.*

The going into a port out of the usual course for necessary repairs, and staying there till such repairs can be completed, is justifiable, provided it plainly appear that such repairs under the circumstances, and at such port, were reasonably necessary, and that the delay was not longer than was requisite for repairs to enable the ship to proceed on her voyage (*p*). The same principle applies when it is necessary to ballast or lighten the ship. Thus, in one case, where a captain, finding he had too little ballast to steady his ship, at the importunity of the crew, and to save his and their lives, put into a port, out of the course of the voyage, where he took in 500 rolls of tobacco as ballast (*q*); and, in another case, where an overladen ship, shortly after sailing, put back

Rona (1884), 51 L. T. 28; Notara *v.* Henderson (1870), L. R. 7 Q. B. 225, 233, 237 (Ex. Ch.); but see per Cockburn, C. J., *S. C.* (1872), L. R. 5 Q. B. at p. 354.

(*o*) Mr. Arthur Cohen says (Halsbury's Laws of England, vol. xvii. § 784): "It seems somewhat doubtful whether this section of the Act was intended to enumerate all the causes which will excuse deviation or delay."

(*p*) Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 545.

(*q*) Guibert *v.* Readshaw (1781), 2 Park, 637.

into a port out of the course of her voyage, to unload part of her cargo—this was held no deviation (*r*). **Sect. 429.**

In the United States it has been held that if the ship does not find in the first port she enters what is indispensable to refit her, she may seek it, if necessary, in a second port out of the course of the voyage (*s*).

The port need not always be the nearest.

Though, generally speaking, the ship must put into the nearest port where necessary repairs can be done, there may be considerations such as danger, time, expense or accommodation, which make a more distant port preferable. If the master, in the reasonable exercise of his judgment, proceed to the more distant port, the policy will still remain in force (*t*).

(2) To procure fresh hands or stores.

430. *To recruit disabled crew, or procure stores or fresh hands.*

There can be little doubt that if a ship, which was originally sufficiently manned and equipped for the voyage, were, in the course of it, to lose so great a proportion of her officers or crew by sickness or other cause, that it became impossible to continue the voyage without procuring more, and no more could be procured except by making a port out of the direct course of the voyage, the putting into such port for such purpose would be allowable. The deviation would be reasonably necessary for the safety of the ship and those on board of her.

Thus, in one Nisi Prius case, Lord Eldon admitted, "That, if by the visitation of God so many of the crew, who were

(*r*) Weir *v.* Aberdein (1819), 2 B. & Ald. 320. These are both cases of unseaworthiness at sailing; but this objection seems not to have been taken in Guibert *v.* Readshaw, and in Weir *v.* Aberdein it was prevented by express license, indorsed on the policy by the underwriters, for the ship to go into Ramsgate and discharge part of her cargo. See as to the latter case, the judgment of the Privy Council pronounced by Lord Penzance in Quebec Maritime Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234, 244; and *post*, § 690.

(*s*) Hall *v.* Franklin Ins. Co. (1830), 9 Pickering, R. 466; 1 Phillips, Ins. s. 1020.

(*t*) Phelps *v.* Hill (C. A.), [1891] 1 Q. B. 605—a charter-party case, the decision in which is, however, applicable to contracts of insurance. See per Lindley, L. J., p. 612.

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otherwise sufficient, became so afflicted with sickness as to be incapable of managing the ship, such an illness of the crew was a necessity which might justify a deviation" (*u*).

So, it has been held in the United States, and apparently on good grounds, that the death of all the superior officers of an East India ship justified the crew in putting into the Isle of France, though out of the course of the voyage (*x*).

Semble, if the ship was originally inadequately fitted out.

It was, however, laid down by Arnould (*y*) that going out of the course for such purposes can only be justified when the ship was adequately manned, equipped and stored in the first instance: if the ship when she sailed was deficient in any of the elements of seaworthiness, the going into port to supply such deficiency, however necessary it may be, will, he said, be deemed a deviation (*z*).

For this statement there is some authority. Thus, where a ship put into a port out of her course in order to procure medicines and medical assistance, with which she ought to have been adequately provided when she sailed, this was held to amount to a deviation (*a*).

(*u*) In Woolf *v.* Claggett (1800), 3 Esp. 257.

(*x*) Winthrop *v.* Union Ins. Co. (1807), 2 Wash. R. 7.

(*y*) 2nd ed. p. 455.

(*z*) The chief authority for this proposition is Woolf *v.* Claggett, *infra*, the *ratio decidendi* of which was that the assured must show that the necessity for going into port arose without any default of the master or himself. The editors pointed out in previous editions that it is at any rate arguable that the deviation under such circumstances would not avoid the policy unless the deficiency was due to the wilful default of the assured himself. If the ship, reduced through the negligence of the assured or his servants to a state of disablement, were in consequence lost by perils insured against, the underwriter would be liable: Mar. Ins. Act, 1906, s. 55. It is therefore not apparent that a deviation, necessitated by the danger of such a loss, should avoid the policy. Of course, if there has been a breach of the warranty of seaworthiness, the insurer is entitled to avoid the policy on that ground. In Kish *v.* Taylor, [1912] A. C. 604, the House of Lords held, with regard to a contract of affreightment, that a deviation, necessary to save the ship and the lives of those on board, but caused by the master having taken her to sea in an unseaworthy state, was justifiable, though the right to recover damages for his previous wrongful act was preserved.

(*a*) Woolf *v.* Claggett (1800), 3 Esp. 257. Forshaw *v.* Chabert (1821), 3 Brod. & B. 158; 6 J. B. Moore, 369, which Arnould also cited, is a questionable authority. The ship, which ought to have sailed

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Upon the same principle it seems to have been held in the United States that the fact of a ship, insufficiently provisioned at the outset for the voyage, going off the course to procure provisions will, as a general rule, discharge the underwriter on the ground of deviation (*b*); though it would certainly be otherwise, were such lack of provisions due to unavoidable (and unusual) delay through causes over which the assured had no control (*c*).

Deviation to procure provisions.

It will be noticed that sub-sect. (1) (d) of sect. 49 of the Marine Insurance Act, 1906, states without qualification that a deviation reasonably necessary for the safety of the ship is excusable. It is therefore doubtful, whatever the law may previously have been, whether the insurer can now, in a case within the sub-section, rely on the fact that the necessity for the deviation was due to default (other, at any rate, than the wilful misconduct of the assured) in providing medicines or other stores.

Or medical aid.

The question whether a deviation to obtain medical aid for persons on board is justifiable when the navigation of the ship is not made unsafe by disablement has not arisen in this country, though it has been held in the United States that when there is an immediate need of medical aid for the preservation of human life, a deviation to obtain such aid is justifiable (*d*). Sub-sect. (1) (f) of sect. 49 of the Marine

with a full complement of men engaged for the whole voyage, sailed with two of the number who were only engaged for part of the voyage, and put into a port out of the limits of the policy, in order to supply this deficiency. The ground of the decision was not really that there had been a deviation, but that the ship was unseaworthy at the start. The jury had found that to touch at Jamaica for fresh hands was justifiable, and the Court expressed neither approval of nor dissent from this finding.

(*b*) See the American case of Kettell *v.* Wiggin (1816), 13 Mass. R. 68, cited 1 Phillips, Ins. s. 1026.

(*c*) See Raine *v.* Bell (1808), 9 East, 195; Thomas *v.* Royal Exch. Ass. Co. (1814), 1 Price, 195.

(*d*) Perkin *v.* Auguste Ins. Co. (1855), 2 Parsons, Ins. p. 34, n.; Peterson *v.* The Chandos (1880), 4 Fed. R. 645; see also Sprague *v.* Overton (1859), 1 Sprague's Decisions, 462. The Supreme Court has held that it may even be the duty of the master to an injured seaman, for the breach of which damages are recoverable against the ship, to

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Insurance Act, 1906, as we have seen, lays down the rule that a deviation is allowable when it is "reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship."

(3) Stress of weather.

431. *Stress of weather.*

The deviation is excused if a ship be driven out of her course by stress of weather; or if the captain puts into a port out of his course, or delays his sailing, to take refuge from a tempest, or to wait for a wind, if in so acting the captain did what a prudent man, in the exercise of sound judgment, would have done under the circumstances, with a view to the safety of the ship or of the subject-matter insured (*e*).

A ship driven out of her course must prosecute her voyage from the point to which she has been driven.

Sect. 49 (2) of the Marine Insurance Act, 1906, provides that "when the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch." The words "the ship must resume her course" suggest that she must return to the actual track from which she turned aside. Yet the deviation may have taken her to a place from which the usual or best course to her destination is a different one. It is submitted that the course ought to be determined with reference to the actual situation of the ship, and this view agrees with the decisions before the Act, according to which a ship driven from her course is not obliged to sail back to the point whence the storm first drove her; but she may make the best of her way to her port of destination from the point whither she has been driven.

Harrington v. Halkeld.

Thus a ship, insured "from London to St. Kitts," was

put into the nearest port where medical assistance can be obtained: The Iroquois (1903), 194 U. S. 240.

(*e*) Mar. Ins. Act, 1906, s. 49 (1) (b) and (d), *ante*, § 424a. Where pumps, intended to be used in salvage operations, were insured from Ardrossan to a wreck, while being used there and back to Ardrossan, the Court of Appeal held that a loss of the pumps during a deviation to Belfast, undertaken to save the salved vessel from sinking, was not recoverable. Wingate *v.* Foster (1878), 3 Q. B. D. 582. See, however, as to this case, *post*, § 471.

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separated from her convoy by a storm and afterwards captured while still out of her course, but taking the best course for St. Kitts or the convoy; Lord Mansfield held this was no deviation (*f*). So where a ship, insured from St. Kitts to London, was driven by a storm out of St. Kitts and obliged to run to St. Eustatia, and, after many unsuccessful efforts to get back to St. Kitts, finally gave up the attempt and completed her lading at St. Eustatia, whence she sailed for London; Lord Mansfield held this no deviation, and said: "If a storm drive a ship into any port out of the course of her voyage, and, being there, she do the best she can to return" (*quære, proceed*) "to her port of destination, she is not obliged to return back to the port whence she is driven" (*g*).

Delaney v. Stoddart.

Waiting until port open.

It has been suggested by Lord Ellenborough in this country (*h*), and decided in the United States (*i*), that if a ship find her port of destination blocked up by ice, or otherwise rendered inaccessible, she may make the nearest practicable port with a view of staying there till her own is open, without its being deemed a deviation. The rule in sect. 49 (2) of the Marine Insurance Act, 1906, is consistent with a stay in such port as long as the cause of the deviation is in operation.

Where a captain, delayed by adverse winds and dangerous weather, puts into a roadstead for safety, it has been held no deviation to send ashore for provisions if requisite (*k*).

(4) Endeavour to avoid capture.

432. *Endeavour to avoid capture.*

The endeavour to avoid the imminent peril of capture, either by lying to in the port of loading, or putting into a port out of the course of the voyage, or by departing from the track of the voyage insured, has always been held to justify

(*f*) Harrington *v.* Halkeld (1778), 2 Park, 639.
(*g*) Delaney *v.* Stoddart (1785), 1 T. R. 22.
(*h*) Blankenhagen *v.* London Ass. Co. (1803), 1 Camp. 453.
(*i*) Graham *v.* Commercial Ins. Co. (1814), 11 Johnson, R. 352. cited 1 Phillips, s. 1023.
(*k*) Thomas *v.* Royal Exch. Ass. Co. (1814), 1 Price, 195.

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a deviation, provided the danger was real and immediate, and the apprehension founded on reasonable evidence (*l*).

So a ship, insured "against capture in her port of loading," may hurry out of such port in order to avoid the imminent peril of capture, though only half loaded and totally unprepared for her voyage; and her afterwards putting into a port out of the course of her voyage in order to repair damage occasioned by such hasty escape will not discharge the insurer (*m*).

In the United States several cases have been decided upon this principle, and in all the main point of inquiry seems to have been whether the danger was so real and immediate as to justify the deviation (*n*).

(5) Endeavour to join convoy.

433. *Endeavour to join convoy.*

It is justifiable, whether the ship be warranted to sail with convoy or not (*o*), to depart from the direct course of the voyage in order to seek convoy either at the usual place of rendezvous or elsewhere; the only question in such cases is whether the circumstances show to the satisfaction of the jury that the captain, in so departing from the direct course of the voyage, acted fairly and *bonâ fide* according to the best of his judgment and with no other view or motive but to meet with convoy, and thereby be enabled to reach the terminus of the voyage by the safest way (*p*).

(*l*) Driscol *v.* Bovil (1798), 1 B. & P. 313; Driscol *v.* Passmore (1798), *ibid.* 200; Blankenhagen *v.* London Ass. Co. (1808), 1 Camp. 453; O'Reilly *v.* Gonne (1815), 4 Camp. 249; see also The San Roman (1873), L. R. 5 P. C. 301. In The Teutonia (1872), L. R. 4 P. C. 171, an action on a charter-party, the Privy Council held that a master of a German ship bound for Dunkirk, having been told war had broken out between France and Germany, was justified in putting back to the Downs to make inquiries.

(*m*) O'Reilly *v.* Gonne (1815), 4 Camp. 249.

(*n*) Oliver *v.* Maryland Ins. Co. (1813), 7 Cranch's S. C. R. 493; Whitney *v.* Haven (1816), 13 Mass. R. 172; Reade *v.* Com. Ins. Co. (1808), 3 Johnson, R. 352.

(*o*) D'Aguilar *v.* Tobin (1816), Holt, N. P. 185. So held also in the United States, Patrick *v.* Ludlow (1802), 3 Johnson's Cases, 10; 1 Phillips. Ins. s. 1023.

(*p*) Bond *v.* Gonzales (1704), 2 Salk. 445; Gordon *v.* Morley (1747),

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It has been held justifiable for a ship, warranted or not to sail with convoy, if she has once sailed therewith and is afterwards driven back to port, to sail the second time without convoy (*q*).

If it clearly appears that, in the common course of the voyage insured, the ship might have obtained convoy at a nearer port, her being limited by her instructions to call for it at a more distant port may discharge the underwriter as varying the risk (*r*).

(6) Succouring the distressed and saving property.

434. A doubt, dishonouring to the jurisprudence of Christian communities, appears for some time to have prevailed both in this country and the United States, whether a departure from the direct course of the voyage, for the purpose of saving the lives of men threatened with an imminent danger of shipwreck or foundering, was or was not a deviation which would discharge the underwriters; it was, however, before the Marine Insurance Act, 1906, was passed, considered clear law, both on this and the other side the Atlantic, that a deviation of this kind, sanctioned alike by the true interests of commerce and the clearest precepts of humanity, can in no instance be held to discharge the underwriters (*s*); and the Act declares that a deviation is justifiable for the purpose of saving human life, or aiding a ship in distress where human life may be in danger (*t*).

2 Str. 1265; Campbell *v.* Bordieu (1747), *ibid.*; Bond *v.* Nutt (1777), 2 Cowp. 601; Enderby *v.* Fletcher (1780), 2 Park, 646; D'Aguilar *v.* Tobin (1816), Holt, N. P. 185; *S. C.*, 2 Marshall, R. 265.

(*q*) Laing *v.* Glover (1813), 5 Taunt. 49.

(*r*) Heselton *v.* Allnutt (1813), 1 M. & S. 46.

(*s*) See the *dictum* of Lawrence, J., in Lawrence *v.* Sydebotham (1805), 6 East, 54, and the judgments of Lord Stowell in The Beaver (1801), 3 C. Rob. 292, and The Jane (1831), 2 Hagg. Ad. R. 345. In the United States, see the cases collected in Phillips, Ins. s. 1027; 3 Kent, Com. 313. See especially the judgment of Story, J., in The Schooner Boston (1833), 1 Sumner, R. 328; see also Peterson *v.* The Chandos (1880), 4 Fed. R. 645.

(*t*) Sect. 49 (1) (e), *ante*, § 424a. See also Maritime Conventions Act, 1911, s. 6, *ibid.* n. (*t*), and the provisions of the Merchant Shipping (Convention) Act, 1914, and the Merchant Shipping (Wireless Tele-

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This liberty, however, does not extend to the case of a deviation solely for the purpose of saving property (*u*).

In an action by a goods owner against the shipowner, whose vessel and her cargo, including the plaintiff's goods, were lost whilst the ship was performing a salvage service for another vessel and her cargo, but not such a service as was reasonably necessary to save the lives of those on board, the Court of Appeal held the deviation to be unjustifiable (*x*). The Court regarded the case as one of the first impression in our Courts. Upon the American authorities they formulated the following propositions, as containing the existing law of the United States on the question, and expressed their cordial concurrence with the law as thus laid down:—

"Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of perils of the seas. And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.

"If, therefore, the lives on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation.

graphy) Act, 1919, as to the duty to render assistance on receiving a wireless distress call, and (in the case of passenger ships and ships of upwards of 1,600 tons gross tonnage) to be provided with a wireless telegraphy installation.

(*u*) Scaramanga *v.* Stamp (1880) (C. A.), 5 C. P. D. 295. See, for the cases in the United States which establish this rule, 1 Phillips, Ins. s. 1028. One of the Institute voyage clauses gives leave to tow and assist vessels or craft in all situations: see Appendix B. For the construction of such a clause in a contract of affreightment, see Stuart *v.* British and African Steam Nav. Co. (1875), 32 L. T. 257; Potter *v.* Burrell, [1897] 1 Q. B. 97 (C. A.); Carver, s. 292a.

(*x*) Scaramanga *v.* Stamp (1880), 5 C. P. D. 295.

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"But where the preservation of life can only be effected through the concurrent saving of property, and the *bonâ fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating" (*y*).

Irresistible force of a peril not insured against.

+ **435.** It has been clearly established that where the departure from the course of the voyage is necessitated by the immediate and irresistible operation of a peril not insured against, it will not discharge the underwriter, whether the peril be one not included among the ordinary risks or expressly excluded by the specific terms of the policy. It is no doubt excusable as being "caused by circumstances beyond the control of the master and his employer" (*z*).

Thus, where a neutral ship, insured expressly "against sea risks and fire only," was carried out of her course and detained six weeks by a British cruiser, it was held that this deviation had no effect on the obligation of the insurer, though capture and seizure were perils not insured against (*a*).

Avoiding peril not insured against.

It appears, however, to have been held at Nisi Prius that a departure from the course in order to avoid, or in consequence of endeavouring to avoid, a peril not insured against is a deviation, though it would not have been so had it taken place in order to avoid a peril insured against. In the case alluded to, the policy was on goods "at and from La Guayra," with the clause "warranted free of capture and seizure, and the consequences thereof, in the port of La Guayra." To avoid seizure the ship ran to sea before she was properly loaded, and was in consequence obliged to put into a port out of the course of the voyage insured and was there lost. Gibbs, C. J., told the jury that, upon these facts, the ship had been guilty of a deviation which discharged the

O'Reilly *v.* Royal Exchange Co.

(*y*) See per Sprague, J., in Crocker *v.* Jackson, Sprague, R. 141.

(*z*) Mar. Ins. Act, 1906, s. 49 (1) (b), *ante*, § 424a.

(*a*) Scott *v.* Thompson (1805), 1 B. & P. N. R. 181. See also per Kent, C. J., in Robinson *v.* Marine Ins. Co. (1806), 2 Johnson, 89, cited 1 Phillips, s. 1025; 3 Kent, Com. 316.

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underwriters, because it was the consequence of endeavouring to avoid a risk for which the underwriters had stipulated by the policy not to be liable (*b*). And this was the sole ground of his decision, for in a policy on the freight of the same ship, in which there was no such exception of capture and seizure in port, the Chief Justice held upon precisely the same state of facts that the ship was guilty of no deviation (*c*).

Both Arnould and Phillips thought it doubtful whether the decision could be sustained as an authority (*d*), and the reasons which the latter gave for this opinion have great weight. As he points out, it cannot but be known to the parties to a policy against one or some only of the ordinary sea perils, that the vessel is to be subject to the other perils usually included in policies, and the fair inference is that they do not contemplate the forfeiture of the insurance by a reasonable departure from the course to avoid one of these risks (*e*).

Sect. 49 (1) (d) of the Marine Insurance Act, 1906 (*f*), which states that a deviation is excused when reasonably necessary for the safety of the ship or subject-matter insured, seems not to contemplate any distinction between a deviation to escape a peril insured against and one to escape a peril for which the insurer would not be liable. It is submitted that such a distinction is not sound, and that, since the Act at any rate, it cannot be supported.

(*b*) O'Reilly *v.* Royal Exch. Ass. Co. (1815), 4 Camp. 246.
(*c*) O'Reilly *v.* Gonne (1815), 4 Camp. 249.
(*d*) See Arnould, vol. i. 2nd ed. 461; 1 Phillips, s. 1025.
(*e*) For an analogous principle, see The Teutonia (1872), L. R. 4 P. C. 171, 180, where, the master having justifiably deviated for the safety of the ship, Mellish, L. J., said: "It cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship because, from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."
(*f*) *Ante*, § 424a.

CHAPTER XVI.

NATURE AND DURATION OF THE RISK IN TIME POLICIES.

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Nature of the Risk in Time Policies 436
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A time policy is one in which the risk is limited by time alone.

436. THE inconvenience or impossibility, when a ship was employed in such adventures as cruising, coasting or fishing voyages, of designating the risk by local termini led to the practice of limiting the risk to a certain fixed term or period of time specified in the policy (*a*). "Where the contract is to insure the subject-matter for a definite period of time, the policy is called a 'time policy'" (*b*). The use of time policies is now very extensive. In fact, they are now used much more than voyage policies for the insurance of steamships, and very largely for that of freight and disbursements. They are not in general suitable for the insurance of goods, which the assured usually wishes to protect during transit from one place to another (*c*). There is one kind of insurance of goods, viz., by floating policies, which, in a sense, is an insurance on time when it covers shipments of goods, made within a certain period of time fixed by the policy, as declared by the assured; but these floating policies are in reality insurances of goods for a series of voyages (*d*).

(*a*) 2 Emerigon, c. xiii. s. 1, p. 41; 2 Benecke, System des Assecuranz, c. viii. s. 3, p. 442.
(*b*) Mar. Ins. Act, 1906, s. 25 (1).
(*c*) See Gow, Mar. Ins. 228—238, for an account of the practice of insuring by time policies.
(*d*) Where a policy covered shipments of goods "from the loading thereof . . . shipments held covered to December 31," "in as many voyages as may be required until 31/12/94," goods shipped on the 31st December, 1894, were held covered, though the ship only sailed on the 1st January, 1895. Johnson *v.* Bryant (1896), 1 Com. Cas. 363.

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In time policies the risk insured is entirely independent of the voyage of the ship (*iter navis*) (*e*), and the policy covers any voyage whatever which the ship may make, and any loss or damage sustained within the space of time limited in the policy (*f*). It is now, however, very common for the policy to except certain geographical limits, either entirely or for certain seasons of the year, as, *e.g.*, "Warranted no St. Lawrence between the 1st of October and the 1st of April." In that case a loss within the excepted limits of time and space is, of course, not covered by the policy (*g*).

There is no implied warranty of seaworthiness in time policies (*h*).

Duration of the risk.

437. The two extremes of the time are the termini of the risk, and the adventure begins and ends with the term wherever the ship may then happen to be, and whether the object of the voyage be then accomplished or not (*i*). The risk necessarily ceases when the time limited in the policy comes to an end (*j*). From the instant that the policy attaches, the insurer's right to the full premium is complete, as is the right of the assured to a full indemnification in case of loss (*k*). Thenceforth there is no suspension of the risk

(*e*) Ist von der Reise des Schiff's vollig unabhängig. 2 Benecke, System des Ass. c. 8, s. 3, 446.

(*f*) 3 Kent, Com. 307, n.

(*g*) See Birrell *v.* Dryer (1884), 9 App. Cas. 345. Where there was a warranty "not to proceed east of Singapore," Bigham, J., held that the assured could recover for a loss on a voyage to a port east of Singapore, at a time when the ship had not yet got as far as Singapore: Simpson SS. Co. *v.* Premier Underwriting Assn. (1905), 10 Com. Cas. 198.

(*h*) Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284; *post*, Part II. Chap. IV.

(*i*) Casaregis, Disc. lxvii. No. 31, cited 2 Emerigon, c. xiii. s. 1, p. 42. Lapso tempore extincta est materia obligationis et consequenter obligatio, quia post tempus, jam alia est materia, alia res. Dumoulin, tom. iii. p. 283, cited 4 Boulay-Paty, Droit Mar. 170.

(*j*) Il suffit que le risque ait commencé pour qu'il finisse au tems préscrit. 2 Emerigon, c. xiii. s. 1, p. 41.

(*k*) Tyrie *v.* Fletcher (1777), 2 Cowp. 666; Lorraine *v.* Thomlinson (1781), 2 Dougl. 585. A clause is usually inserted in time policies (see Institute Clauses, *post*, App. B.) providing for a return of an agreed

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whether the ship be at sea or in port; it continues to run until the expiration of the period insured (*l*).

Time policy may be retrospective.

A time policy, like a voyage policy, may be effected retrospectively if it contain the clause "lost or not lost"; as where a policy was effected in August, 1807, "to commence from 1st August, 1806," on a ship engaged in the Southern whale fishery, which had sailed on her voyage in 1805 (*m*).

Loss caused within the limits of the time, but damage not ascertained till afterwards.

438. On general principles, it is clear that the underwriters on a time policy ought to be liable for any loss which happens within the limits of the time (*n*). It is supposed, however, to have been laid down in Meretony *v.* Dunlope, that where damage is caused within the limits of the time, but the extent of it not ascertained till afterwards, the underwriter is not liable. The case, as shortly stated by Willes, J., was that of an insurance for six months on a ship, which received her death-wound three days before, but was kept afloat by pumping till three days after, the expiration of the time: the verdict for the underwriters was confirmed by the Court (*o*). In Knight *v.* Faith (*p*), however, which subsequently raised the same point for decision, Lord Campbell, in giving the judgment of the Court, intimated considerable doubt whether the doctrine supposed to be established by

Supposed doctrine of Meretony *v.* Dunlope overruled by Knight *v.* Faith.

part of the premium when the ship has been laid up for thirty consecutive days.

(*l*) 2 Emerigon, c. xiii. s. 1, p. 41. See, to the same effect, Syers Bridge (1780), 2 Dougl. 527. A usual clause in time policies (see Institute Time Clauses, App. B.) makes the risk attach "in port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, &c."

(*m*) Hucks *v.* Thornton (1815), Holt, N. P. 30. Could it possibly be argued that such an insurance, even without the clause, "lost or not lost," was not intended to be retrospective?

(*n*) A loss of freight in consequence of a casualty happening during the time limited by the policy is recoverable, although the voyage could not have been completed, and therefore the freight would not have been earned within such time. Michael *v.* Gillespy (1857), 2 C. B. N. S. 627; 26 L. J. C. P. 306.

(*o*) Meretony *v.* Dunlope (1783), stated by Willes, J., in giving judgment in Lockyer *v.* Offley (1786), 1 T. R. 260.

(*p*) Knight *v.* Faith (1850), 15 Q. B. 649.

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Meretony *v.* Dunlope was ever laid down by Lord Mansfield, and stated what the Court deemed to be the correct doctrine thus:—"If a ship, insured for time, during the time received damage from the perils of the seas, though the amount thereof be not ascertained till the expiration of that time, and she is kept afloat till then, upon the assured taking proper steps, there does not appear any good reason why they may not, according to the facts, proceed against the underwriters either for a total or for a partial loss" (*q*).

In the following case, although the casualty which caused a loss of freight took place before the policy expired, the loss was held to have occurred afterwards. The policy was expressed to be "from the 15th April to the 14th October, both inclusive, on chartered freight," to pay only loss of hire which might arise under the "forty-eight hours' clause" in a charter-party "for accidents occurring between the 15th April and the 15th October." The ship met with an accident in June, but was only docked for repairs in November, and the repairs were not completed until the 30th December, and in the meanwhile the payment of hire ceased. The Court of Appeal held, affirming the Divisional Court, that the underwriter was not liable, because freight had been paid for the whole period covered by the policy, and consequently there was no loss of freight within that period (*r*).

Time policies limited in England to a year; not so restricted elsewhere.

439. England appears to be the only commercial state in which any restriction is placed on the duration of time policies. The foreign codes, in general, expressly allow insurances on time without any limitation as to their extent (*s*); and the law is the same in the United States of America (*t*).

In England the law, as declared in the Stamp Act, 1891, was "that no policy of sea insurance made for time shall

(*q*) Knight *v.* Faith (1850), 15 Q. B. 667.
(*r*) Hough *v.* Head (1885), 55 L. J. Q. B. 43.
(*s*) See, *e.g.*, the Code of Holland, art. 256; German Code, art. 830; Code de Commerce, arts. 332, 363.
(*t*) 1 Phillips, Ins. s. 949, n.

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be made for any time exceeding twelve months," and a policy made for a longer period was expressly declared to be invalid (*u*).

Continuation clause.

440. In the English time policies it has been usual to provide by a clause attached to the policy, called the continuation clause, that if at the end of the period of the insurance the ship is at sea the insurance may be extended until her arrival at some port. The form of the clause in the Institute Time Clauses for policies on ship is now as follows:—"Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro ratâ* monthly premium to her port of destination."

Another form of continuation clause, which has sometimes been inserted in policies, does not make the prolongation of the risk conditional on notice being given, but provides simply that if the ship be at sea at the expiration of the policy the insurance shall continue until the ship arrives at some port (*x*).

For some time there was considerable doubt whether or not a continuation clause in a policy for twelve months had the effect of vitiating the whole insurance, on the ground that it made the policy one for a period exceeding twelve months within the meaning of the Stamp Act, 1891, s. 93 (*y*).

In two cases (*z*) it was held that the assured could not recover under this clause for a loss which took place after the expiration of the twelve months. The assured were thus relying on a contract of insurance alleged by themselves to be one for more than twelve months (*a*). Such a contract is

(*u*) Stamp Act, 1891, s. 93 (2), (3).
(*x*) See, *e.g.*, the continuation clause in Charlesworth *v.* Faber (1900), 5 Com. Cas. 408.
(*y*) See Gow, Mar. Ins. 237.
(*z*) Charlesworth *v.* Faber (1900), 5 Com. Cas. 408; Royal Exchange Ass. Corporation *v.* Sjoforsakrings Aktie-bolaget Vega, [1901] 2 K. B. 567; [1902] 2 K. B. 384, C. A.
(*a*) They also contended in the later case that the policy contained

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plainly void. In the later case Bigham, J., expressed the opinion that the contract was severable, so that the illegal part could be rejected, and if the loss had taken place within the twelve months the assured could have recovered (*b*). The decision of the Court of Appeal was, however, based on the ground that the contract was indivisible and the policy therefore altogether void. "It is one time policy throughout," said Mathew, L. J., "for the period of twelve months and the additional time contemplated by this very extensive continuation clause" (*c*). It appears, therefore, that any term prolonging an insurance for a year makes the policy one for a period exceeding twelve months.

Sect. 11 of the Finance Act, 1901 (1 Edw. 7, c. 7), has, however, provided that a policy of sea insurance shall not be invalid on the ground that by reason of a continuation clause it may become available for a period exceeding twelve months; and a continuation clause is defined as an agreement, the effect of which is that in the event of the ship being at sea, or the voyage otherwise not completed, on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days (*d*).

Sect. 25 (2) of the Marine Insurance Act, 1906, declares that "subject to the provisions of sect. 11 of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid" (*e*).

The question of continuing policies arose some time ago in

two separate contracts, one an insurance for twelve months, the other made by the continuation clause an insurance either for a voyage or for a further period. It was, however, held that even if the clause could be regarded as a separate policy, it was invalid under sect. 93 (3) of the Stamp Act, because if for a voyage it did not sufficiently specify the termini, if for time it did not determine the period.

(*b*) [1901] 2 K. B. at p. 573.

(*c*) [1902] 2 K. B. at p. 395.

(*d*) As to the stamping of a time policy with a continuation clause, see *ante*, § 31.

(*e*) A policy on a ship under construction or repair, though made for a time exceeding twelve months, is not deemed to be a time policy: Revenue Act, 1903, s. 8, *ante*, § 31.

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connection with a club policy, of which a rule, declaring that the association should renew the policy unless they received ten days' notice to the contrary, was expressly made a term. It was not necessary to decide whether the insurance (originally for thirty-eight days only) was thereby prolonged; but Cockburn, C. J., expressed the opinion that the policy was a continuing one (*f*). In a later case the question arose whether a club policy for twelve months was a continuing one by reason of a similar rule, and it was held that, according to the terms of the rule and the words of 30 & 31 Vict. c. 23, the policy was not a continuing one (*g*).

Duration of an insurance "from" a day.

441. When the insurance is expressed to be from one particular day to another, *e.g.*, "from the 14th day of February, 1914, until the 14th day of August, 1914," it has been held in the case of a fire policy that the risk does not in general commence to run until the former day has expired, and that it will cover losses happening on the latter day (*h*). The decision seems applicable to marine policies; but it appears that there is no hard-and-fast rule to this effect, and that in

(*f*) Michael *v.* Gillespy (1857), 2 C. B. N. S. 627; 26 L. J. C. P. 306.

(*g*) Lishman *v.* Northern Marit. Ins. Co. (1873), L. R. 8 C. P. 216; in the Exch. Ch. (1875), L. R. 10 C. P. 179. The assured, it must be noticed, was not suing on or asserting the validity of the policy. The question was whether he was insured by it, after the expiration of twelve months, within the terms of a warranty in another policy not to be insured beyond a certain amount. The rules of the mutual insurance associations commonly provide for the continuation of the insurance and the issue of a fresh policy from year to year, in default of notice by either party to terminate the insurance. The club policies are usually expressed to be made subject to the rules and regulations of the associations. If the rule prolonging the insurance be thereby incorporated in the policy, the latter is invalid, as being made for more than twelve months. But the correct view, it is submitted, is that the policy only incorporates those rules which are applicable to the risk for the year and not the antecedent agreement to issue a fresh policy at the expiration of the risk. This view agrees with the decision in Lishman *v.* Northern Maritime Ins. Co., *supra*.

(*h*) Isaacs *v.* Royal Ins. Co. (1870), L. R. 5 Ex. 296. Accord. South Staffordshire Tramways Co. *v.* Sickness and Accident Ass. Assn., [1891] 1 Q. B. 402, a case upon an accident insurance.

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any particular case it would be open to one of the parties to prove that a different computation of time was intended.

Time of what place determines the duration of the risk.

Usually, however, in English policies the risk is declared to run from a particular hour of a particular day, *e.g.*, "from noon of the 20th day of February." It is evident that the time of the same place ought to determine the beginning and end of the risk, otherwise the ship, by sailing eastward or westward, might shorten or lengthen the duration of the risk. In the United States it has been decided that the time which determines the duration of the risk is that of the place where the contract was executed, unless it be shown that a different computation of time was contemplated (*i*). The same rule would no doubt be followed in the English Courts, if the question should arise here. It is, however, usually stipulated in the English policies that Greenwich mean time is the time which governs the risk. In view of the fact that in practice Greenwich mean time is everywhere used in England, even without this stipulation it would no doubt be held that this time was applicable to a policy made in this country (*k*).

Proof of time of loss in case of missing ship.

442. Sect. 58 of the Marine Insurance Act, 1906, declares that "where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed." Still, the burden of proving that a loss took place within the time covered by the policy is on the assured, and there is no presumption in the case of a missing ship that the loss took place at a particular time (*l*). The assured must, therefore,

(*i*) Walker *v.* Protection Ins. Co. (1849), 29 Maine R. 317; 1 Phillips, s. 949.

(*k*) By the Statutes (Definition of Time) Act, 1880, as amended by the Time (Ireland) Act, 1916, any expression of time in a statute, deed, or legal instrument shall, unless it be otherwise specifically stated, be held to be Greenwich mean time.

(*l*) Brown *v.* Neilson (1804), 1 Caines, 525, cited 1 Parsons, 311, and followed by Field, J., in Reid *v.* Standard Marine Ins. Co. (1886), 2 Times L. R. 807. The rules of the mutual insurance associations, however, often provide that a missing ship shall be deemed to have been lost on the day when she was last heard of.

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in order to recover, produce some evidence on which a jury will be justified in finding that the loss took place while the policy was in force. Evidence that the ship must have encountered a violent storm which happened at a particular time may be sufficient (*m*). Again, if in the ordinary course the ship ought to have arrived at her destination before the expiration of the policy, a loss within the time limit may be inferred (*n*).

Mixed policies.

443. The policies hitherto considered have been purely time policies, in form as well as in effect; *i.e.*, the limits of the risk have been defined in the policy, solely by points of time, without any designation of local termini at all: policies, however, have sometimes, though not very frequently, been made, in which not only the time is specified for which the risk is limited, but the voyage also is described by its local termini (*o*). As, for instance, "at and from London to Cadiz for six months," or "from the 1st of January, 1914, to the 1st of June, 1914, at and from Bristol to Marseilles," &c., or "from the 1st of January, 1914, at and from Liverpool to New York."

Construction and effect of mixed policies.

These policies are neither time nor voyage policies, but partake of the nature of both, and, for the sake of convenience, may be called mixed policies (*p*). They are time policies in this, that the underwriter is not liable for any loss unless it occur within the limits of the time specified in the policy; and they are so far voyage policies, that the underwriter is not liable for any loss unless the ship originally sailed on the voyage described in the policy, and at the time

(*m*) See a case before James, V.-C., cited by North, J., in In re Rhodes (1887), 36 Ch. D. 591.

(*n*) Brown *v.* Neilson, *supra*.

(*o*) Way *v.* Modigliani (1787), 2 T. R. 30; Robertson *v.* French (1803), 4 East, 130. See also Maritime Ins. Co. *v.* Alianza Ins. Co., [1907] 2 K. B. 661.

(*p*) There are also policies, such as harbour policies, for a fixed period of time, to which the expression used by Lord Chelmsford, viz., "localised time policies," may be fitly applied: see 1 App. Cas. at p. 504. As to these policies, see *infra*, § 508.

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of the loss be sailing on the prescribed course between the termini of such voyage (*q*), or if insured "at and from" a place, be there at the time of the loss for the purposes of the voyage insured.

Way *v.* Modigliani.

Thus, as we have already seen, where a Newfoundland ship was insured "at and from the 20th of October, from any ports in Newfoundland to Falmouth, or her port or ports of discharge in England"; it was held that, although under this policy the ship need not have been in any port in Newfoundland on the 20th of October, yet, in order to make the policy attach at all, the ship must have originally sailed on the voyage insured, and that as in this case she had not done so, the assured could not recover, though the loss took place after the 20th of October, and when the ship had got into the course of the voyage described in the policy (*r*).

The ship need not be at the *terminus a quo* on the day from which the policy takes effect.

444. The point conceded in this case, viz., that in such a policy it is not necessary that the ship should be in the port named as the *terminus a quo* in the policy, at the time when the insurance is limited to commence, has been illustrated in the United States.

American cases on this point.

Thus, where a brig was insured "from Calais, in Maine, on the 16th day of July, to, at, and from all ports to which she may proceed in the coasting trade for six months"; and

(*q*) Salvage pumps were insured "from the 30th of December, 1882, to the 12th of January, 1883, . . . whilst engaged in salvage operations at the wreck of the C.," "including all risk while being conveyed from B. to and/or on board the wreck." Cave, J., held that "at the wreck" meant at the locality of the wreck, and that the policy did not cover a loss of the pumps on board the wreck within the prescribed period, while it was being towed to the nearest port of safety. Difiori *v.* Adams (1884), 53 L. J. Q. B. 437.

(*r*) Way *v.* Modigliani (1787), 2 T. R. 30. The ship had left Newfoundland on the 1st of October. If she had sailed after the 20th on the voyage insured, she would no doubt also have been protected by the policy when she broke ground, the mention of the date not being a warranty (it is apprehended) that she shall sail on or before that date, but only fixing the date before which the risk cannot attach. There may, however, be an implied condition in a policy like this, that the voyage shall at any rate commence within a reasonable time after the specified date. Cf. Mar. Ins. Act, 1906, s. 42 (2).

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the brig was not at Calais on the 16th July, but had been there subsequently within the six months; the Court held that the policy had attached on the 16th July, "for it was the clear intent of the parties to insure on time, without regard to the place where the vessel might then be, but only with regard to the employment in which she was engaged, viz., the coasting trade" (*s*).

So where insurance was effected on a ship for a voyage "at and from Boston to Charlestown," the policy only to take effect so far as the ship was not covered by previous insurances; and it appeared that the ship, fully covered by a prior policy on time, had sailed from Boston before such prior policy had expired, the second policy was held to attach while the ship was at sea on the voyage, immediately upon the expiration of the first (*t*).

Where it is evident from the whole language of the instrument that, although the risk is expressly made to commence from a specified local terminus, yet the policy is substantially a time policy, it has been held in the United States that it will attach and operate as such, though the vessel may never within the term have been at the local *terminus a quo* named in the policy as the place where the risk is to commence. A policy was effected on ship "to, at, and from one or more ports in the globe, for one year, commencing the risk at Barbadoes the 7th of December, 1810, to continue till the vessel shall be arrived and moored at anchor twenty-four hours in safety within the year aforesaid." The vessel was not at Barbadoes, as supposed by the policy, having left on the 6th; but the Court said her being so was immaterial, and that the risk would end with the year without any regard to her being in any port, either at that time or before; the beginning, duration, and end of the risk being well enough described without any regard to the place

(*s*) Martin *v.* Fishing Ins. Co. (1838), 20 Pick. R. 389, cited 1 Phillips, Ins. s. 928.

(*t*) Kent *v.* Manufacturers' Ins. Co. (1836), 18 Pick. R. 19; 1 Phillips, Ins. s. 928.

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where it was to commence, or to the vessel's being safe in port (*u*).

Difference in effect between these mixed policies and voyage policies.

Upon the whole it may be laid down that, supposing a policy in this mixed form once to have attached, the only difference in point of effect between it and an ordinary voyage policy will be that the risk upon the adventure will continue, not until the arrival of the ship or the landing of the goods, but until the completion of the time specified, whenever and wherever that may be, totally irrespective of the completion or non-completion of the voyage. These policies, in fact, afford no more protection than, and not so much liberty as, time policies, and are, probably for that reason, comparatively of rare occurrence (*x*).

Policies for voyage and time.

445. Sect. 25 (1) of the Marine Insurance Act, 1906, declares that "a contract for both voyage and time may be included in the same policy"; and by the Stamp Act, 1891, s. 94, "where any sea insurance is made for a voyage, and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time."

(*u*) Manley *v.* United Marine and Fire Ins. Co. (1812), 9 Mass. R. 85, cited 1 Phillips, s. 928.

(*x*) Benecke, System des Assecuranz, c. viii. introductory section, p. 203.

CHAPTER XVII.

DURATION OF THE RISK IN VOYAGE POLICIES.

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Clause fixing the duration of the risk.

446. THE clause describing the voyage by its termini is distinct in our English policies from that which defines the commencement, continuance, and end of the risk. This latter clause, upon the construction of which the nature of the contract between the parties so materially depends, is in Lloyd's policies in the following form:—

> "Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship upon the said ship, &c. , and shall so continue and endure, during her abode there, upon the said ship, &c., and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at , upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises till the same be there discharged and safely landed" (*a*).

(*a*) By express stipulation the risk on goods is sometimes made to attach during a land transit preceding the marine voyage. See, *e.g.*, Hyderabad Deccan Co. *v.* Willoughby, [1899] 2 Q. B. 530.

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As there are many decisions on the construction of this clause, and as the duration of the risk varies upon the different subjects of insurance, it will conduce to clearness if we discuss separately the duration of the risk: (1) on goods; (2) on ship; (3) on freight. It must, however, be noticed that in general, whatever be the subject-matter insured, there is an implied condition in a voyage policy that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced, the insurer may avoid the policy (*b*).

Commencement of the risk on goods.

447. "Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship."

Rule 4 of the Rules for the Construction of a Policy in this form, in the first Schedule of the Marine Insurance Act, 1906 (*c*), provides that—

> Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship (*d*).

In this respect our practice differs from that of almost all continental states, which either decree by their laws or stipulate in their policies that the risk of the underwriters on goods shall commence directly the goods leave the shore in order to be loaded on board the ship (*e*).

(*b*) Mar. Ins. Act, 1906, s. 42 (1), *post*, § 480.

(*c*) These Rules apply "unless the context of the policy otherwise requires": sect. 30 (2).

(*d*) The form of policy in the Schedule is for an insurance "at and from" a named port. If the insurance were expressed to be merely "from" the port of loading, it is apprehended that the risk would not commence until the ship started on the insured voyage, even though the printed clause as above were not deleted. See Mar. Ins. Act, 1906, Sched. I. rule 2, *post*, § 473.

(*e*) Thus the German Commercial Code (art. 824) provides that the risk on goods shall begin immediately from the time the goods leave the shore. By the Russian Commercial Code (art. 567) and the Egyptian Maritime Code (art. 184) the beginning of the risk is

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The commencement of the risk may by varied by a special clause.

Of course goods, even in this country, may be protected while thus in transit from quay to ship by any express clause in the policy duly framed for the purpose, and a clause such as "including risk of craft to and from the vessel" is commonly inserted in English policies (*f*).

Commencement of the risk under the ordinary clause.

448. "From the loading thereof on board the said ship at."

Upon the construction of these words it has been decisively established that a policy on goods for a voyage "at and from" a specified terminus in which the risk is expressed to begin "from the loading thereof on board the ship," in the common form, will only attach upon goods loaded on board at the very place named as the *terminus a quo* of the voyage (*g*); and this even though it should plainly appear, from extrinsic evidence, that the underwriters knew that the goods had in fact been loaded on board prior to the ship's arrival at the place specified in the policy as the *terminus a quo* of the

the same, unless the policy itself provides otherwise. By the Belgian Maritime Code (art. 195), when the duration of the risk is not settled by the policy, it runs as to goods from the moment they are loaded in the ship, or in lighters to convey them there. The Commercial Codes of Holland (art. 627) and of Spain (arts. 733, 761) go even further, and declare that the risk on goods shall commence from the time they are brought down to the quay or wharf in order to be loaded on board. The French Code de Commerce (arts. 328, 341) makes the risk attach from the loading of the goods on board the ship or the lighters that are to convey them thither. For the former laws of continental countries, see 3 Boulay-Paty, Droit Mar. tit. x. s. 9, pp. 418—420; 2 Emerigon, c. xiii. s. 2, p. 48; and 2 Benecke, System des Assecuranz, c. viii. s. 1, p. 205; Nolte's ed. vol. i. pp. 641—646.

(*f*) A clause, called the "warehouse to warehouse" clause, which has frequently been inserted in Lloyd's policies, covers "all and every risk in craft to and/or from the vessel or vessels, and all risks, including fire, from the warehouse of the consignor by any conveyances by land or by water, and until safely delivered into the warehouses of the consignees and/or their agents." See Ide *v.* Chalmers (1900), 5 Com. Cas. 212. Somewhat differently worded "warehouse to warehouse" and "craft" clauses are included in the Institute Cargo Clauses. See *post*, Vol. II. App. B.

(*g*) Robertson *v.* French (1803), 4 East, 130; Spitta *v.* Woodman (1810), 2 Taunt. 416; Horneyer *v.* Lushington (1812), 15 East, 46; Langhorn *v.* Hardy (1812), 4 Taunt. 628; Mellish *v.* Allnutt (1813), 2 M. & S. 106; Rickman *v.* Carstairs (1833), 5 B. & Ad. 651.

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voyage, and that the assured effected the insurance with the intention of protecting the goods so loaded elsewhere (*h*). Most of these cases arose during the great wars of the French Revolution, when, in consequence of Napoleon's Berlin and Milan decrees, goods really shipped in this country were constantly insured as though shipped at some Baltic port.

Spitta *v.* Woodman.

Thus, to take one case as an illustration of many: a cargo insured "at and from Gottenburg to the ship's port or ports of discharge in the Baltic," with the usual clause, "beginning the adventure on the said goods from the loading thereof on board the said ship," had been loaded at London, carried to Gottenburg, where it was not taken out nor reloaded, and after leaving Gottenburg was totally lost by capture. Although the policy on which the action was brought was proved by parol evidence to be in continuation of another policy, from London to Gottenburg, effected with the same underwriter, as he well knew, the Court felt themselves bound by the express words of the policy, and held that, as the goods had been loaded on board, not at Gottenburg, the *terminus a quo* of the voyage insured, but at a previous port, the policy never attached at all, and that the assured could recover nothing (*i*).

In this case the risk was made to begin on the goods "from the loading thereof on board the ship" in blank, *i.e.*, without saying where: of course, if the risk is from their being "loaded on board the ship at" the *terminus a quo* or

(*h*) Per Bayley, J., in Gladstone *v.* Clay (1813), 1 M. & S. 423; per Lord Denman in Rickman *v.* Carstairs, *supra;* and see the facts of Robertson *v.* French (1803), 4 East, 130; Spitta *v.* Woodman (1810), 2 Taunt. 416; Langhorn *v.* Hardy (1812), 4 Taunt. 628, in all which it plainly appeared that the underwriters knew the goods had been previously loaded. The principle of these decisions has been adversely criticised by Erle, C. J., in Carr *v.* Montefiore (1864), 5 B. & S. 408, 428; 33 L. J. Q. B. 256, 259; and by Mr. Arthur Cohen, who thinks that they will not in future be followed: Halsbury's Laws of England, vol. xvii. § 760. Alternatively, the Court might now entertain a claim for rectification of the policy.

(*i*) Spitta *v.* Woodman (1810), 2 Taunt. 416; *S. C.*, 16 East, 188, n. See also Mellish *v.* Allnutt (1813), 2 M. & S. 106, where the risk was also made to begin "from the loading on board ship," without more.

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other named place, the reason for a strict construction of the policy is still more cogent (*j*).

Rickman *v.* Carstairs.

449. The strict rule of construction was not relaxed in the later case of Rickman *v.* Carstairs, which was an action on a policy on ship and goods for a homeward voyage "at and from the coast of Africa" to the ship's port of discharge in the United Kingdom, beginning the adventure on the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the coast of Africa." It was held by Lord Denman and the Court of King's Bench, that, in the absence of anything upon the face of the instrument to show the contrary, this policy did not attach on part of the outward cargo, which, although still remaining on board the ship on the coast of Africa more than twenty-four hours after her arrival there and at the time of loss, had been loaded on board at her port of departure in this country (*k*).

Lord Denman, in delivering the judgment of the Court in that case, said: "It appears very likely that the assured intended by this policy to insure both the outward and homeward cargo. Unfortunately, however, they have used words which will not, we think, effectuate that intention. The question in this and other cases of the construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used" (*l*).

(*j*) See, accordingly, Robertson *v.* French (1803), 4 East, 130; Horneyer *v.* Lushington (1812), 15 East, 46; Langhorn *v.* Hardy (1812), 4 Taunt. 628; in all which the risk was made to commence from the loading on board at a named place.

(*k*) Rickman *v.* Carstairs (1833), 5 B. & Ad. 651.

(*l*) 5 B. & Ad. 662. In Carr *v.* Montefiore (1864), 5 B. & S. 428; 33 L. J. Q. B. 256, Erle, C. J., formulated the following rule of construction: "If the words of the instrument are clear in themselves, the instrument must be construed accordingly; but if they are susceptible of more meanings than one, then the judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract"; and he was of opinion that the provision as to beginning the adventure from the loading at the *terminus a quo* is mere description, not a warranty that the cargo shall be loaded there. This is also Phillips' view: 1 Phillips, s. 939.

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The Courts take every opportunity afforded by the parties of modifying the strict rule.

450. The application of this rule to some of these cases was the subject of severe animadversion in Carr *v.* Montefiore. "In the several Gottenburg cases it seems to me," says Erle, C. J. (*m*), "that a construction was put on the policies so as to defeat the intention of the parties." Cockburn, C. J., in the same case below (*n*), expresses a hope that it might be brought under the consideration of the highest Court of Appeal. And Lord Ellenborough, C. J., himself an assisting party in the establishment of this construction, says of it: "A very strict and certainly a construction not to be favoured, and still less to be extended, was adopted in Spitta *v.* Woodman. But if there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that construction" (*o*).

Bell *v.* Hobson.

Accordingly, where the words used on the face of the written instrument show, consistently with sound principles of interpretation, that the parties intended by the policy to protect goods loaded on board the ship elsewhere than at the *terminus a quo* of the voyage insured, the Court will relax the rigour of this rule.

Thus, where a policy on American produce for a voyage at and from Gottenburg to any ports in the Baltic, "beginning the adventure on the goods from the loading thereof on board the ship," was on the face of it declared to be "in continuation of five other policies," and these were on the same cargo for a voyage from Norfolk in Virginia to Gottenburg: Lord Ellenborough held that, as it thus clearly appeared on the face of the policy that the parties to it must have known that the goods had been loaded on board before arriving at Gottenburg, the policy had attached (*p*).

(*m*) (1864), 33 L. J. Q. B. 256, 259; 5 B. & S. 408, 429.

(*n*) 33 L. J. Q. B. 57, 63. The observation is not reported in Best & Smith.

(*o*) Bell *v.* Hobson (1812), 16 East, 240, 248. In the following year, however, Lord Ellenborough followed Spitta *v.* Woodman in Mellish *v.* Allnutt (1813), 2 M. & S. 106.

(*p*) Bell *v.* Hobson (1812), 16 East, 240; *S. C.*, at N. P. 3 Camp. 272.

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Joyce *v.* Realm Insurance Co.

So a policy of re-insurance was in such terms as would have brought it within the rule in Spitta *v.* Woodman; but it was expressly made "subject to all clauses and conditions of the original policy," and as the original policy, being upon goods embarked in the barter trade on a voyage to Africa and back, stipulated that outward cargo should be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge, it was held that the policy of re-insurance was qualified by the terms of the original policy and had attached on the goods, although not loaded on the coast of Africa, but at Liverpool (*q*).

Effect of the words "wheresoever loaded." Gladstone *v.* Clay.

Lord Ellenborough had, in Bell *v.* Hobson, suggested the introduction of the words "wheresoever loaded" as a way of adapting the policy to the purposes of the parties. Accordingly a policy on a cargo for a homeward voyage "at and from Pernambuco to Maranham, and at and from thence to Liverpool"—"beginning the adventure on the said goods from the loading thereof on board the said ship wheresoever"—was held, by virtue of the word "wheresoever," to protect a portion of the outward cargo loaded at Liverpool and still on board at the time of the loss, while the ship was on her way from Pernambuco to Maranham, not having found a market at Pernambuco (*r*).

Constructive loading.

451. Moreover, if the goods, though originally loaded on board elsewhere, are afterwards, either wholly or in part, first landed and then reloaded, at the port specified in the policy as the *terminus a quo* of the voyage, this is a sufficient "loading on board the ship" at that port to make the policy attach under the clause.

Nonnen *v.* Kettlewell.

Thus, under a policy on ship and goods "at and from Landscrona to Wolgast," beginning the risk on the goods "from the loading on board the ship," the goods, though previously loaded on board at Gottenburg, were partly taken

(*q*) Joyce *v.* Realm Ins. Co. (1872), L. R. 7 Q. B. 580; 41 L. J. Q. B. 356.

(*r*) Gladstone *v.* Clay (1813), 1 M. & S. 418.

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out of the hold on the ship's arrival at Landscrona and landed on the quay there, so as to enable the custom-house officers to ascertain the quality of the whole cargo and adjust the duties on it, after which they were reloaded on board. Lord Ellenborough held that this unloading and reloading distinguished the case from that of Spitta *v.* Woodman, and was sufficient to make the policy attach on the goods at and from Landscrona (*s*).

Carr *v.* Montefiore.

Accordingly, under a similar policy on goods "from a port or ports in the River Plate," where the cargo on the forepeak down to the keelson was taken out and landed at Monte Video for the purpose of repairing the ship and then reloaded, it was held that this satisfied the clause "from the loading thereof on board," although it was a cargo of guano that had been originally shipped at Liones Island in Patagonia. Cockburn, C. J., however, said he relied more upon the additional fact that at Monte Video, after the repairs, both ship and cargo had changed hands by sale and a new destination was given to the adventure by the purchasers (*t*).

Constructive loading in the United States.

In the United States, where the construction put upon this clause is as strict as in our own Courts, it has been held that merely unstowing the goods from the hold on the ship's arrival at the *terminus a quo* of the voyage insured, in order to make room for other goods there taken in, and then re-stowing them, is not equivalent to a loading on board at such terminus so as to make the policy attach on those goods (*u*). Phillips thinks that if the goods in this case had been landed on the wharf and then taken on board again, this would have been a loading within the terms of the policy.

(*s*) Nonnen *v.* Kettlewell (1812), 16 East, 176. In this case it was objected that the cargo had not been so far unloaded as to ascertain what amount of sea damage it had sustained on the voyage from its prior port of loading; but Lord Ellenborough held that as the goods were "warranted free of average," the objection at all events in this case would not apply.

(*t*) Carr *v.* Montefiore (1863), 5 B. & S. 408; 33 L. J. Q. B. 57; affirmed (in error) (1864), 5 B. & S. 425; 33 L. J. Q. B. 256.

(*u*) Murray *v.* Columbian Ins. Co. (1814), 11 Johnson, 302, cited 1 Phillips, Ins. s. 939.

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452. This strict rule of construction, which has been applied in the case of goods loaded before the ship has reached the *terminus a quo*, does not prevail where, the voyage being a trading or bartering voyage, the policy contains a liberty "to touch, stay, trade, &c.," or any other clause of that kind; for in such cases it is obvious, on the face of the policy itself, that it must have been contemplated by the parties that other goods would be put on board in the course of the voyage than those loaded at the port of departure, and that they intended to protect such goods by the policy. Wherever, therefore, it can fairly be deduced from the whole construction of the policy that the parties contemplated loading, unloading, bartering or trading with goods at any intermediate ports in the course of the voyage insured, the policy attaches not only on goods loaded on board at the port of departure, but also on those loaded on board at any of the ports where the ship is empowered to touch and trade under the terms of the policy, or where, upon a true construction of the whole instrument, it must be presumed that such a loading was contemplated (*x*).

The strict rule not applicable where there is a liberty to touch and stay.

Violett *v.* Allnutt.

Thus, where a ship has liberty by such a policy to touch at a specified port, the policy attaches on goods loaded on board at that port in order to complete the cargo (*y*).

Barclay *v.* Stirling.

So a freight policy, with liberty for the ship "to call, exchange, or take on board goods at any ports or places she may call at," was held to cover the freight on fresh goods loaded on board the ship at a port of distress in order to replace part of the original cargo, which had been washed out of her as she lay ashore (*z*).

Hunter *v.* Leathley.

So in the case of Hunter *v.* Leathley, the policy attached on goods shipped on board to complete the cargo at a port lying diametrically out of the course from the original port of loading to the ultimate ports of discharge, and not named in the policy, though embraced within its very

(*x*) Violett *v.* Allnutt (1811), 3 Taunt. 419; Grant *v.* Delacour (1806), cited 1 Taunt. 466; Grant *v.* Paxton (1809), *ibid.* 463; Barclay *v.* Stirling (1816), 5 M. & S. 6; Hunter *v.* Leathley (1830), 10 B. & Cr. 858; affirmed (in error) (1831), 7 Bing. 517.

(*y*) Violett *v.* Allnutt (1811), 3 Taunt. 419.

(*z*) Barclay *v.* Stirling (1816), 5 M. & S. 6.

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extensive terms. Lord Tenterden intimated that in policies on trading voyages all places mentioned in the policy after the words "with liberty to touch, &c." may be considered as loading ports—*i.e.*, as ports, goods loaded at which will be protected by the policy (*a*).

453. The two following cases afford a good illustration of the mode in which the Courts apply policies containing such extensive liberties of touching and staying to the protection of goods laden on board in the course of the voyage.

Grant *v.* Delacour.

An East India captain, being desirous of protecting his interest in the adventure for the voyage out and home, effected a policy "on goods as interest shall appear" "at and from London to all ports or places on this or the other side of the Cape of Good Hope forwards and backwards at sea, at all times, on all services, and all ports and places, until the ship's arrival back again to her last station of discharge at Blackwall or Deptford," "beginning the adventure on the said goods from the loading thereof on board the said ship at London."

The Court held that, though these last words literally applied only to goods laden in London for the outward voyage, yet as these voyages were for the purposes of trading and barter, the policy attached upon any goods which the captain might acquire by trading with his outfit in the course of the voyage described in the policy, wherever they might be loaded on board (*b*).

Grant *v.* Paxton.

The same captain, to protect his interest in the same adventure for the homeward voyage, effected an insurance on goods "at and from China to all or any other ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere beyond the Cape of Good Hope, in port and at sea, in all places, at all times, and in all services, until the ship's safe arrival at London"—"beginning the adventure upon

(*a*) Hunter *v.* Leathley (1830), 10 B. & Cr. 858; in error (1831), 7 Bing. 517.

(*b*) Grant *v.* Delacour (1806), cited 1 Taunt. 466. See per Mansfield, C. J., *ibid.* 474.

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the said goods from the loading thereof on board at China," "with liberty for the ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever, for any purposes whatsoever, without being deemed a deviation." With a cargo of tea originally loaded on board at China for the homeward voyage, the ship was afterwards obliged to put into Bombay to repair; the tea cargo was sent on to England in another vessel, and the captain, having repaired his ship, loaded a cargo of cottons at Bombay, and sent her therewith to Canton, on which voyage she was lost.

The Court held that this policy, unlike the former, had never attached on the goods so loaded at Bombay for the voyage to Canton; the insurance, they said, in this case was on nothing but the goods laden on board at China for the homeward voyage thence to London (*c*). The Court remarked that there was nothing on the face of this policy nor in the circumstances of the case to alter "the plain, fair, grammatical sense" of the words "beginning the risk on the goods from the loading thereof on board in China"; there was no custom of trade authorizing the company to send back the ship from Bombay to Canton, so as to keep her still within the protection of a policy effected on a homeward voyage from Canton to London; there was no intention of unloading the goods, for "it never was in the contemplation of the underwriters, or of any man, that a ship once laden with tea, a very valuable cargo, would be unloaded and employed in some other trade."

Limits of the port for the purposes of this rule.

454. The strict rule of construction which confines the policy to goods loaded at the *terminus a quo*, is not satisfied by their being loaded at a place within the legal limits merely of the port; unless it appears that the word used to describe the *terminus a quo* is understood in this extended sense by mercantile men (*d*).

(*c*) Grant *v.* Paxton (1809), 1 Taunt. 463.

(*d*) See *infra*, § 485, as to the meaning of "port" or "port of loading" in a policy. See also Sailing Ship Garston Co. *v.* Hickie

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Constable v. Noble.

Thus, under a policy on goods "at and from Lyme to London," it appeared that the goods were loaded on board at Bridport, a town nine miles from Lyme town, but a member of the port of Lyme; the Court held, in the absence of any mercantile usage to show that goods insured from Lyme might be loaded at Bridport, that this policy never attached on these goods (*e*).

Payne v. Hutchinson.

In this case it appeared that there was no separate custom-house at Bridport; *à fortiori* where goods insured "at and from Carmarthen to London" were in fact loaded on board at Llanelly, which, though legally speaking a member of the port of Carmarthen, yet has a separate custom-house at which vessels are cleared out independent of that at Carmarthen, the Court held that this policy had never attached on the goods loaded at Llanelly (*f*).

Effect of usage.

If, on the contrary, there is a mercantile usage to ship goods under such policies, not at the place specified in the policy, but at some place adjoining thereto, the policy will attach on goods shipped in compliance with the usage. Thus

Moxon v. Atkins.

where a policy was effected on goods "at and from the ship's loading port or ports in Amelia Island," and the ship never touched at Amelia Island at all, but took in her cargo at Tigre Island, which is a little higher up the river St. Mary's —but this was the usual manner in which ships took in their cargo in that trade—Lord Ellenborough held that the policy attached on the goods so loaded (*g*).

A policy on goods "at and from" for a homeward voyage, only

455. A policy on goods "at and from" a foreign port for the homeward voyage, only protects the homeward-bound cargo, and only runs from the time when such cargo is wholly or partially loaded on board there. If there be a policy on

(1885), 15 Q. B. D. 580, for a discussion by Lord Esher of the tests for determining the business meaning of the word "port" in a charter-party.

(*e*) Constable *v.* Noble (1810), 2 Taunt. 403.

(*f*) Payne *v.* Hutchinson (1808), 2 Taunt. 405, n. The law as to this point is the same in the United States. See Murray *v.* Columbian Ins. Co. (1809), 4 Johns. R. 443, cited 1 Phillips, s. 931.

(*g*) Moxon *v.* Atkins (1812), 3 Camp. 200.

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protects the homeward cargo.

outward cargo "until discharged and safely landed" in the same port, both policies may operate concurrently, the outward policy to protect what remains on board of the outward cargo, and the homeward policy to protect what has been already loaded of the homeward cargo (*h*).

Policy at and from an island.

If the place be an island or other place having several ports, as Jamaica, and there be two several policies, one on the outward cargo, say "from London to Jamaica," and the pother on the homeward cargo "at and from Jamaica to London," and the ship, after discharging part of her outward and shipping part of her homeward cargo at one port in Jamaica, be lost while proceeding to another port in that island in order to dispose of the residue of her outward and complete the loading of her homeward voyage, having thus part of both cargoes on board at the time of loss; in such case the true result of the authorities appears to be that the outward policy continues to protect what remains on board of the outward cargo, and the homeward policy attaches on what has been already taken on board of the homeward cargo (*i*).

Barter policies.

In policies on the African barter traffic, after the usual clause giving extensive liberty to load, reload, exchange, sell, or barter, &c., there is usually a clause that outward cargo is to be considered homeward interest twenty-four hours after arrival at first port or place of trade, so that the new and the old cargo on board are protected during the barter transactions on the coast (*k*).

Under such a policy on ship and goods for twelve months,

(*h*) See 2 Emerigon, c. xiii. s. 20; 3 Boulay-Paty, Droit Mar. 421—428; and 3 Kent, Com. 309. The effect of the clause often inserted in African voyages, that outward cargo is considered homeward risk twenty-four hours after arrival at the first port of discharge, may be that the outward cargo is protected at the same time by different sets of policies—*i.e.*, those on the outward and homeward voyages.

(*i*) 2 Emerigon, c. xiii. s. 20, pp. 114, 115; 3 Boulay-Paty, Droit Mar. 422; Camden *v.* Cowley (1763), 1 W. Bl. 417; Forbes *v.* Aspinall (1811), 13 East, 323; Warre *v.* Miller (1825), 4 B. & Cr. 538; Rickman *v.* Carstairs (1833), 5 B. & Ad. 651; 3 Kent, Com. 309.

(*k*) See Tobin *v.* Harford (1863), 13 C. B. N. S. 791; 32 L. J. C. P. 134; in error (1864), 34 L. J. C. P. 37, for such a clause.

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an attempt was made to extend the barter clause so as to render the underwriter liable for loss by fire of cargo landed but not yet bartered, and of the produce received in exchange for part of it although not yet shipped; it was held, however, that the policy did not protect either kind of goods while on land (*l*).

In the United States, policy on goods outward and on their proceeds home.

It has been decided in the United States that a policy on goods outward and upon their proceeds home will apply to a homeward cargo procured by money or credit of the consignees at the port of discharge, though the outward goods, for want of a market, have not been in fact sold so as to realize any proceeds (*m*). A policy in this form will not, however, protect for the homeward voyage the same goods that were carried out but not landed at the outward port (*n*).

Continuance and end of the risk on goods.

456. The common clause in our English policies makes the risk on goods continue during the voyage to the port of discharge, "until the same be there discharged and safely landed" (*o*).

Meaning of "safely landed."

Rule 5 of the Rules for the Construction of the Policy in the First Schedule of the Marine Insurance Act, 1906, declares that—

> Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

By "safely landed" is meant safely delivered on shore, at

(*l*) Harrison *v.* Ellis (1857), 7 E. & B. 465; 26 L. J. Q. B. 239.

(*m*) Haven *v.* Gray (1815), 12 Mass. R. 71; Whitney *v.* The American Ins. Co. (1824), 3 Cowen, 210; 3 Kent. Com. 310.

(*n*) *Ibid.*

(*o*) In Marten *v.* Nippon, &c. Ins. Co. (1898), 3 Com. Cas. 164, the clause was "until safely delivered to consignees," and Bigham, J., held that placing the goods in the Customs warehouse was a safe delivery within the meaning of the clause. A "warehouse to warehouse" clause, which extends the risk until the goods are safely warehoused at their destination, is now usually inserted in the policy. See *ante*, § 447, note (*f*), and the Institute Cargo Clauses, *post*, Vol. II. App. B.

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the ordinary wharves and quays or customary landing-places within the limits of the port of discharge (*p*). These limits are to be ascertained in case of doubt by the evidence of mercantile usage (*q*).

Policy covers goods landed in lighters according to usage.

457. It is frequently necessary to employ smaller craft, such as lighters, shallops, &c., to carry the goods from the ship to the shore. Whenever it is established that such a usage exists by the general course of trade, the underwriters are liable for any loss or damage that may happen to the goods in the course of their being so carried; for they are being landed in the customary manner (*r*).

"The insurer," says Lord Mansfield, "in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. He took the risk upon the supposition that what was usual and necessary would be done, and therefore when goods are insured 'till discharged and safely landed' the insurance, without express words, extends to the boat, the

(*p*) See, as to this, Gatliffe *v.* Bourne (1838), 4 Bing. N. C. 314; Bourne *v.* Gatliffe (in error) (1841), 3 M. & Gr. 643; *S. C.*, before the House of Lords (1841), 7 M. & Gr. 850. The question in this case was what amounts to a delivery of goods under a charter-party to the consignee. The editors submit that the goods may be "landed" within the meaning of the policy, although the consignee may be entitled to say that there was not a good delivery to him because the landing-place was not a customary one.

(*q*) See per Lord Esher in Sailing Ship Garston Co. *v.* Hickie (1885), 15 Q. B. D. 580, for the meaning of the word "port" in a charter-party. See also *infra*, § 485.

(*r*) Whether the goods are protected while being discharged in a reasonable, though not the customary, manner was a moot point before the Mar. Ins. Act, 1906. Phillips (vol. i. s. 970) considered that goods are only protected in lighters when that is the usual mode of discharge. Parsons (vol. ii. p. 61) thought that the same rule should apply to any mode of conveyance by water made necessary by the circumstances of the case. Thus, if the usual mode of discharge is from the ship on to a quay, but in consequence of the crowded state of the quays the goods are taken ashore in lighters, they would, according to Parsons' rule, be protected. The rule in the Act agrees with Phillips' opinion.

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usual manner of landing goods out of a ship upon the shore" (*s*).

In the port of London public lighters being employed, in the general course of trade, to unload ships, goods on such lighters, while being conveyed from the ship to the wharf, are under the protection of the policy (*t*).

So, where formerly, in the contraband trade in the Spanish main, it was usual for ships to stand into shore as near as they could, and then run the cargo ashore in launches, it was held that goods insured for this traffic were protected while in such launches (*u*). So, where the general usage with regard to all goods destined for a certain shallow bay in Jamaica was to put the ship into the nearest practicable port, and thence send the goods ashore in shallops; Lord Tenterden held, that the goods while being so sent on were protected by the policy (*v*).

Goods for St. Petersburg, on board vessels of any burden, are unloaded at Cronstadt, about twenty miles from the capital, and thence sent on, up the Neva, in lighters. Before the cutting of the canal of the Helder to Amsterdam, vessels of large burden sometimes unloaded at the Texel, and formerly the largest class of vessels were obliged to lighten between Cuxhaven and Hamburg. In such cases, as the river navigation is a foreseen and customary part of the voyage, and the risk thereof calculated in the rate of premium, the goods would be protected in the river craft under our common form of policies.

In France.

In France, it seems that their policies, though not considered as a general rule to protect goods when sent on from

(*s*) 1 Burr. 348; see also Lane *v.* Nixon (1866), L. R. 1 C. P. 412; per Byles, J., *ibid.* 420. In France this general principle is confined to the taking of goods from the ship to the shore, and does not, as a general rule, extend to their transport from the ship up rivers to the port of discharge. 2 Emerigon, c. xiii. s. 2, p. 49; 3 Boulay-Paty, Droit Mar. 419.

(*t*) Rucker *v.* London Ass. Co. (1784), 2 B. & P. 432, *in notis;* Hurry *v.* Royal Exch. Ass. Co. (1801), *ibid.* 430.

(*u*) Matthie *v.* Potts (1802), 3 B. & P. 23.

(*v*) Stewart *v.* Bell (1821), 5 B. & Ald. 238.

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the ship up a river to the port, will yet do so whenever there is a usage to unload goods at the seaboard, and thus send them on, as from Paimbœuf to Nantes, though the distance between the two places is ten French leagues (*x*).

In the United States.

So, in the United States, on its being proved that hides were generally sent ashore at New York from the ship in boats, the Supreme Court of the United States held, that the risk continued on them while they were being so sent (*y*).

Where the assured receives the goods into his own care.

458. It has been held that in all such cases the assured may terminate the risk before the time when it would expire in the usual course under the policy, by receiving the goods out of the ship into his own care. Thus, although, as we have seen, goods while in a course of being carried in lighters from the ship to the shore are, generally speaking, protected in the port of London, yet a merchant of that port was held to have put an end to this protection by himself sending for them and bringing them ashore in his own lighter (*z*). Again, where goods were brought in a public lighter in the port of London

Sparrow *v.* Carruthers.

(*x*) 2 Emerigon, 49; 3 Boulay-Paty, Droit Mar. 419, 420; 1 Nolte's Benecke, 654.

(*y*) Wadsworth *v.* Pacific Ins. Co. (1829), 4 Wendall's R. 33. Arnould stated that in Osacar *v.* Louisiana Ins. Co. (1827), 5 Martin, N. S. 386, cited 1 Phillips, s. 970, the principle was carried to the extent of protecting goods destined for a Mexican port, while being carried up from the river bar to the town, partly in boats and partly overland on mules, that being shown to be the general mode of conveying them to their place of destination (2nd ed. vol. i. p. 484). This is, however, erroneous. The decision was that the goods were protected while being conveyed ashore in launches; and the Court said that, as the insurance was a marine one, there was no responsibility for land risks.

(*z*) Sparrow *v.* Carruthers (1746), 2 Str. 1236. "The only strong ground upon which it (*i.e.*, this case) can be supported," said Chambre, J., in Hurry *v.* Royal Exchange Assurance, "is that the owner of the goods completely accepted them and discharged the shipowner" (2 B. & P. 436). The discharge of the shipowner cannot, however, be the test of the end of the risk; for, although the liability of the shipowner ceased when he delivered the goods to a public lighterman, it was held in that case that the risk was not thereby terminated. Whatever the correct rule may be, as Marshall remarks, if there were a custom for merchants in any port to use their own lighters in landing goods, they would, no doubt, be protected by the policy. See also 2 Benecke, System des Assecuranz, c. viii. s. 1, p. 213.

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to the merchant's wharf, where, owing to the roughness of the weather, they could not then be unloaded; and thereupon the merchant dismissed the lighterman, and told him to leave his lighter all night moored to the wharf, where he himself would look after it, and in the course of the night the lighter with the goods on board sank: the Court held that the merchant, by thus taking the goods into his own care and possession, had discharged the underwriter from all liability (*a*).

The Court of Appeal said in one case: "It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing, and himself terminates the risk by taking delivery short of the land" (*b*). There is, however, nothing in the wording of the instrument to justify the rule that the policy does not protect the goods when the assured has taken possession of them. The risk is expressed to be, not until the owner of the goods takes delivery, but until the goods are safely landed (*c*).

Paul *v.* Ins. Co. of North America.

In another case (*d*) there was a policy on goods from Baltimore to Ipswich, "including all risks of craft to and from the vessel." The evidence was that steamers bound to Ipswich usually proceeded up the Orwell to Butterman's Pool, where they discharged their cargoes into lighters; but by an arrangement made in this case, which was said not to be an unusual one, the owners of the goods insured took delivery of them into their own lighters, and some of the goods were lost alongside after they had been put into one of these lighters. Mathew, J., held that the assured could recover. He characterized the decisions in Sparrow *v.* Carruthers and Strong *v.* Natally as extra-

(*a*) Strong *v.* Natally (1804), 1 B. & P. N. R. 16.

(*b*) Houlder *v.* Merchants' Marine Ins. Co. (1886), 17 Q. B. D. 354, 356. It was not necessary to decide this point. See *post*, § 459.

(*c*) Mr. Arthur Cohen agrees with this view: Halsbury's Laws of England, vol. xvii. § 764.

(*d*) Paul *v.* Insurance Co. of North America (1899), 15 Times L. R. 535.

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ordinary, and said: "'Including risk of craft' covers carriage in a hired lighter; why not also in lighters belonging to the assured?" The only ground on which this judgment can be reconciled with that of the Court of Common Pleas in Strong *v.* Natally is that the clause "including risk of craft from the vessel" authorizes any reasonable use of lighters to discharge the goods, and thereby, even when the lighters belong to the assured, prevents the application of the principle of Strong *v.* Natally; but this is not a satisfactory reason for distinguishing the cases. For the reason already given, the editors consider Strong *v.* Natally a questionable decision. They further submit that, even if that case be supported, if the ship, owing to perils of the sea, had to abandon the voyage at an intermediate port, and the owner of goods, obliged to take possession of them there, carried them in his own ship to the *terminus ad quem*, the underwriter would not be discharged. This acceptance of the goods is not the same as a voluntary acceptance at the port of discharge.

Risk of craft till landed.

459. Where the policy expressly provided for "all risk of craft until the goods are discharged and safely landed," and the goods had been put into lighters at the port of destination named in the policy, not, however, for the purpose of being landed, but of being transhipped into export vessels bound for a foreign port, a loss of part of the goods was held not to be within the risk described in the policy. The goods were not in lighters for the purpose of being landed, but for the purpose of being transhipped, a purpose that could not be expressed by the term "landed" (*e*).

When the goods are considered to have been "landed."

460. Whenever the goods can be considered as landed, according to the usual course of business at their port of destination, the risk ends, though they may never have been delivered into the hands of the consignees (*f*).

(*e*) Houlder *v.* Merchants' Marine Ins. Co. (1886), 17 Q. B. D. 354. The rule is different when goods are, in the customary way, placed in lighters at an intermediate port for transhipment, there being liberty to tranship.

(*f*) Gatliffe *v.* Bourne (1838), 4 Bing. N. C. 314; *S. C.*, before the House of Lords (1841), 7 M. & Gr. 850.

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Thus at Reval, the port of discharge, the cargo was (according to the uniform course of business in that port) unloaded into government lighters by the revenue officers, and lodged in government warehouses, where it was afterwards confiscated, without ever coming into the hands of the consignees: Lord Ellenborough held, that the risk ceased on its so being landed, for that the policy protected it against the perils of the sea only, and not of the shore (*g*).

General rule.

The general rule, in fact, is clear, that the underwriter in a sea policy insures only against sea risks; the risk on goods, therefore, ends directly they are put on terra firma, unless they are placed there only for a temporary purpose, subsidiary to the main purpose of the voyage, or under such circumstances as to be protected by the usage of the trade (*h*), or unless there be a special agreement to prolong the risk (*i*).

The following American case, which seems to have been well decided, affords a good illustration of this rule. An insurance had been effected on "specie and merchandise out and merchandise home, at and from Boston to ports in the islands of Sumatra and Java, for the purpose of disposing of the outward and procuring a return cargo, &c., with liberty to touch at the usual places and trade thereat." The captain had landed, at a port in Sumatra, a chest of opium, part of the outward cargo, to be exchanged for a certain quantity of pepper and dollars, but, not being able to come to terms, had taken up the chest and stowed it in the launch for the purpose of being carried back to the ship, when the natives made a rush on the crew, overpowered them, and carried off the opium: the Court held that, under these circumstances, the opium was protected by the policy. Sedgwick, J., in giving the judgment of the Court, said: "The goods were as much

(*g*) Brown *v.* Carstairs (1811), 3 Camp. 161; see also Marten *v.* Nippon, &c. Ins. Co. (1898), 3 Com. Cas. 164.

(*h*) Harrison *v.* Ellis (1857), 7 E. & B. 465; 25 L. J. Q. B. 239; contrasted with Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341; Brough *v.* Whitmore (1791), 4 T. R. 206; see also Australian Agricultural Co. *v.* Saunders (1875), L. R. 10 C. P. 668.

(*i*) See *post*, § 470.

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protected by the policy in the boats, while employed as auxiliary to the voyage, as they were on board the ship" (*k*).

Damage in unloading.

461. As by our law the risk on the goods continues until they are safely landed at the wharves or usual landing places of the port of discharge, any damage caused to the goods in the course of unloading them from the ship into the lighters, or from the lighters on to the wharf, would fall on the underwriters, always supposing, that is, that such damage be not imputable to the wilful default of the assured. Accordingly, where a policy, otherwise in the common form, gave a special power of shipping and reshipping the goods, Lee, C. J., held that the policy would extend to cover a loss happening in the unloading and reshipping from one ship to another (*l*).

In a more recent case, though the words were "risk of transhipment, or landing and reshipment," such as would cover a loss by fire during a continuous process of transhipment, or while the goods were being landed or reshipped, it was held that in the absence of custom they would not cover a loss by fire while the goods, after being landed, were stored in a warehouse and waiting to be shipped (*m*).

Time within which the goods must be landed.

462. In our common policies no fixed period of time is specified during which the risk on the goods is limited to continue after the ship's arrival; *i.e.*, there is no specified time within which their landing must be completed, and beyond which they will be out of the protection of the policy. The rule, as we have seen, is that they must be landed "within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases" (*n*).

Foreign law.

The law of France in this respect agrees with our own (*o*).

(*k*) Parsons *v.* Massachusetts Fire and Marine Ins. Co. (1810), 6 Mass. R. 197; 1 Phillips, s. 970.

(*l*) Tierney *v.* Etherington (1743), 1 Burr. 348.

(*m*) Australian Agricultural Co. *v.* Saunders (1875), L. R. 10 C. P. 668.

(*n*) Mar. Ins. Act, 1906, Sched. I. rule 5, *ante*, § 456.

(*o*) The Code de Commerce (arts. 328, 341) provides that the risk on goods shall continue "jusqu'au jour où elles sont délivrées à terre." The

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By some of the foreign codes, on the other hand, it is provided that the risk upon the goods, unless they are previously landed, shall continue only for a certain limited number of days after the ship's arrival at the port of discharge (*p*).

The reasons given for preferring a fixed number of days are—1st, to avoid all litigation as to what shall be deemed reasonable time (as to which see presently); 2ndly, to compel a speedy clearance of the cargo. Benecke, however, after examining the different provisions of foreign states on this subject, concluded that the rule adopted in England and France is, upon the whole, preferable; and this opinion seems well founded (*q*).

Duration of risk may be varied by a special clause.

It is, of course, competent to parties effecting insurances in this country to adopt special clauses, varying the duration of the risk as fixed by the common clauses.

What is a reasonable time for discharging cargo.

463. The extent of a reasonable time for the unloading depends entirely on the nature and usages of the trade, the main object of the adventure, and the circumstances of the port of discharge at the time.

In the barter trade.

Thus, under a policy for the African barter trade in gum, continuing the risk on the cargo "till discharged and safely landed," the ship was captured about a month after her arrival on the African coast, at which time, as no gums had been brought down to the coast by the natives, no part of her outward cargo had been landed for the purpose of barter:

Belgian Code (art. 195) and the Spanish Code (art. 761) are similar. Except in the case of unjustifiable delay on the part of the assured or consignee, the risk endures by the German Code also (arts. 824, 821 (4)) until the goods are landed. By the Russian Code (art. 557) the risk ends when the goods are landed, or the time fixed for discharging has expired.

(*p*) By the Commercial Code of Holland (art. 627) the risk ends fifteen days after the ship's arrival. In case of delay through the fault of the consignee, the Italian Code (arts. 601, 611) makes the risk end one month after arrival. For the older laws, see 2 Magens, and 2 Benecke, System des Assecuranz, c. viii. s. 1, p. 209.

(*q*) 2 Benecke, System des Assecuranz, p. 223; Nolte agrees with him, vol. i. pp. 657—660.

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Lord Kenyon held, that as, under the circumstances, no unnecessary delay appeared to have taken place, the risk on the outward cargo was a continuing risk at the time of the loss (*r*).

In the Newfoundland trade.

In the Newfoundland and Labrador trade, as carried on early in the nineteenth century, the great object of the adventure being to catch fish, the outward cargo generally consisted in great part of salt and provisions for victualling the crew and curing the fish caught. This part of the cargo was naturally consumed as wanted, and never landed at all; even such part of it as consisted of merchandise was frequently not landed until the fishing, which was the main business of the adventure, left the crew at liberty to discharge it. In the case, therefore, of outward cargoes insured on board ships engaged in this trade by policies in the common form, continuing the risk on the goods "till discharged or safely landed," it was held that such outward cargoes were protected by the policy, though in one instance they were still on board for thirty, and in another for fifty, days after the ship's arrival off the coast (*s*).

As a general principle, the risk continues until the goods are landed at the ultimate port of discharge.

464. When goods are insured in the common form, the risk upon them continues until they are safely landed at the particular port which is either named in the policy as their ultimate port of discharge, or contemplated as such by the parties (*t*).

Even when the place named in the policy as the *terminus ad quem* of the voyage is one of the West Indian Islands, or other place containing several ports, an outward policy effected on the goods will, generally speaking, enure to protect them until the whole of the outward cargo, or, at

(*r*) Parkinson *v.* Collier (1797), 2 Park, Ins. 653; 1 Marshall, Ins. 255. It is obvious that in such a case as this a fixed rule of time would have operated unjustly.

(*s*) Noble *v.* Kennoway (1780), 2 Dougl. 510; see also Vallance *v.* Dewar (1808), 1 Camp. 503; Ougier *v.* Jennings (1800), *ibid.* 505, n.

(*t*) Lord Mansfield in Barrass *v.* London Ass. Co. (1782), 1 Marshall, Ins. 266; Leigh *v.* Mather (1795), 1 Esp. 412.

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all events, until the great bulk of it, has been safely landed at that port in the island which was, in fact, contemplated by the parties as the ultimate port of discharge (*u*).

Where the great bulk of the cargo has been discharged.

465. Where, indeed, the great bulk of the outward cargo, under such a policy, has been unloaded and sold at any given port, either in that island or elsewhere within the limits of the voyage, and that which remains on board, being trifling in quantity, is taken on, either as ballast or because it could not be sold at the port where the rest was disposed of, in such cases the risk on the outward cargo will be held to have terminated at the port where the bulk of it was sold; and the liability of the underwriters on the outward policy will not be held to continue merely because at the time of the loss an insignificant portion of the outward cargo may still be on board.

This principle, which is equitable and well adapted to the real intentions of the parties, has long been established in the law of France (*x*); and has received abundant confirmation in the jurisprudence of this country (*y*).

Leigh *v.* Mather.

Thus, where an insurance was made on ship and goods "at and from Georgia to Jamaica," and the ship arrived at Montego Bay, which was the port to which the cargo was originally destined, where she remained a month, and during that period sold and delivered the greatest part of her cargo, and would have disposed of the whole but for a verbal agreement with a party who chartered the vessel for a voyage from Montego Bay to St. Anne's, for a cargo, and thence to London, by which agreement part of the outward cargo,

(*u*) Barrass *v.* London Ass. Co. (1782), 1 Marshall, 266.

(*x*) Emerigon, c. xiii. s. 20; 3 Boulay-Paty, Droit Mar. 421—429.

(*y*) Leigh *v.* Mather (1795), 1 Marshall, Ins. 266; 1 Park, 74. As to the ship, Inglis *v.* Vaux (1813), 3 Camp. 437; Moore *v.* Taylor (1834), 1 A. & E. 25. The editors submit that under a policy on a trading voyage the fact that only a small quantity of goods remains on board, because it has not been sold, will not determine the policy, except it be so trifling that the maxim "De minimis," &c., applies. Of course, if goods are kept as ballast only, they cease to be cargo and to be protected by the policy.

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which was lumber, was to be carried in ballast to St. Anne's: Lord Kenyon held, that under these circumstances the risk on the outward cargo came to an end when the bulk of it was landed at Montego Bay, and did not continue on that part of it which was carried on as ballast to St. Anne's (*z*).

The subject will receive further illustration when we come to consider the duration of risk on the ship.

Goods insured "till arrived at the last place of discharge in the outward voyage."

466. In the following case a question was made as to the continuance of the risk on goods insured "until arrived at the last place of discharge in the outward voyage."

The goods in question were the investment of an East India captain, and the voyage for which they were insured was described in the policy to be "at and from London to Madeira, the Cape of Good Hope, and all or any of the ports or places in the East Indies, China, Persia, or elsewhere, on this or the other side the Cape," "until arrived at the last place of discharge on the outward voyage, with leave to exchange the goods in the course of the voyage." The ship arrived at Calcutta, and there discharged the whole of the cargo she carried out for the East India Company; after which she was ordered by the company on an intermediate voyage to Madras, and took on board a cargo to be conveyed thither. The captain had also landed the whole of his investment (the goods insured by this policy) at Calcutta, and had disposed of a considerable part of it; but, being unable to find purchasers for the residue, he resolved to carry it on to a new market, and, with this view, re-loaded it on board the ship for Madras. The ship was lost on the intermediate voyage from Calcutta to Madras. Lord Ellenborough held that the risk had ended at Calcutta; for, as all the company's outward cargo had been discharged there, that port was the "last place of discharge on the outward voyage," upon the true construction of the policy (*a*).

(*z*) Leigh *v.* Mather (1795), as reported 1 Marshall, Ins. 266; 1 Park, Ins. 74. The case, as reported in 1 Esp. 412, is not consistent with the principles above laid down, nor, it is submitted, with law.

(*a*) Richardson *v.* London Ass. Co. (1814), 4 Camp. 94.

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Goods insured "to a market."

"If," said Lord Ellenborough, "the company's officers wish for the protection which is here sought (*i.e.*, until the goods are finally disposed of in some market in the East Indies), they must not limit the risk to the duration of the outward voyage, but extend it to the arrival of the goods to a market at their final port of discharge." No doubt an insurance in such form would effectually protect the goods until the whole were actually disposed of in some foreign market (*b*).

Goods insured to their "final port of destination."

467. When the risk on the goods is made by the policy to continue "until they shall be arrived at their final port of destination," it will frequently become a question of fact, depending upon the intention of the parties, what "the final port of destination" really was.

Oliverson *v.* Brightman.

During the suspension of friendly relations between this country and China, in the year 1841, the "Penang" arrived in Macao Roads, with a cargo insured from Liverpool for various ports in China by a policy, containing the most extensive liberties, in the China Seas, to tranship cargo on board any other vessel, to visit any ports, and to remain there till it should be deemed expedient to proceed to her port or ports of discharge, continuing the risk "until the goods should be arrived at their final port of destination."

The consignees at Macao, finding that it would be dangerous to send the goods up the river to Canton, and also that it would be necessary, owing to sea damage sustained in the voyage, to tranship them, hired the "James Laing" as a temporary receiving ship, and sent her with the "Penang" to Hong Kong—the safest anchorage in those seas—in order there to receive the cargo from the "Penang" for the purpose, 1st, of examining it; 2nd, of keeping it on board in a place of safety till it could be sent on to Canton, or some other market in China, where it could be sold; there being then no market whatever at Hong Kong. During the

(*b*) See the cases as to the continuance of risk on ship, *post*, §§ 496, 501.

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transhipment in Hong Kong Roads, the "James Laing," and all the goods that had, up to that time, been transhipped into her, were sunk in a typhoon and lost. In an action for this loss the Court were clearly of opinion that Hong Kong was not the final port of destination within the contemplation of the parties, and further, that the principle established by Brown *v.* Vigne (*c*)—that if a vessel, instead of proceeding to her originally destined port, chooses to wait at another until the termination of war, the voyage is thereby determined—was inapplicable to the circumstances of this case; for the fact in Brown *v.* Vigne was that there was actual war with Spain, which rendered it illegal to send on the goods to their original port of destination; whereas here, there having been no formal declaration of war against China, it would not have been illegal, but only dangerous and inexpedient, to send the goods on to Canton, or any other market in China. Accordingly, the risk on the goods lost in the "James Laing" was held to be a continuing risk at the time of the loss, and the plaintiff therefore recovered (*d*).

Effect of transhipment.

468. The general rule is, that if goods be transferred in the course of the voyage to another ship the risk is at an end, the English policy being worded to cover a voyage in one ship only. There are, however, two cases in which it was held—before the Marine Insurance Act, 1906—that the risk is not determined by a transhipment. One is where the policy contains an express licence to tranship (*e*); the other is

(*c*) (1810), 12 East, 283.

(*d*) Oliverson *v.* Brightman (1846), 8 Q. B. 781; 15 L. J. Q. B. 274. In this case the policy contained an express liberty "to tranship." In another case on the same adventure, where the policy contained no such liberty, the Court, on proof of the above facts, directed a nonsuit. Bold *v.* Rotherham (1846), 8 Q. B. 781; 15 L. J. Q. B. 279.

(*e*) Where goods shipped on board a P. & O. steamer were insured to any ports in Australia "in P. & O. and Orient steamers, with all liberties and exceptions as per bill of lading," and by the bill of lading the goods were to be transhipped at Sydney into local steamers for delivery at Brisbane, Bigham, J., held that they were covered after transhipment into a local steamer which did not belong to the P. & O. Company, whose steamers do not run to Brisbane. Neale *v.* Rose

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where it is impossible to carry the goods to their destination in the original vessel. Thus, if in the course of the voyage the original ship becomes disabled, and the goods are by the master sent on in another vessel, it was held that the risk on the goods continues until they are safely landed out of the substituted ship at the original port of destination (*f*), provided that a clear case of necessity is made out (*g*).

With reference to transhipment from necessity, sect. 59 of the Marine Insurance Act, 1906, contains the following provision:—

> Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment (*h*), to justify the master in landing and reshipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment (*i*).

When the policy gives leave to tranship, the insurer is liable for a loss happening in the course of a transhipment or landing and reshipment effected in the manner usual in the port (*k*); and there is no doubt that whenever the transhipment or landing and reshipment do not put an end to the risk, the insurer is similarly liable (*l*).

(1898), 3 Com. Cas. 236. See also Belgian Grain and Produce Co. *v.* Cox, [1919] W. N. 308 (C. A.).

(*f*) Plantamour *v.* Staples (1781), 1 T. R. 611, n.; 1 Marshall, Ins. 164. In that case a policy was effected on ship and goods for a trading voyage out and home. The ship was wrecked on the outward voyage, but some of the goods were saved and sent to their destination. It was held that the policy covered goods bought with the proceeds of the sale and sent home in another ship.

(*g*) Bold *v.* Rotherham (1846), 8 Q. B. 797; De Cuadra *v.* Swan (1864), 16 C. B. N. S. 772.

(*h*) See note (*s*), *ante*, § 192.

(*i*) *Quære* whether the effect of this provision has been to impose a restriction, as between the assured and insurer, upon the right of transhipment in case of necessity, which did not previously exist: see *ante*, § 192, note (*r*).

(*k*) Tierney *v.* Etherington (1743), cited 1 Burr. 348; Oliverson *v.* Brightman (1846), 8 Q. B. 781; 15 L. J. Q. B. 274; Australian Agricultural Co. *v.* Saunders (1875), L. R. 10 C. P. 668, 676, 678.

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Tierney *v.* Etherington.

In Tierney *v.* Etherington goods were insured on board a Dutch ship "from Malaga to Gibraltar, and at and from thence to England and Holland, both or either," continuing the risk "till the ship and goods be arrived at England or Holland, and there safely landed." There was a special clause in the policy, by which it was agreed that on the arrival of the ship at Gibraltar the goods might be unloaded and reshipped in one or more British ship or ships for England and Holland, &c. When the ship arrived at Gibraltar there was no British ship there, and the goods were unloaded and put into a store-ship (which it was proved was always considered as a warehouse), in order to be kept there till some British ship should arrive. Two days after the goods were put into this store-ship they were lost in a storm.

For the underwriters it was objected that the risk on the goods was at an end upon their being loaded into this store-ship, which was to be considered as a warehouse on land; but Lee, C. J., held that the construction should be according to the course of trade in Gibraltar; and that, as it appeared to be the usual method of unloading and reshipping in that place, that, when there is no British ship there, the goods should be kept in store-ships until one arrives, the risk upon the goods so loaded according to such custom should be held to continue, and the underwriters to be liable (*m*).

Predetermination of the risk by sale of the goods.

469. Inasmuch as an assured must be interested in the subject-matter insured at the time of the loss (*n*), the underwriter's liability on the policy may be terminated before the end of the voyage, if the assured part with his interest with-

(*l*) The Supreme Court of Massachusetts said in one case that if it be necessary on account of the loss of the ship to carry the cargo overland for the purpose of transhipment, the underwriter is liable during the land transit. Bryant *v.* Commonwealth Ins. Co. (1833), 13 Pickering, 543, 555.

(*m*) Tierney *v.* Etherington (1743), cited 1 Burr. 348, 349.

(*n*) See § 258, *ante*.

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out transferring the right to the protection of the policy. Thus, where a cargo of wheat insured from Galatz to Emden and (or) United Kingdom was sold by the assured, "including insurance to Emden," it was held that the purchaser could not recover for a loss between Emden and the port of discharge in the United Kingdom (*o*).

Prolongation of the risk during land transit;

470. By express contract the protection of a marine policy may be prolonged after landing and during the subsequent transport of the goods overland (*p*). Thus, in a policy the voyage was described: "At and from Japan and (or) Shanghai to Marseilles and (or) Leghorn, and (or) London *viâ* Marseilles and (or) Southampton, and whilst remaining there for transit, with leave to call, &c., in the good ship or vessel called 'The ——' steamers or steamer, per overland, or *viâ* Suez Canal," &c. In the margin was this memorandum: "It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and (or) the steamers of the Mercantile Trading Company of Liverpool only."

The goods were shipped and paid for to London by the Messageries Impériales steamers, whose customary route, followed in this instance, was from Shanghai to Marseilles, and thence overland, through France, *viâ* Paris, where they arrived on the 13th of September, 1870; and while they were still there the German armies approached on the 19th September and surrounded the city, preventing the goods after that event from being forwarded to London. It was held that, the goods being still covered by the policy, there was a total loss within the meaning of the peril described

(*o*) Ionides *v.* Harford (1859), 29 L. J. Ex. 36; see also North of England Oilcake Co. *v.* Archangel Maritime Ins. Co. (1875), L. R. 10 Q. B. 249. As to the assignment of the policy to a purchaser, see *ante*, § 174 *et seq.*

(*p*) See, *e.g.*, Rodocanachi *v.* Elliott (1873), L. R. 8 C. P. 649. For other forms of policy prolonging the risk to cover a land transit, see Simon, Israel & Co. *v.* Sedgwick, [1893] 1 Q. B. 303; Schloss *v.* Stevens, [1906] 2 K. B. 665.

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therein as "the arrests, restraints, and detainments of all kings, princes, and people" (*q*).

until goods warehoused.

It is now usual by means of a "warehouse to warehouse" clause to prolong the risk after the goods have been landed, until they have been warehoused at their destination (*r*).

Policy on pumps for a salvage adventure.

471. A somewhat peculiar case arose out of a policy specially worded to protect certain pumps used in salvage operations.

A salvage company intending to raise the steamer "Alexandra," ashore near Drogheda, effected a policy on four steam pumps, &c., valued at 2,000*l.*, on the "Sea Mew" salvage steamer, "at and from Ardrossan to the 'Alexandra' steamer ashore in the neighbourhood of Drogheda, and whilst there engaged at the wreck, and until again returned to Ardrossan; the risk beginning from the loading on board the 'Sea Mew' upon the said ship and (or) wreck, &c." The pumps arrived safely at the wreck, were used on board of it, and were successful in raising it. The wreck, with the pumps still on board, then started for Ardrossan in tow of several tugs, the "Sea Mew" also acting in that capacity; but the weather became so foul that they necessarily put about for Belfast, and before that port could be reached the wreck went down with the pumps on board. The Court of Appeal held that the words of the policy did not cover the voyage to

(*q*) Rodocanachi *v.* Elliott, *supra.*

(*r*) See *ante*, § 447, n. (*f*). A policy on goods "to wharf or export vessel at port of discharge," was expressly stated to cover the goods while "temporarily placed upon the quay . . . and until delivered to the export vessel or at any wharf or warehouse within the limits of the port." They were placed in sheds on the quay while the consignee, who had not made up his mind as to their ultimate destination, was trying to find a purchaser, and were there damaged by fire; and it was held that they were covered: Westminster Fire Office *v.* Reliance Mar. Ins. Co. (1903), 19 Times L. R. 668. For the construction of a policy on goods "until safely delivered into warehouse or other place for which the goods have been entered, or in which it is intended they shall be lodged," see Deutsch-Australische Dampfschiffsgesellschaft *v.* Sturge (1913), 30 Times L. R. 137.

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Belfast, that being a voyage undertaken for the safety of the wreck, and not intended to be insured (*s*).

Cotton, L. J., and Thesiger, L. J., thought that it was not in the contemplation of the parties that the pumps should be kept on the wreck after she was raised and while she was being taken to a port of refuge. Brett, L. J., was of opinion that the pumps would have been protected even on the wreck if she had been returning to Ardrossan. It is submitted, however, that the correctness of the decision may depend on whether the policy was intended to cover the pumps on the wreck after she was raised. If not, it is clear that the risk was varied when the pumps were afterwards allowed to remain on board of her, instead of being reloaded on board the "Sea Mew"; and the policy then came to an end. On the other hand, if the policy covered the pumps on board the wreck until their return to Ardrossan, although no doubt the voyage to Belfast instead of to Ardrossan was not within the scope of the policy, the deviation to Belfast might be justifiable if it was properly made for the safety of the "Alexandra." It was under such circumstances a deviation for the safety both of the vessel on which the assured was entitled to have the pumps carried, and of the property on board of her.

Duration of risk on the ship.

472. We come now to consider the duration of the risk on ship, and first its commencement. In most of the Continental states the period of the commencement of the risk on the ship is fixed by their codes: subject, of course, to be varied by the express stipulations of the parties. Thus, in France, unless otherwise stipulated by the policy, the risk on ship commences from the day of the ship's sailing (*t*).

Commencement of risk abroad.

In this country the period at which the risk on the ship commences depends on the terms of the policy, and the nature of the voyage intended to be insured.

In this country.

(*s*) Wingate *v.* Foster (1878), 3 Q. B. D. 582. For another case of a policy on pumps for a salvage adventure, see *ante*, § 443, note (*q*).

(*t*) Code de Commerce, arts. 328, 341.

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Insurance "from" a port.

473. Rule 2 of the Rules for the Construction of the Policy in the first Schedule of the Marine Insurance Act, 1906, states that—

> Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

Thus, if the ship be insured simply "from" a port, or if the adventure on the ship be made by the policy "to begin on the ship from A. B.," the risk does not commence until the ship sails on her voyage "from" such port; *i.e.*, until she quits her moorings and breaks ground, being in a state of perfect equipment and readiness for her voyage (*u*).

"At and from" a port:

474. With regard to insurances on ship "at and from," the law was stated as follows in the second edition of this work:—

"If the ship be insured 'at and from' a home port, *i.e.*, if the *terminus a quo* be a port in this country in which the ship is then lying, the risk commences on the ship immediately upon the execution of the policy, and continues during the whole time the ship remains in the home port in a course of preparation for her voyage.

"If the ship be insured, and the adventure made to commence upon her 'at and from' some foreign port at which the ship is expected to arrive, with the view of protecting her for her homeward voyage, it is now settled in this country that, in order to make the risk under the homeward policy attach on the ship, she must have once been at the outward port in good physical safety" (*x*).

(*u*) Pittegrew *v.* Pringle (1832), 3 B. & Ad. 514; Hunting *v.* Boulton (1895), 1 Com. Cas. 120, in which the insurance was "from date of sailing from Leith;" 1 Marshall, Ins. 260. The law is the same in the United States. 3 Kent, Com. 307, n. (*a*). See what constitutes a sailing within the meaning of warranties to sail at a particular time, *post*, § 643 *et seq.*

(*x*) 2nd ed. p. 496; 6th ed. p. 404. The authorities cited are Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 548; Palmer *v.* Marshall (1831), 8 Bing. 79. The same rule is stated by Story, J., in Seaman *v.* Loring (1816), 1 Mason, R. 127, 140. Chancellor Kent says that the

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The language of this passage, and that used by many judges and text-writers, suggests that this question of the commencement of the risk is a different one according as the voyage is from a home or a foreign port (*y*). Yet there is no distinction in principle, as regards the attachment of the risk, between voyages beginning at home and those beginning at foreign ports; and no such distinction is made, as will presently appear, in the Rules for the Construction of the Policy in the Marine Insurance Act, 1906.

Rules in Mar. Ins. Act for attachment of risk on ship.

475. When the insurance is "at and from" there are three possible cases—(1) The ship may then be lying at the *terminus a quo*, (2) she may not have arrived there, (3) she may already have sailed.

In relation to the first and second cases, the Marine Insurance Act, 1906, lays down the following rule (*z*):—

> (a) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.
>
> (b) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

Policy "at and from" a port effected when the ship is lying there.

With regard to a ship lying at the *terminus a quo* when the policy is effected, it thus appears that the mere presence of the ship in port will not under all circumstances cause the policy to attach. She must be there "in good safety," and therefore the policy will not attach unless the ship is in a

risk "includes all the time the ship is in port, after the policy is subscribed, if the ship be at home": 3 Com. 307. See, as to this, Chitty *v.* Selwyn (1742), 2 Atk. 359, and *ante*, "Deviation."

(*y*) There is no suggestion of such a distinction in Phillips' treatise, unless it can be inferred from the statement (vol. i. s. 934) that under a policy "at and from" a foreign port the risk is held not to commence until the ship is there in good safety. The distinction is, however, recognized by Chancellor Kent (3 Com. 307), and by Story, J., in Seaman *v.* Loring (1816), 1 Mason, R. 127, 140.

(*z*) Sched. I. rule 3.

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reasonable state of fitness for the harbour risk (*a*). And it is further submitted that the policy will not attach if the ship be not in the port for the purposes of the insured voyage (*b*). Thus, if the insured voyage be "at and from" A. to B. and at the time when the contract is made the ship be taking cargo on board for a voyage from A. to C., it seems clear that the risk will not attach even "at" A. So also, if a ship has been laid up for some time, it may be that the policy will not attach until preparations for the voyage are begun. This has been decided in the United States with regard to a ship lying in a foreign port (*c*).

Before the Marine Insurance Act, 1906, it had not been necessary to decide that a policy on a ship "at and from" a place where she was then lying did not attach retrospectively. There is no doubt authority for the view that the risk only attaches as from the time when the contract is made; and Rule 3 (*d*) in the first Schedule to the Act, which provides that the risk attaches immediately, certainly seems to be founded on this view. For the condition in the rule that the ship must at the time when the contract is concluded be in good safety at the *terminus a quo* cannot be reconciled with a right to recover for previous losses; for if the ship had already been totally lost during her stay "at" the *terminus*

(*a*) Forbes *v.* Wilson (1800), 1 Park, 472; see also Annen *v.* Woodman (1810), 3 Taunt. 299; Parmeter *v.* Cousins (1809), 2 Camp. 235. See further, as to good safety, *infra*, § 478.

(*b*) See *infra*, note (*j*).

(*c*) Seaman *v.* Loring (1816), 1 Mason, R. 127, 140, cited 1 Phillips, s. 935. In Palmer *v.* Marshall, *supra*, the policy was on a yacht, then lying ready for sea. When vessels are laid up it is usual to insure them by "port" or "harbour" policies at a low premium. See *infra*, § 508.

(*d*) In Palmer *v.* Marshall (1831), 8 Bing. 79, the Judge had directed the jury that the policy only attached when the ship (a yacht lying at Bristol ready for sea, but apparently without reference to any particular voyage) commenced her voyage. This was held to be a wrong direction. There was a sufficient delay after the insurance was made to avoid the policy, and on a second trial the plaintiff was non-suited on this ground (8 Bing. 317). It was unnecessary to consider whether under ordinary circumstances the policy could have been retrospective; but Tindal, C. J., certainly said that the risk on the policy could only commence from its date.

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a quo it would be impossible to satisfy this condition. Rule 1 of the Rules for the Construction of the Policy declares, however, that "when the subject-matter is insured 'lost or not lost,' and the loss has occurred before the contract is concluded, the risk attaches, unless at such time the assured was aware of the loss, and the insurer was not." The terms mentioned in the Schedule are not to be construed as having the scope and meaning assigned to them therein when the context of the policy otherwise requires (*e*). It is therefore submitted that the rule which gives effect to the "lost or not lost" clause ought to prevail, and that in a policy "lost or not lost," "at and from" a port where the ship is lying at the time when the policy is effected, the risk generally attaches as from the earliest time when the ship was in the port in good safety for the purposes of the voyage insured (*f*).

Policy "at and from" a port from which the ship has already sailed.

476. The same principle, it is submitted, applies when a ship is insured "at and from" a port from which she has already sailed. This case is not dealt with in the Marine Insurance Act, 1906; but if the rule applicable to it were that an insurance "at and from" does not attach before the making of the contract, such a policy on a vessel that had already sailed would only amount to an insurance "from" the port.

Construction of words "at and from" with reference to circumstances.

477. The principle in virtue of which it is maintained that a policy "at and from," with the "lost or not lost" clause, attaches retrospectively during the whole stay of the ship at the port for the purposes of the voyage is probably to be

(*e*) Mar. Ins. Act, 1906, s. 30 (2).

(*f*) See Phillips, s. 932. The rule, that in homeward policies the risk attaches from the arrival at the foreign port, is laid down in general terms by Lord Hardwicke in Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 545, 548. It is not necessary for the attachment of the risk that the cargo of the previous voyage shall have been discharged. See Camden *v.* Cowley, and Reliance Mar. Ins. Co. *v.* Duder, *infra*, § 486. For, as has been held with reference to insurances on freight, the discharge of the outward cargo is an act done for the purposes of the homeward voyage: Warre *v.* Miller (1825), 4 B. & Cr. 538. See also Foley *v.* United, &c. Ins. Co. (1870), L. R. 5 C. P. 160, 164.

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regarded rather as a rule of construction than as a principle of universal application. Ordinarily, that is to say, the words ought so to be construed; but there may be special circumstances in which the ambiguity of the word "at" (*g*) may justify the admission of parol evidence to show that the real contract between the parties was different. If, for instance, the ship had, prior to the policy, sustained considerable damage, and a premium be agreed upon amounting to less than the sum to which both parties knew such damage amounted, it would be clear that such damage was not intended to be covered. It seems, then, that, in accordance with the opinion of Mathew, J., in a somewhat similar case (*h*), evidence would be admissible to show, consistently with the language of the policy, what the risk was. The effect of such evidence, in the instance we have given, would, no doubt, be that the words we are discussing would receive an interpretation not in conformity with the general principle, but limited in accordance with the intentions of the parties in the particular case.

Policy "at and from" a port where the ship has not yet arrived.

478. As we have seen, if the ship insured "at and from" a port be not yet arrived when the policy is effected, the risk attaches as soon as she arrives there in good safety (*i*).

Thus, under a policy on ship "at and from" Havana to Greenock, the ship arrived off Havana and the master

(*g*) In Haughton *v.* Empire Mar. Ins. Co. (1866), L. R. 1 Exch. at p. 210, Channell, B., seems to have considered that *primâ facie* the word "at" would cover the whole of the ship's stay at the port, but that this presumption might be controlled by extrinsic evidence.

(*h*) Hunting *v.* Boulton (1895), 1 Com. Cas. 120.

(*i*) Mar. Ins. Act, 1906, Sched. I. r. 3 (b), *ante*, § 475. See per Lord Hardwicke, Motteux *v.* London Ass. Co. (1739), 1 Atk. 545, 548; 1 Phillips, ss. 927, 932. Of course, if at the time of the ship's arrival there be no intention to send her on the insured voyage, the risk does not attach, by reason of the abandonment of the voyage. *Ante*, § 380. It is also submitted that the policy does not attach if the ship arrives for the purpose of an intermediate voyage. Thus if a ship be insured "at and from" A. to B., being then on her way to A., and the intention be then to send her first on a voyage from A. to C. and back to A., and then on the voyage from A. to B., the risk will only attach, if at all, on the second arrival of the ship at A.

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engaged a tug and pilot for the purpose of taking her to a clear anchorage. She was towed into the harbour, past the place where she ultimately discharged her cargo, to a point at the head of the harbour called the Regla Shoal. There she grounded, and received damage from the anchor of another ship. "In my opinion," says Channell, B., delivering judgment in the case, "she was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred at Havana, geographically speaking, and there is nothing which to my mind shows that the parties, at the time this policy was underwritten, contemplated any other meaning of the word 'at.' All the limitation which the law appears ever to have imposed as to the time of the commencement of the risk in such a case is, that the ship should arrive at the port at which she is insured in a state of sufficient repair or seaworthiness to be enabled to be there in safety" (*k*).

Good safety.

What constitutes good safety is well illustrated by the case of Parmeter *v.* Cousins. The policy was on ship "at and from St. Michael's, or all or any of the western islands, to England"; and it appeared that the ship, which had encountered very bad weather on the whole of the outward voyage, cast anchor off St. Michael's in such a leaky condition as to be unfit to take in a cargo, and was only kept afloat by pumping, and that, after lying in the roadstead there at anchor for upwards of twenty-four hours (during the whole of which time she was in great danger from the storm that still continued), she was blown out to sea and wrecked: Lord Ellenborough held that under these circumstances the risk had never commenced on the ship under the homeward policy, for the ship had never been at St. Michael's in good safety (*l*).

Physical, not political, safety is necessary.

All that is required in such case is good physical safety; not that the ship should have been free during her stay at the *terminus a quo* from political danger.

(*k*) Haughton *v.* Empire Marine Ins. Co. (1866), L. R. 1 Ex. 206.
(*l*) Parmeter *v.* Cousins (1809), 2 Camp. 235.

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Bell *v.* Bell.

Thus, where a ship was insured "at and from Riga to her ports of discharge in the United Kingdom," and immediately upon her arrival at Riga her papers were seized by government and the ship and cargo sequestrated and condemned before the outward cargo had been discharged: Lord Ellenborough held that, as the ship had been once "at" Riga in good physical safety, the risk under the homeward policy had attached on the ship (*m*).

What physical safety is required.

All that is required, in fact, is that the ship while at the *terminus a quo* of the voyage should "be in such a condition as to enable her to lie there in reasonable security till she is properly repaired and equipped for her voyage" (*n*).

Thus, where a ship, though leaky, was able to lie for a month loading in a river, it was held that the policy had attached (*o*). Of course the vessel must subsequently be made seaworthy for the marine risk.

The words "at and from" do not imply that the ship is at the place.

479. It follows from what has already been said that the words "at and from" do not imply a warranty or a representation that the ship is at the time of effecting the policy in the port in question; but it has been decided that the ship must be there within such a time afterwards that the risk shall not be materially varied; and that any delay between the making of the policy and the commencement of the risk, *whether such delay be voluntary or involuntary*, which has the effect of materially varying the risk, will prevent the policy from attaching (*p*).

(*m*) Bell *v.* Bell (1810), 2 Camp. 475.
(*n*) The stipulation as to "good safety" does not seem to mean anything more than that in this form of policy, as in all voyage policies, it is a condition precedent to the attachment of the risk that the vessel shall be seaworthy. This appears to have been the view of Channell, B., in Haughton *v.* Empire Mar. Ins. Co. (1866), L. R. 1 Exch. 210, and is consistent with that of Lord Ellenborough in Parmeter *v.* Cousins (1809), 2 Camp. 237. In Bell *v.* Bell (1810), 2 Camp. 475, Lord Ellenborough required "physical safety from the perils insured against."
(*o*) Annen *v.* Woodman (1810), 3 Taunt. 299; see also per Lord Kenyon in Forbes *v.* Wilson (1800), 1 Marshall, 148; 1 Park, 472.
(*p*) Hull *v.* Cooper (1811), 14 East, 479; De Wolf *v.* Archangel Marit. Bank & Ins. Co. (1874), L. R. 9 Q. B. 451; Maritime Ins. Co. *v.* Stearns, [1901] 2 K. B. 912.

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The facts of the case on which this latter point was decided were these. The policy, "at and from Montreal," was effected on the 13th of July. No question was put by the underwriter as to where the ship then was, and no information was offered by the assured; but in fact she was then at sea, on a voyage intended to end at Montreal. She did not arrive at Montreal till the 30th of August. Evidence was given on the trial that the delay of arrival at Montreal had materially varied the risk and the rate of premium. Evidence was offered, but not received, to show that the delay was not voluntary, but was due entirely to sea perils upon the voyage to Montreal. It was held that this evidence was properly rejected, as upon the facts of this case the only question for the jury was whether the delay had materially varied the risk (*q*).

The above decision is the earliest in our books as to the effect of involuntary delay preceding the time fixed for such a policy attaching. The question had come before the Court of Common Pleas in respect of voluntary delay, and was then decided adversely to the assured (*r*). Tindal, C. J., in delivering the judgment of the Court, seemed to intimate that his decision would have been the other way in case the underwriter had been prepared to expect delay by notice, or, what is equivalent to notice, by the existence of a usage (*s*). But Blackburn, J., in the later decision already cited, expressly reserved his opinion as to the effect of either notice or usage on the question (*t*).

The adventure must commence within a reasonable time.

480. On this subject sect. 42 of the Marine Insurance Act, 1906, lays down the following rules:—

> (1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time (*u*), and that if the adventure be not so commenced the insurer may avoid the contract (*x*).
>
> (2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

(*q*) De Wolf *v.* Archangel Marit. Bank & Ins. Co., *supra*.
(*r*) Mount *v.* Larkins (1831), 8 Bing. 108.
(*s*) *Ibid.* 121.
(*t*) De Wolf *v.* Archangel, &c. Co., *supra*. See *post*, § 483.

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The implied condition, as stated in this section, is that the adventure shall be commenced within a reasonable time; and it is arguable that such a condition is not the same as one that there shall not be a delay which materially varies the risk. In relation to contracts of affreightment it has been established by the House of Lords that an obligation to discharge a ship in a reasonable time must be construed with reference to the circumstances existing at the time of performance, so that the shipowner is not responsible for a delay arising from causes beyond his control, provided that he has not acted negligently or unreasonably (*y*). If the principle of this decision governs the construction of the words "reasonable time" in sect. 42, De Wolf *v.* Archangel Maritime is no longer law, in so far as it decides that an involuntary delay prevents the policy from attaching (*z*). Yet the condition that the adventure shall be commenced within a reasonable time is not the same as an obligation, a failure to discharge which will render the person on whom it is imposed liable to an action for breach of contract. The assured is under no obligation whatever to bring his ship to the *terminus a quo* and to prosecute the voyage insured. Therefore it is not clear that the rule laid down by the House of Lords with reference to the fulfilment of an obliga-

(*u*) By sect. 88 of the Act the question what is a reasonable time is one of fact.
(*x*) See Maritime Ins. Co. *v.* Stearns, *supra*.
(*y*) Hick *v.* Raymond, [1893] A. C. 22; Carlton SS. Co., Ltd. *v.* Castle Mail Packets Co., Ltd., [1898] A. C. 486. In the former case Lord Watson stated the rule as being one of general application and not confined to contracts for the carriage of goods: [1893] A. C. at p. 32.
(*z*) Mr. Arthur Cohen inclines to this view: Halsbury's Laws of England, vol. xvii. § 770.

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tion must be applied to the determination of the question what is a reasonable time within the meaning of sect. 42 of the Marine Insurance Act, 1906. The language of the section does not preclude a construction by which the question of reasonable time must be determined with reference to the risk contemplated at the time of the insurance, and it is submitted that this construction, which gives effect to the rule laid down in De Wolf *v.* Archangel Maritime Bank, is the correct one.

What delay is excusable.

481. Where the policy has once attached, length of time occupied in necessary repairs, though considerable, does not take the ship out of the protection of the policy, supposing those repairs to be made with an ultimate view of sending the ship on the voyage insured (*a*); nor does any other reasonable delay, if justified by necessity, or *bonâ fide* incurred for the purposes of the voyage (*b*)—as to take in simulated papers (*c*), or a particular description of crew (*d*); or provisions where rendered necessary by unavoidable delay (*e*).

The principle, in short, established by the cases is, that where the risk "at and from" has once attached, "a detention for a reasonable time for the purposes of the adventure insured must be allowed, and whether the time is reasonable must be determined, not by any positive or arbitrary rule, but by the state of things existing in the port where the vessel happens to be" (*f*).

What delay inexcusable.

482. On the other hand, it has been said that a policy effected on a ship "at and from" a port implies that the voyage insured shall be very shortly commenced, or, at all

(*a*) Mar. Ins. Act, 1906, s. 49 (c), *ante*, § 424a. Motteux *v.* London Ass. Co. (1739), 1 Atkyns, 545, 548.

(*b*) Smith *v.* Surridge (1801), 4 Esp. 25; Grant *v.* King (1802), 4 Esp. 175.

(*c*) Langhorn *v.* Allnutt (1812), 4 Taunt. 510.

(*d*) Grant *v.* King (1805), 4 Esp. 174.

(*e*) Raine *v.* Bell (1808), 9 East, 195.

(*f*) Per Tindal, C. J., in Phillips *v.* Irving (1844), 7 M. & Gr. 328. See, to the same effect, the remarks of Story, J., in Seaman *v.* Loring (1816), 1 Mason, R. 127, cited 1 Phillips, s. 935.

events, be in the near contemplation of the parties (*g*). And the ship will not be under the protection of the policy if she lie at the port for a long time before sailing or preparing for the voyage insured, and there be no reasonable excuse for delay (*h*). Sect. 482.

Thus, for instance, if all thought of the voyage insured be laid aside, and the ship lie in the port for years, the risk would be held either never to have attached, or, at all events, to have come to an end directly the determination to abandon the voyage was finally fixed (*i*).

Exception by usage.

The general rule as to the attachment of the policies is subject to be modified by the usages of particular trades. Thus, in the Newfoundland trade, owing to the well-known practice of making fishing expeditions or intermediate trading voyages after the ship's first arrival off the coast of Newfoundland, the risk under policies for the homeward voyage though expressed to be "at and from" any port or ports in Newfoundland, was held not to attach upon the ships on their first arrival out, but only from their beginning to prepare for the homeward voyage (*k*).

Delay of which the underwriter has been informed.

483. If a communication has been made to the underwriter from which he ought to infer that there will be a delay in the attachment of the risk, it has been a matter of doubt whether he is discharged by such a delay? In De Wolf *v.* Archangel Maritime Bank and Insurance Co. (*l*) the Court indicated that there were two possible views: (1) that there is in every case the implied understanding that the risk is to commence within such a time that it will not be varied unless the policy contains some express condition on the subject;

(*g*) Per Tindal, C. J., in Palmer *v.* Marshall (1832), 8 Bing. 317, 318; see also per Park, J., in Palmer *v.* Fenning (1833), 9 Bing. 462.

(*h*) Palmer *v.* Marshall (1832), 8 Bing. 317.

(*i*) See the observations of Lord Hardwicke in Chitty *v.* Selwyn (1742), 2 Atkyns, 359.

(*k*) Vallance *v.* Dewar (1808), 1 Camp. 503, and the other cases there collected.

(*l*) *Ante*, § 479.

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(2) that a communication, though not embodied in the policy, will qualify or rebut the implied understanding (*m*).

The latter view was supported by the Newfoundland voyage cases already referred to, in which even when the delay consequent on the customary fishing expedition or intermediate voyages changed a voyage back to Europe from a summer to a winter voyage, it was held that the policy on the homeward voyage remained good. Further, it was held that the assured was not bound to disclose the fact that the ship might be engaged in fishing, or sent on the intermediate voyage (after which, only, the policy by usage attached), because the underwriter was presumed to know the usage of the trade (*n*). Thus the *ratio decidendi* of these cases, as Chief Justice Tindal said in a later case, was that the usage of the trade was equivalent to notice (*o*).

In support of this view it was also argued that there is no express stipulation in the ordinary policy with regard to the time when the risk attaches. Therefore the time must be that which is contemplated by the parties. When no information is given to the underwriter, he is entitled to assume that the ship, if not yet arrived, will be at the *terminus a quo* within such time as is reasonable under ordinary circumstances. If facts relating to the previous voyage of the ship be communicated to him, he ought to keep these facts in mind in estimating the probable date when the voyage insured will commence. He is in a position to estimate the risk, he can fix the premium accordingly, and may, as is sometimes done, stipulate for a varying rate of premium, according to the time when the voyage begins.

The point has been settled by sect. 42 (2) of the Marine Insurance Act, 1906, which, as we have seen, provides that the implied condition that the adventure shall be commenced within a reasonable time may be negatived by showing that

(*m*) See L. R. 9 Q. B. 456, 457; 1 Phillips, ss. 602, 690.

(*n*) Vallance *v.* Dewar (1808), 1 Camp. 503; Ougier *v.* Jennings (1800), *ibid.* 505, n.

(*o*) Mount *v.* Larkins (1831), 8 Bing. 108, 122.

the delay was caused by circumstances known to the insurer before the contract was concluded. Sect. 483.

What is a beginning to prepare for the homeward voyage. Lambert *v.* Liddard.

484. It has sometimes been made a question when a ship begins to prepare for her homeward voyage. The following case illustrates the nature of the evidence with which the Courts will be satisfied on this point:—A ship engaged on a cruising voyage on the Southern Atlantic was insured for a trading voyage home by a policy effected on ship and freight "at and from Pernambuco or any other port or ports in the Brazils to London," "beginning the adventure on the goods from the loading thereof on board" the ship, "and upon the ship on the determination of her cruise, and preparing for her voyage to London," &c.

The cruise being ended, the captain went to Pernambuco, and, when off that place, sent in one of his officers to see if a cargo could be procured there; but as there was none, he sailed southward to St. Salvador for the same purpose, and was lost at sea between the two places. The Court held that his going to Pernambuco for a cargo, and sending in an officer there to inquire after one, was such "a preparing for his voyage to London" within the words of the policy, as to make the homeward risk attach from that moment and protect the ship at the time of loss (*p*).

What is included in "port." Named port.

485. We have already seen that, when the terminus "at and from" which the voyage is made to commence is a named port, the name is, generally speaking, taken to include, not different places classed together in legal style, or for the purposes of revenue, as one port, but some one place, which in the more limited and popular sense is considered the port; in other words, the harbour-town (*q*). If the

(*p*) Lambert *v.* Liddard (1814), 1 Marshall, R. 149; *S. C.*, 5 Taunt. 480. See also *ante*, § 475, note (*f*).

(*q*) Constable *v.* Noble (1810), 2 Taunt. 403; Payne *v.* Hutchinson (1808), *ibid.* 405, n.; Brown *v.* Tayleur (1835), 4 A. & E. 241; *ante*, § 454. See also, as to the meaning of the word "port," Hull Dock Co. *v.* Browne (1831), 2 B. & Ad. 43; Stockton and Darlington Rail. Co.

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"Port or ports."

"Port of loading."

policy be "at and from a port or ports" or "place or places" in the alternative, it must be supposed that the insurer meant to incur the greater risk of letting the ship sail to several places in order to take in her cargo (*r*). But where a ship was insured "at and from her port of lading," the Court held that the expression "port of lading" pointed to one single place, and did not allow of the ship loading at two distinct places (though both lying within seven miles of one another in the same bay), in either of which there might have been a lading (*s*).

"Port" does not necessarily imply an artificial harbour

It is not at all necessary to the definition of the term "port," as used in policies, that it should be an artificial harbour shut in with regular moles or piers. If it be a natural basin protected by a headland, or even an open roadstead, provided it be the usual and sole place of loading and unloading, it will be sufficient, especially if there be provided the usual machinery and appendages of a harbour (*t*). Thus, in one case, the Court of King's Bench held that the expression "to any port or ports whatsoever," in a time policy, ought to be construed the same as "place or places," and would protect the ship while anchored in an open roadstead, that being the usual place for loading and unloading goods at the place where the loss occurred (*u*).

Sea Insurance Company *v.* Gavin.

A ship, insured "at and from Leith to Shetland, and

v. Barrett (1844), 7 M. & Gr. 870, in Dom. Proc.; Roelandts *v.* Harrison (1854), 9 Ex. 444; Van Baggen *v.* Baines (1854), 9 Ex. 523; SS. Garston Co. *v.* Hickie (1885), 15 Q. B. D. 580; Hunter *v.* Northern Marine Ins. Co. (1888), 13 App. Cas. 717, 722, 726, 733; Goodbody *v.* Balfour (1899), 5 Com. Cas. 59 (C. A.).

(*r*) Brown *v.* Tayleur (1835), 4 Ad. & E. 241; see also Lambert *v.* Liddard, *supra*, § 484.

(*s*) Brown *v.* Tayleur (1835), 4 Ad. & E. 241. There may, however, be a usage by which a loading begun in a place designated in the policy may be finished elsewhere. Kingston *v.* Knibbs (1808), 1 Camp. 508, n.

(*t*) See SS. Garston Co. *v.* Hickie (1885), 15 Q. B. D. 580; and the judgments in Hunter *v.* Northern Marine Ins. Co. (1888), 13 App. Cas. 717.

(*u*) Cockey *v.* Atkinson (1819), 2 B. & Ald. 460; *S. P.*, in the United States, Delonguemere *v.* Firemen's Ins. Co. (1813), 10 Johnson, R. 126, cited 1 Phillips, Ins. s. 929.

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from thence to Barcelona, and at and from thence and two other ports in Spain, to a port in Great Britain," was lost while loading at Saloe. The roadstead there was the usual station for vessels of her burden. Saloe town lay at the bottom of a natural basin, protected by a headland, and without any artificial harbour. It was frequented as a port, usually designated as such, and so recognized both by the Spanish Government and in this country, which had a vice-consul there. It had a Custom House and harbour-master; port dues were levied there, and at the time of the loss conveniences were erected on the shore for the purpose of loading goods and of protecting smaller vessels from wind and weather. On this evidence the House of Lords, affirming the judgment of the Scotch Court of Session, decided that it was a port within the meaning of the policy (*x*).

Policy "at and from" an island or district containing several ports.

486. Where the policy is "at and from" an island or other district containing several ports, the risk on ship commences as soon as the ship has arrived in good safety at the first port at which she touches at the island or district for the purpose of discharging her outward cargo. Hence, where a ship, insured for her outward voyage from London to Jamaica, "until moored twenty-four hours in good safety," and by an homeward policy "at and from Jamaica to London," was lost in coasting the island after she had stayed some days at one port there, but before she had delivered all her outward cargo; a special jury found, and Lord Mansfield supported their finding, that this loss on the ship was at the risk of the underwriters on the homeward policy (*y*).

(*x*) Sea Insurance Co. *v.* Gavin (1830), 4 Bligh, N. S. 578; 2 Dow & Clark, 129. Several additional cases as to the meaning of the word "port" will be found in §§ 903, 905, *post*, Vol. II. As to the meaning of the words "place or places" following the words "port or ports," see Maritime Ins. Co. *v.* Alianza Ins. Co., [1907] 2 K. B. 660, *infra*, § 508.

(*y*) Camden *v.* Cowley (1763), 1 W. Bl. 417, 418. See also Reliance Mar. Ins. Co. *v.* Duder, [1913] 1 K. B. 265 (C. A.); 17 Com. Cas. 24, 227. Arnould stated (2nd ed. p. 503) that the risk commences in

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Ever since this case it has been clear insurance law that a ship insured for a homeward voyage "at and from" any of the West India Islands is protected by the word "at" in going from port to port of the island (*z*).

In these cases, the general word by which the *terminus a quo* of the homeward voyage is described comprehends all ports and places in the island or country named; the construction would be different if the *terminus a quo* were otherwise described in the policy: thus if the policy were on the ship "at and from the ship's port of loading" in Jamaica, that would restrict the commencement of the risk to one particular port in the island (*a*).

When the insurance is from or to a district or island, evidence of usage is admissible to show what meaning is attached to the description of the terminus in the policy, as, *e.g.*, that the Baltic includes the Gulf of Finland (*b*), or that "East Indian Island" includes Mauritius (*c*).

Risk to commence on expiration of previous policy.

486a. The attachment of the risk may of course be deferred by a stipulation that it is to commence on the happening of a particular event, such as the expiration of a previous policy. A ship was insured for a voyage from Australia "to port or ports, place or places of call and for discharge . . . . on the West Coast of South America," and by a later policy subscribed by the same underwriter for a voyage "at and from Valparaiso and/or port or ports . . . .

such a case when the ship has been moored in good safety for twenty-four hours at the first port of discharge—*i.e.*, when the policy on the outward voyage expires. It was, however, established by Haughton *v.* Empire Marine Ins. Co. (1866), L. R. 1 Ex. 206, that the expiration of the outward policy is not the test of the commencement of the risk under the homeward policy, and it is so expressly declared in the Mar. Ins. Act, 1906, Sched. I. rule 3 (b), *ante*, § 475.

(*z*) Cruickshank *v.* Janson (1810), 2 Taunt. 301; Warre *v.* Miller (1825), 4 B. & Cr. 538.

(*a*) Per Patteson, J., in Brown *v.* Tayleur (1835), 4 A. & E. 248.

(*b*) Uhde *v.* Walters (1811), 3 Camp. 16.

(*c*) Robertson *v.* Money (1824), Ry. & M. 75. In a previous case the Court had held the evidence insufficient to establish this construction. Robertson *v.* Clarke (1824), 1 Bing. 445.

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on the West Coast of South America" to European ports, with the additional stipulation "risk to commence from expiration of previous policy." The vessel discharged part of her Australian cargo at Valparaiso, and was lost while proceeding from Valparaiso to Tocopilla, where she was to have discharged the remainder of her Australian cargo and taken on board a cargo for Europe. It was held by Scrutton, J., that the liability of the underwriter was under the earlier policy (*d*), though, as is shown by a later decision, the vessel was also at the time of the loss on the voyage described in the second policy (*e*).

Continuance and termination of risk on ship. Foreign law.

487. The risk on the ship is in all our common voyage policies expressed to continue "until the ship hath moored at anchor twenty-four hours in good safety."

In France the risk is declared by the Code de Commerce to end, unless determined by the contract, when the ship is anchored or moored at her destination (*f*).

According to the codes of some countries the risk on the ship continues either until the ship has entirely discharged her cargo, or for a certain specified number of days after her arrival (*g*).

Alteration proposed by Magens.

Magens, observing that it is impossible in most cases to discharge the cargo in twenty-four hours, recommended the insertion of a clause by which the risk shall be made to continue for twenty-one working days after the ship's commencing to unload (*h*); and a clause prolonging the risk for a given number of days after arrival (usually thirty) is now commonly inserted in voyage policies (*i*). In the absence of

(*d*) Kynance SS. Co. *v.* Young (1911), 16 Com. Cas. 123.

(*e*) Reliance Mar. Ins. Co. *v.* Duder, [1913] 1 K. B. 265 (C. A.).

(*f*) Code de Commerce, arts. 328, 341. The law is similar in Spain (Code, arts. 733, 761), and in Portugal (Code, art. 602). The Russian Code (art. 558) makes the risk end when the ship reaches her destination.

(*g*) See the Code of Holland (art. 625), of Belgium (art. 195), and of Germany (art. 823). For the former ordinances of Continental states, see Magens, vol. ii. *passim*; Benecke, System des Assecuranz, c. viii. s. 1, pp. 234—238; Nolte, vol. i. pp. 668—671, ed. 1851.

(*h*) 1 Magens, p. 47.

(*i*) See *infra*, § 495.

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a clause of this kind the underwriters are not responsible for any loss that has happened after the ship has once been "moored twenty-four hours in good safety."

What is a "mooring in good safety."

488. The question on the ordinary English policy has generally been what constitutes a mooring in good safety.

The result of the cases appears to be that a ship cannot be considered to have been moored for twenty-four hours in good safety, unless she have been moored for that space of time in the harbour of her port of discharge: (1) in such a state of physical safety that she can keep afloat while her cargo is being unloaded; (2) in such a state of political safety that she shall not have been subjected during that time to any embargo, seizure, or capture on the part of the government of the port or of strangers; (3) under such circumstances as to have had an opportunity of unloading and discharging (*k*).

1. Physical safety.

489. The ship must have been for the twenty-four hours moored in a state of physical safety.

Shawe *v.* Felton.

A ship arrived at Demerara, her port of destination, a perfect wreck, having received her death-wound at sea, and was with the utmost difficulty kept afloat by lashing her to a hulk, till all the people on board were landed, a few days after which, in an attempt to move her, she sank in the harbour; Lord Kenyon held that the risk under the policy still continued on the ship when she so sank, "for though she arrived at Demerara she was never moored twenty-four hours, nor a moment, in safety" (*l*).

Lidgett *v.* Secretan.

A ship was insured "at and from London to Calcutta, and for thirty days after arrival"; the words "until she have moored at anchor twenty-four hours in good safety" still

(*k*) A better expression would be, "under such circumstances as to have been free to unload and discharge." What is meant is not that there must have been nothing to prevent the immediate discharge of the ship, but that there shall have been no legal obstacle to the discharge, such as one arising from the quarantine regulations of the port. See *post*, § 491.

(*l*) Shawe *v.* Felton (1801), 2 East, 110.

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remaining part of the policy. While on her voyage she struck on a reef, and thereby suffered such damage that her pumps required to be kept constantly going, and her steering gear was materially injured. In this condition, on the 28th of October, she came to anchor in the harbour of Calcutta, at a place in the river where vessels commonly discharge their cargo, and there she safely completed the discharge of her cargo on the 8th of November, a fire engine being used to pump the water out of her, until she lightened sufficiently to lessen the leak and to place the water under control of the ship's pumps. The ship while in this position was exposed to the perils common to all vessels so anchored, viz., the strong currents and the bore in the Hooghly, aggravated in her case, if she had broken adrift, by the bad condition of her steering gear. She was then placed in a dry dock for repairs, and while there, and after the lapse of twenty-four hours, and more than thirty days in addition, she was destroyed by fire.

It was unnecessary, in the events which had happened, to determine in this case whether under this policy the thirty days were to be reckoned from the arrival of the vessel at Calcutta, or from her having moored at anchor twenty-four hours in good safety (*m*). Bovill, C. J., delivering the judgment, said: "Assuming, then, that the thirty days are to be reckoned from the time of the ship being moored for twenty-four hours in good safety, the question arises, What is the meaning of those words in such a policy? We are of opinion that the meaning is not, as has been contended, that the moorings are safe, but that the words refer to the ship being in safety. The words cannot mean that the vessel is to arrive without any damage or injury whatever from the effects of the voyage; otherwise, the loss of a mast or even a spar, a sail, or rope, though the vessel was perfectly fit to keep not only the river but the sea, would, contrary to all the ordinary meaning of language, prevent her from being considered as

(*m*) See, as to this point, Mercantile Marine Ins. Co. *v.* Tithering-ton (1864), 5 B. & S. 765; 34 L. J. Q. B. 11, *post*, § 495.

Sect. 489. in safety. So, on the other hand, the words would not, in our opinion, be satisfied by the vessel arriving and being moored in a sinking state, or as a mere wreck, or by a mere temporary mooring. We think, also, that the mere liability to damage, whether partial or total, during the twenty-four hours, by the occurrence of some or all of the perils insured against, cannot prevent the running of the twenty-four hours, because the extension of the period of risk for twenty-four hours, after having moored in good safety, clearly implies that, notwithstanding the safety intended, the ship is liable to partial or total loss by the occurrence of a peril insured against.

". . . . In the present case the vessel, though considerably damaged and leaky, and with one compartment full of water, existed as a ship at the time of her arrival, and she was able to keep afloat, and did keep afloat as a ship more than twenty-four hours after being moored, by exerting the means within the power of the captain. She arrived and moored at the ordinary place for unloading, and was so moored as a ship in the possession or control of her owners for more than twenty-four hours; and she remained as a ship, and in possession of her owners, for more than thirty days after the lapse of the twenty-four hours before described, and until the time of the fire by which she was totally lost." It was therefore held, that the total loss which had occurred was not within the period of risk covered by the outward policy, and that only the average loss was recoverable under it (*n*).

2. Political safety. Minett *v.* Anderson.

490. The ship must have been for the twenty-four hours in a state of political safety.

An English ship insured from Bilbao to Rouen was, the day after arrival at Rouen, laid under an embargo then existing there against all English ships, and her captain and crew treated as prisoners of war; Lord Kenyon held that the

(*n*) Lidgett *v.* Secretan (1870), L. R. 5 C. P. 190, 198, 199, 200. See this case considered, with reference to another policy, on a different point (L. R. 6 C. P. 616), *post*, vol. ii. § 1223.

risk on the ship still continued, for she could not be said, under the circumstances, to have been twenty-four hours, or even a minute, moored in safety, having been, immediately she entered the port, to all intents and purposes captured by the French (*o*). Sect. 490.

So, where immediately on the ship's arrival at Riga (which was her port of discharge under the policy), her hatches were sealed down and her papers sent to St. Petersburg to be examined, on which examination the ship and cargo were seized and afterwards condemned; it was held, that as there had been an incipient seizure immediately on the ship's arrival which ended in condemnation, this was not a mooring twenty-four hours in good safety (*p*). Horneyer *v.* Lushington.

In the first of these cases a constructive, and in the second an actual, seizure had taken place immediately on the ship's arrival. Our Courts, however, have refused to regard a seizure as having a relation back to the moment of arrival, merely on the ground of the ship's liability to seizure from that moment onward.

A ship insured "from Hamburg to London," had rendered herself liable to forfeiture under our revenue laws for smuggling committed during the voyage; she arrived in the port of London on the 1st of September, and was not seized by the revenue officers for the said smuggling till the 27th, having been all that time safe at her moorings in the river Thames. The Court held that the risk in this case was at an end twenty-four hours after the ship's arrival (*q*). Lockyer *v.* Offley.

491. The ship must have been so moored as to have had an opportunity of unloading and discharging. Otherwise, whatever time may have elapsed since her arrival, the risk will be deemed to be still continuing. 3. Liberty to unload and discharge.

A ship was moored on the 8th July at a wharf in London, but, that same day, was ordered back into quarantine for a Waples *v.* Eames.

(*o*) Minett *v.* Anderson (1794), Peake, N. P. R. 277.
(*p*) Horneyer *v.* Lushington (1812), 15 East, 46.
(*q*) Lockyer *v.* Offley (1786), 1 T. R. 252.

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fortnight; she did not go into quarantine till the 30th July, having all the time remained at her moorings; she was burnt on the 23rd August, before she could get permission to leave the quarantine ground.

The Court held that, though so long at her moorings before she ultimately went into quarantine, she had not been there in good safety, which must imply an opportunity of loading and discharging (*r*).

Samuel *v.* Royal Exchange Assurance Co.

A ship insured from Sierra Leone to London was ordered into the King's Dock at Deptford, and on the 18th February arrived off the dock gates; not being able then to enter, the captain lashed her to a king's ship outside the gates. Owing to the quantity of ice that had drifted down the river, no attempt could be made to get her in until the 27th of February. On that day, while she was being warped towards the dock, the rope broke and she went ashore and was totally lost. The Court of King's Bench held, that as the captain was ordered to take the ship into the King's Dock, that was her place of discharge, and consequently, as she had never been there, she had not been moored twenty-four hours in good safety, and so the risk continued (*s*).

If, however, the ship be moored in such a place and under such circumstances that she has only to wait till her turn of unloading comes without again unmooring, this is held a mooring in good safety.

Angerstein *v.* Bell.

A ship insured to London arrived at the wharf where it was intended she should unload, but was laid on the outside of the tier of shipping, there being no room to lay her inside, and remained so moored and lashed to other vessels for seven days, when she was forced adrift by the ice and lost: Lord

(*r*) Waples *v.* Eames (1746), 2 Str. 1243.

(*s*) Samuel *v.* Royal Exch. Co. (1828), 8 B. & Cr. 119. See Stone *v.* Mar. Ins. Co. of Gothenburg (1876), 1 Ex. D. 81. See also Zacharie *v.* New Orleans Ins. Co. (1827), 5 Martin, Louisiana R. N. S. 637; and Dickey *v.* United Ins. Co. (1814), 11 Johns. 358; cited 1 Phillips, s. 968.

Kenyon held that she had been moored twenty-four hours in good safety (*t*). Sect. 491.

492. In Samuel *v.* Royal Exchange Assurance Company, the circumstances showed that the ship had not arrived at her true port of discharge. Where, however, she has once arrived at a port for the purpose of discharging, that will be deemed to be her true port of discharge, although a different port may have been agreed upon in her charter-party. Ship must have arrived at true port of discharge.

Thus a ship insured from Liverpool to Quebec and back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety, was by her charter-party to take her cargo from Quebec "to Wallasey Pool, on the River Mersey, or as near thereto as she could safely get." She arrived in the Mersey on the 4th September, and was towed up the next morning abreast of Wallasey Pool, where, as she could not enter the port by reason of her great draft of water, the captain anchored, and reported the vessel at Liverpool. He engaged lumpers to unload and discharged the crew. After the deck cargo and a considerable portion of the other cargo had been discharged, the ship, on 14th September, fell over and sustained injury. The captain had always intended to take the vessel into Wallasey Pool with as much of the cargo as she could safely carry. The Court of Exchequer, nevertheless, held that the ship had been moored twenty-four hours in safety, and consequently that the underwriters were not liable (*u*). Whitwell *v.* Harrison.

493. If the twenty-four hours' clause were struck out of the policy, the risk on the ship would still continue until her safe arrival at her port of destination, but would cease immediately on her being at her moorings (*x*). Duration of risk without ordinary clause.

(*t*) Angerstein *v.* Bell (1795), 1 Park, 54; 1 Marshall, Ins. 263.

(*u*) Whitwell *v.* Harrison (1848), 2 Ex. 127; 18 L. J. Ex. 465; approved in the United States in Bramhall *v.* Sun Ins. Co. (1870), 104 Mass. 510.

(*x*) Anonymous case (1685), Skinner's R. 243; see also the American case of Dickey *v.* United Ins. Co. (1814), 11 Johnson's Cases, 358,

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Termination of risk where there is no cargo to discharge.

494. Where the ship is not proceeding to the *terminus ad quem* to discharge cargo, but for other purposes, the question where the risk ends may be one of fact, depending on usage with reference to the voyage. Thus, where a ship insured to the Mauritius and for thirty days after arrival, anchored at the entrance of the harbour, seeking freight, at a place where vessels usually anchored for that purpose, the jury found that the ship had arrived at the place where the voyage ended, and the Court of Exchequer upheld the verdict (*y*).

Express prolongation of risk beyond the twenty-four hours.

495. The risk is frequently prolonged by express stipulation in the policy beyond the usual period of twenty-four hours.

Thus, a ship was insured, by a clause in writing, to any port in the Pacific Ocean, and during thirty days' stay in her last port of discharge. The printed twenty-four hours' clause remained in the policy. The ship arrived at her last port at 7 p.m. on the 25th of May, and was lost at 3.45 a.m. on the 24th of June. The underwriters contended (1) that in computing the thirty days the whole of the 25th of May should be reckoned; (2) that the printed twenty-four hours' clause was superseded by the written thirty days' clause. According to their argument, the 23rd of June was the last day of the risk. Crompton, J., however, said: "We must construe the policy so as to make all the parts of it available, and I cannot see why we should not read it as meaning that the thirty days should run from the expiration of twenty-four hours after the ship had moored at anchor." Cockburn, C. J., concurred, and there was judgment for the assured (*z*).

cited 1 Phillips, Ins. s. 968. "I quite agree with the statement in Arnould, that where there is no clause as to mooring in good safety for any given time, if a vessel got to port, and was at moorings waiting her turn to unload, she would have finished her voyage": per Bramwell, B., in Stone *v.* Marine Ins. Co., Ocean, Ltd. of Gothenburg (1876), 1 Ex. D. 81, 85.

(*y*) Lindsay *v.* Janson (1859), 4 H. & N. 699; 28 L. J. Ex. 315.

(*z*) Mercantile Marine Ins. Co. *v.* Titherington (1864), 5 B. & S. 735; 34 L. J. Q. B. 11. Such a policy is a time policy engrafted on a voyage policy. Gambles *v.* Ocean Marine Ins. Co. of Bombay (1876),

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In a later case a ship was insured for a voyage to Algoa Bay "and for thirty days in port after arrival," the printed words "twenty-four hours" in the clause "until she hath there moored at anchor twenty-four hours in good safety" being struck out. The ship was moored in good safety at 11.30 a.m. on the 2nd of August; and the Court of Appeal held, affirming the judgment of Bigham, J., that the words "thirty days" meant thirty consecutive periods of twenty-four hours, beginning at 11.30 a.m. on that day, so that the assured could not recover for a loss which took place at 4.30 p.m. on the 1st of September (*a*).

End of risk when ship insured to an island.

496. When the ship is insured to an island or other district generally, comprising several ports, questions have been raised as to the duration of the outward risk on the ship so insured. This mode of insurance used to be exceedingly common in the West Indian trade. Circumstances which can only be ascertained on arrival may make it expedient for the ship to touch at more or fewer ports, or to visit them in any order which may seem most suitable on the spot.

The outward risk on ships so insured.

It was decided in the time of Lord Mansfield, and has ever since been a clear point in insurance law, that the risk on the outward voyage upon a ship insured to an island terminates immediately after the ship has moored for twenty-four hours

1 Ex. D. 141; 45 L. J. Ex. 366. Where a ship was insured "while in port thirty days after arrival," Lord Trayner held that the risk ended when the ship left the public dock and was laid up for repairs in a private graving dock in Greenock Harbour, on the ground that she was no longer under the protection nor in the jurisdiction of the port authorities. It became unnecessary on appeal to consider this decision, but Lord Shand expressed a strong opinion that it could not be supported. Hunter *v.* Northern Mar. Ins. Co. (1887), 14 Ct. of Sess. Cas. 4th Ser. 544. In Union Mar. Ins. Co. *v.* Martin (1866), 35 L. J. C. P. 181, the Court of Common Pleas held, on the facts, that an insurance to A., and for thirty days after arrival, was terminated by a new insurance with the same underwriters "at and from A." Cf. Kynance SS. Co. *v.* Young (1911), 16 Com. Cas. 123, where the second policy contained a clause, "risk to commence from expiration of previous policy," and Scrutton, J., held that the earlier policy remained in force.

(*a*) Cornfoot *v.* Royal Exchange Ass. Corporation, [1903] 2 K. B. 363; [1904] 1 K. B. 40.

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in safety at the first port in the island at which she discharges the great bulk of her cargo, and that afterwards, if lost in coasting round the island, it is the underwriters on the homeward policy who are alone liable (*b*).

Nor does it make any difference to the liability of the underwriters under the outward policy on the ship that a small part of the outward cargo is still on board at the time of loss. Thus in Leigh *v.* Mather, as the ship had moored and unloaded the great bulk of her outward cargo at Montego Bay, in the island of Jamaica, the outward risk on the ship was thereby held to be at an end, although a small part was sent round as ballast to the port of St. Ann's in the same island (*c*).

Inglis *v.* Vaux.

A ship insured "to Martinique and all or any of the Windward and Leeward Islands, with liberty to touch at any ports or places whatsoever, to take on board and land goods, stores," &c., arrived at Martinique, where the captain disposed of all his outward cargo, except a small quantity of lime and bricks, with which he sailed for, and arrived at, Antigua, and there remained for about five weeks, partly, as he said, to dispose of the remnant of the outward cargo, and partly to procure a homeward cargo: at the end of this time she went down in a hurricane, with the lime and bricks still on board. Lord Ellenborough held the underwriters on the outward policy not liable for this loss, the risk on the ship having come to an end, at all events directly the disposal of the outward cargo at Antigua ceased to be the sole object of the captain's stay there (*d*).

Moore *v.* Taylor.

A ship was insured for a trading voyage from the West Indies to this country and back, in the following terms: "At and from St. Vincent's, Barbadoes, and all or any other of the West India Islands (Jamaica and St. Domingo excepted),

(*b*) Camden *v.* Cowley (1763), 1 W. Bl. 417, 418; Barrass *v.* London Ass. Co. (1782), 1 Park, Ins. 74; 1 Marshall, Ins. 266; Cruickshank *v.* Janson (1810), 2 Taunt. 301.

(*c*) Leigh *v.* Mather (1795), 1 Marshall, Ins. 266; 1 Esp. 412; see also Inglis *v.* Vaux (1813), 3 Camp. 437.

(*d*) Inglis *v.* Vaux (1813), 3 Camp. 437.

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to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back again to Barbadoes and all or any other West India Islands (Jamaica and St. Domingo excepted), until the ship shall be arrived at her final port as aforesaid, with liberty to the ship in this voyage to proceed to and touch and stay at any port or places whatsoever, and to load and unload goods at all places she may call at." Having sailed to Liverpool, she took on board for the return voyage, amongst other things, a quantity of coals and bricks which in weight formed about one-third of the whole cargo, but in value not above one-eighteenth. She arrived at Barbadoes, where she disposed of all the cargo loaded on board her at Liverpool, except the coals and bricks; with these on board, and also with some empty sugar casks loaded on board her at Barbadoes, she was ordered to proceed to Berbice for the purpose of bringing back a cargo, when, just before sailing, she was lost by a hurricane off Barbadoes.

There was some doubt on the evidence whether the coals and bricks were on board as ballast, or whether they formed part of the outward cargo, and were intended to be disposed of at Berbice. Lord Denman directed the jury to find for the defendant (*i.e.*, that the risk on the ship was at an end at the time of loss) if they thought that the cargo had been substantially discharged at Barbadoes: the jury thought that it had, and found accordingly for the defendant. The Court held this direction right, and though they seemed to think that the jury had drawn an incorrect conclusion from the facts, refused to disturb the verdict (*e*).

Insurance to an island and a market.

It has been held in the United States that under a policy on ship to any named West India Island, as Barbadoes, "and a market," the ship will be protected in going *bonâ fide* from island to island till her cargo is disposed of (*f*).

Effect of unloading a small part of the cargo.

497. The discharge of a small part of the cargo at an intermediate port does not put an end to the risk. In Leigh

(*e*) Moore *v.* Taylor (1834), 1 A. & E. 25.

(*f*) Maxwell *v.* Robinson (1806), 1 Johnson, R. 333, cited 1 Phillips, Ins. s. 960. So, Deblois *v.* Ocean Ins. Co. (1835), 16 Pick. (Mass.) 303.

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v. Mather, Lord Kenyon stated (and the special jury seem to have been of the same opinion) that if a ship, insured from A. to B., be obliged to put into an intermediate port of distress, and there dispose of part of her cargo, the risk on the ship does not thereby terminate, but continues until her arrival at some port at which it was originally contemplated that she should discharge her cargo in whole or in part (*g*).

This appears to be a very just rule, and is illustrated and confirmed in the jurisprudence of the United States.

Thus, where a ship was insured from the United States to Europe, and back "to her port of discharge in the United States," it was held that the landing of 150 boxes of lemons at New York, a port into which the ship had put to wait for orders, the lemons being in a perishing state and likely to be spoiled, did not make New York the port of discharge under this policy, so as to terminate there the risk on the ship (*h*). Where a ship, under the same form of policy, having put into New York for orders, and being directed to proceed up the Connecticut River to Middletown, necessarily landed about 3,000 bushels of salt into lighters at New York to be carried up to Middletown, and then herself proceeded thither with the residue of her cargo, the same Court held that, notwithstanding this necessary discharge of part of the cargo there, New York was only the port of arrival, and not the port of discharge, and therefore that the risk continued to Middletown (*i*).

Result.

498. From these cases it is evidently not the fact of unloading at any port into which the ship runs in the course of the voyage which puts an end to the risk on the ship, when insured either generally to an island or country, or to her port or ports of discharge. It is not until she has moored twenty-four hours in good safety at a port at which she was

(*g*) Leigh *v.* Mather (1795), 1 Esp. 412.

(*h*) Sage *v.* Middletown Ins. Co. (1814), 1 Connecticut R. 239; 1 Phillips, Ins. s. 962.

(*i*) King *v.* Middletown Ins. Co. (1814), 1 Connecticut R. 184; 1 Phillips, Ins. s. 962.

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intended to unload, and at which the master actually breaks bulk for the purpose of unloading either the whole or the greater part of her cargo, that the risk on the ship will be held to terminate.

If, indeed, the port into which she puts be one to which she was originally destined, then, if she be lost after having moored there twenty-four hours in good safety, the risk on the ship will no doubt be at an end, even although she has not actually broken bulk, but be only preparing to unload her cargo at the time of the loss.

On the other hand, if the ship enter a port with only a contingent purpose to unload there, if circumstances should render it expedient, it has been decided in the United States that such port shall not be deemed her port of discharge, so as to terminate the risk on the ship, by her mooring there for twenty-four hours in good safety. Thus, a vessel insured "to her port of discharge in the United States," put into Savannah, where the master intended to discharge his cargo if the market was favourable; but not finding it so, he resolved to proceed to Boston, and, accordingly, after doing repairs at Savannah, but without breaking bulk there, he sailed for Boston and was lost. The Court in Massachusetts held, apparently on very sound principles, that the risk on the ship, under the circumstances, continued to Boston (*k*). But where the insurance was to "Bilbao or a port of discharge," and the ship had put into Bilbao and discharged part of her cargo and then sailed to Lisbon: it was held in the United States that the outward risk ended at Bilbao (*l*).

Law of France as to end of risk in the West India trade.

499. The general rule in France as to the duration of the outward and commencement of the homeward risk on a ship insured for the West India trade seems to be substantially

(*k*) Lapham *v.* Atlas Ins. Co. (1833), 24 Pick. Mass. R. 1. See 1 Phillips, Ins. s. 962; 3 Kent, Com. p. 309; see also Coolidge *v.* Gray (1812), 8 Mass. R. 527, cited 1 Phillips, Ins. s. 962.

(*l*) Stevens *v.* Beverley Ins. Co. (1820), cited 1 Phillips, s. 963. "The plain meaning of the expression," said the Chief Justice, "is to Bilbao or some other port of discharge."

Sect. 499. the same as our own, viz., that the risk on the ship under the outward policy continues till her arrival at the port of substantial discharge, and cannot be extended beyond that, merely because an inconsiderable portion of the outward cargo may still be on board after she has sailed from that port, or at the time of loss (*m*).

As it seems to be repugnant to French law that the outward and homeward policies on ship should be concurrent, Emerigon proceeds to consider what rules there are for ascertaining when the loss on the ship is at the risk of the outward and when at that of the homeward insurers (*n*). No such principle exists in the law of England; so that if the outward policy be "until moored twenty-four hours in good safety," and the homeward policy be "at and from" the same port, both policies may well be concurrent during the twenty-four hours (*o*).

Insurance to "port of discharge."

500. Questions have arisen as to the duration of the risk on the ship when she is insured "to her port of discharge," or "to her port or ports of discharge," or to a named place "and her port of discharge," or "to her final port of discharge or destination."

In one of the earlier English cases it was said that the ship's port of discharge means that at which it was originally intended that the goods should be delivered (*p*); and it has been held in the United States, apparently on good grounds, that the risk on the ship under an insurance "to her port of discharge" (in the singular) terminates twenty-four hours after she has moored in safety at the port, where, in pursuance of the original intentions of the parties to the policy,

(*m*) 2 Emerigon, c. xiii. s. 18, p. 108.

(*n*) See 2 Emerigon, c. xiii. s. 20; see also 3 Boulay-Paty, Droit Mar. tit. x. s. 9, tom. iii. pp. 423—426.

(*o*) See Mar. Ins. Act, 1906, Sched. I. rule 3 (b), *ante*, § 475; Haughton *v.* Empire Marine Ins. Co. (1866), L. R. 1 Ex. 206, 210, 211.

(*p*) Clason *v.* Simmonds (1741), cited 6 T. R. 533. See, however, Kynance SS. Co. *v.* Young, *infra*, note (*r*).

she first breaks bulk for the purpose of discharging her cargo (*q*). Sect. 500.

Where the insurance is to her "port or ports of discharge," in the alternative, the duration of the risk is not confined to the first port at which she breaks bulk, and discharges cargo (*r*). According to Arnould's view, the risk would be extended until twenty-four hours after her arrival at that port, where, in fact, she substantially discharged her cargo, *i.e.*, the great bulk of it (*s*). "Port or ports of discharge."

501. This is unquestionably the rule when the ship is insured "to her final port of discharge," as the following cases sufficiently prove:— Final port of discharge.

A ship, insured "till her safe arrival at her last port of discharge in the East Indies or China," unloaded all her cargo at Madras, and was afterwards lost on her way to Bengal: the Court held that the risk on the ship was at an end at the time of the loss, for by the true interpretation of the policy, the last port of discharge was not that where the ship might have been originally destined to discharge any part of her cargo, but that where she actually did discharge the whole of it (*t*). Moffatt *v.* Ward.

In this case the whole cargo had been discharged at Madras: in that which follows only a part of the cargo was unloaded there, and the residue, which was intended for an ulterior port, was still on board at the time of the loss.

A ship insured "from London to Madras and Bengal, or the ship's last port of discharge of her Europe cargo beyond the Cape of Good Hope," was, as the underwriters knew at the time of subscribing the policy, destined for China: on Preston *v.* Greenwood.

(*q*) Coolidge *v.* Gray (1812), 8 Mass. R. 527; 1 Phillips, s. 962.

(*r*) See Kynance SS. Co. *v.* Young (1911), 16 Com. Cas. 123. In that case the charter-party provided for a discharge at one port, but the shipowner and charterer afterwards agreed that the cargo should be discharged at two ports; and Scrutton, J., held that a loss while the ship was on her way from the first to the second port was covered by a policy to "port or ports of discharge."

(*s*) 2nd ed. p. 516; and see *ante*, § 498.

(*t*) Moffatt *v.* Ward (1784), 4 Dougl. 29, n. (*a*), 31, n. (*b*).

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arriving at Madras she unloaded a considerable part of her cargo there, but still had on board all that part of it which had been originally destined for China, when she perished by a hurricane in Madras roads. Lord Mansfield held that the risk, under these circumstances, continued till the ship's arrival at China (*u*).

Substituted port where it is illegal to enter "last port of discharge."

502. If a ship insured to port or ports "until arrived at her last port of discharge" elects to put into some other port because it would be illegal by the laws of war to continue her voyage to the port of original destination, and disposes of a considerable part of her cargo in the substituted port, the risk on the ship ends after she has moored there twenty-four hours, even though the captain may not at the time of loss have entirely abandoned the intention of ultimately proceeding to the place of his original destination.

Brown *v.* Vigne.

A ship was insured "at and from London to any port or ports in the river Plate, until her arrival at her last port of discharge in the river Plate." There are three ports in the river Plate, which are reached in the following order by a ship arriving from England:—1. Maldonado; 2. Monte Video; 3. Buenos Ayres. The captain, on sailing from England, had intended to proceed to Buenos Ayres, but on his arrival in the river Plate, learning that Buenos Ayres was in the hands of the Spaniards, then at war with this country, he sailed past Maldonado, and put into Monte Video, which was then occupied by the English. His intention was to land and sell his whole cargo there, and finish the voyage at that place if he found the markets favourable; finding the sale, however, duller than he expected, he had not given up all thoughts of proceeding on to Buenos Ayres for a market with that portion of the cargo which he could not sell at Monte Video, when his ship was fouled in Monte Video harbour and received the damage, to recover which the underwriter was now sued under this policy. The Court held that

(*u*) Preston *v.* Greenwood (1784), 4 Dougl. 28, 33; see also Moore *v.* Taylor (1834), 1 A. & E. 25.

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the plaintiff could not recover, the risk on the ship having come to an end after her being safely moored for twenty-four hours in Monte Video (*x*).

In the course of the argument Bayley, J., intimated that the words "last port of discharge" must mean "the last practicable friendly port of discharge"; just as in an insurance on a ship "from Liverpool to any of the Windward or Leeward Isles," Lord Kenyon had previously held that the meaning of such policy must be to any of such isles as were friendly; for that a hostile port could not be in the contemplation of the parties at the time the policy was effected (*y*).

It will be observed that in this case the port originally contemplated as the final port of discharge was in a state of open hostility at the time the vessel reached the river Plate, so that it would have been absolutely illegal for her to have proceeded to such port: this is very different from the case of a mere temporary obstruction, or one in which, though there might be danger, yet there would be no illegality in proceeding to the final port; and this constitutes the point of distinction between this case and that of Oliverson *v.* Brightman (*z*).

Insurance to "final port."

503. A policy on ship to ports in a country or district may, of course, be so worded that the risk does not end at the last port of discharge.

Crocker *v.* Sturge.

A ship was insured from Australia "to any port or ports, place or places on the West Coast of South America . . . , while there and thence" to the United Kingdom. The underwriters re-insured the earlier portion of their risk by a policy "to any port or ports, place or places in any order on the West Coast of South America and for thirty days after arrival in final port, however employed." The ship, after discharging her cargo at a port on the West Coast, was lost

(*x*) Brown *v.* Vigne (1810), 12 East, 283.
(*y*) Neilson *v.* Delacour (1798), 2 Esp. 619.
(*z*) Oliverson *v.* Brightman (1846), 8 Q. B. 781; *ante*, § 467.

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on her way to a loading port on the West Coast. Mathew, J. held that the words "port or ports" and "final port" were not limited to ports of discharge, and that the risk still endured at the time of the loss (*a*).

"To any port or ports, however employed." Crocker *v.* General Insurance Co.

In another policy of re-insurance on the same risk, the clause was "to any port or ports, place or places, in any order on the West Coast of South America, and for thirty days in port after arrival however employed or until sailing on next voyage, whichever may first occur." The Court of Appeal held, affirming the decision of Mathew, J., that the loss was also covered by this policy. They considered that the words "however employed" applied to the words "to any port or ports," as well as to the words "for thirty days in port after arrival," and therefore that "port or ports" included loading ports for the next voyage as well as ports of discharge (*b*).

Marten *v.* Vestey.

Recently the question what is the "final port" arose in a case where the words "however employed" had not been added as in the previous cases. A steamship was insured by an ordinary Lloyd's policy for a voyage from the river Plate "to any port or ports, place or places in France and/or the United Kingdom (final port) including Mediterranean *via* any ports in any order." She discharged part of her cargo at St. Nazaire and completed her discharge at Havre. She then sailed for Barry for bunker coal and was lost on the way. The House of Lords held unanimously that the words "final port" were not limited to the United Kingdom, and that on the true construction of the policy "final port" meant the final port of discharge, so that at the time of the loss the insured voyage had come to an end. As is usual when ships are insured by the ordinary Lloyd's policy, the words "upon the goods and merchandises until the same be there discharged and safely landed" were allowed to remain in the policy, and both Lord Haldane and Lord Atkinson considered that in determining the intention of the parties these words ought to be taken into consideration. Lord Dunedin, on the other hand, was of opinion that, having regard to the time-honoured practice of using the same form of policy for insurances both of ships and goods, without deleting the phrases inapplicable to the subject of the insurance, no conclusion could be drawn from the retention of these words in the policy; but he also held that the voyage insured had come to an end at Havre, mainly on the ground that the progress of the ship from Havre to Barry was not the finishing of the old voyage, but a preparation for a new one, and that if "final port" did not mean final port of discharge there was no proper determination of the *terminus ad quem* which would save the policy from vitiation on the ground of uncertainty (*c*).

(*a*) Crocker *v.* Sturge, [1897] 1 Q. B. 330; 66 L. J. Q. B. 514; Spalding *v.* Crocker (1897), 2 Com. Cas. 189.

(*b*) Crocker *v.* General Ins. Co. of Trieste (1897), 2 Com. Cas. 233; in the C. A., 3 Com. Cas. 22.

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Final abandonment of intention to proceed to port of original destination.

504. If a ship entirely abandons the voyage insured, and finally gives up all hopes of proceeding to the port of her original destination, the risk on the ship is at an end immediately that determination is definitely formed. If, on the other hand, the ship, yielding to the irresistible force of present circumstances, merely puts back or lies by for a time with the intention of ultimately proceeding to the original terminus, she is deemed still to be on the voyage insured, and the risk continues till she arrives at the final terminus. In order, however, that this should be so, the obstruction must be only temporary in its nature; and the ultimate point of destination must continue the same.

A ship insured to a port in the Baltic, finding it blocked up with ice, took shelter for the winter in a place as near to it as she could safely go, and waited till the spring, when, on the first thaw, she sailed for it again; the risk on the ship was held to continue till her arrival there (*d*).

Blackenhagen *v.* London Assurance Co.

But where a ship insured from London to Revel, hearing

(*c*) Marten *v.* Vestey, [1920] A. C. 307.

(*d*) See Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 454, 455; and Brown *v.* Vigne (1810), 12 East, 286.

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of an embargo at Revel, sailed back from the Baltic, by orders of a British man-of-war, to Copenhagen Roads, and then, entirely abandoning her voyage, accompanied the fleet to England; Lord Ellenborough nonsuited the plaintiff on the ground that the risk had terminated under this policy, at all events, directly the ship had sailed back to England from Copenhagen Roads (*e*).

His Lordship, however, remarked, that had the ship been coming home as the best means of getting finally to Revel, and had there been a possibility of her accomplishing that object when the loss happened, she might still have been considered in the course of the voyage insured; but that all thought of completing her original voyage seemed to have been abandoned when she sailed home from Copenhagen with the fleet (*f*).

Parkin *v.* Tunno.

In such cases, in fact, the risk may be held to continue on the ship during the whole period in which she can be fairly considered as taking measures with a view to ultimately arriving at the port of destination; but she will not be protected if, when turned away or forced to desist from proceeding to her original port, from its being in the hands of the enemy, she forthwith prosecutes a new voyage to the nearest friendly port, even though it be a voyage of necessity (*g*).

Duration prolonged by usage.

505. The duration of the risk may be prolonged by usage, to illustrate which principle reference may still be made to the cases on the trade of the East India Company's ships. By the usual course of that trade, the ships on arriving out were liable to be employed, at the discretion of the different presidential governments, in intermediate voyages, or in what was called the country trade, the charter-parties giving permission to prolong the ship's stay for a year or more. The policies were generally adapted to this usage and were

(*e*) Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 454.
(*f*) Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 455.
(*g*) Parkin *v.* Tunno (1809), 11 East, 22. The law of the United States seems to be different: see *post*, § 808.

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uniformly held to cover all intermediate voyages in the Indian seas, unless restricted by special clauses (*h*). So great, indeed, was the influence of usage in the construction of these policies that a policy on a company's ship containing a liberty to touch and stay, but not to trade, would yet protect the ship while engaged on one and even a second country voyage for trading purposes (*i*).

Preston *v.* Greenwood.

It was at one time a rule in the East India trade that a voyage to China was not to be held included in a policy on a company's ship, unless China were expressly named in the instrument; where, however, it clearly appeared that the ship's destination for China was publicly known at the India House, and that the premium was the same as it would have been on a China voyage—although the insurance in terms was only "from London to Madras and Bengal, or the ship's last port of discharge of her Europe cargo beyond the Cape of Good Hope"—Lord Mansfield held, that although the word China was not introduced into the policy, yet, as the words in themselves certainly extended to China, the risk under the circumstances must be considered as continuing on the ship till her arrival in China, for the underwriters must clearly be considered to have contemplated the ship's proceeding thither when they subscribed the policy (*j*).

Substitution of a new *terminus ad quem* by agreement.

506. If a new *terminus ad quem* be substituted for the original one by a memorandum indorsed on the policy, the risk will terminate there.

Stone *v.* Mar. Ins. Co., Ocean Limited of Gothenburg.

In the case of a ship reinsured "from Liverpool to Philadelphia and back to the United Kingdom," it was found that a large part of her homeward cargo had been sold by the charterer to persons in Antwerp, and the underwriters, at

(*h*) Salvador *v.* Hopkins (1765), 3 Burr. 1707; Gregory *v.* Christie (1784), 3 Dougl. 419; 1 Park, 104; 1 Marshall, Ins. 273.
(*i*) Farquharson *v.* Hunter (1785), 1 Park, 105; 1 Marshall, Ins. 274; Gregory *v.* Christie, *quâ supra*.
(*j*) Preston *v.* Greenwood (1784), 4 Dougl. 28. See, however, *ante*, § 57. Buller, J., had on a former trial directed the jury to find for the defendants.

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request of the assured, indorsed the policy thus: "In consideration of an additional premium of 7*s*. 6*d*. per cent., it is hereby agreed to allow the vessel to go to Antwerp." The vessel, without calling at the United Kingdom, had arrived in the outer dock of Antwerp when the captain was ordered by telegraph to Leith. He sailed for Leith as soon as he could, and on his way thither his ship was totally lost by perils of the seas. It was held that the memorandum construed with the policy might mean to Antwerp by way of the United Kingdom, but whether this or not, that Antwerp was certainly to be taken to be the final port of her destination, and consequently that the ship was not protected by the policy at the time of her loss (*k*).

Usage to cover ship's furniture on shore.

507. Generally speaking, the underwriter on a sea policy only insures against sea risks, and consequently is not responsible for any loss that may take place on shore. Usage, however, in this, as in all other cases, is the great regulator of the rights of parties under policies of insurance; and sect. 2 (1) of the Marine Insurance Act, 1906, declares that a contract of marine insurance may, by usage of trade, be extended so as to protect the assured against losses on any land risk which may be incidental to any sea voyage. Thus, if it can be shown that ship's furniture or stores are regularly landed at certain parts of a voyage by the usage of trade, they are as much within the protection of a policy on ship while thus put on shore as when on board the ship herself (*l*).

Insurance "at" a place only.

508. An insurance on a ship "at" a port or place in relation to a voyage is not common. In a recent case, however, the question whether the risk had attached arose on a policy of re-insurance expressed to be "at and from July 1, 1904, until August 31, 1904, ... whilst at port or ports, place or places in New Caledonia," the original

(*k*) Stone *v*. Marine Ins. Co., Ocean, Ltd. of Gothenburg (1876), 1 Ex. D. 81.

(*l*) Pelly *v*. Royal Exch. Ass. Co. (1757), 1 Burr. 341; Brough *v*. Whitmore (1791), 4 T. R. 206.

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insurance being for a voyage from New Zealand to Nehone, New Caledonia, and while there and thence to Grangemouth. A loss occurred while the ship was proceeding through Gazelle Passage on the coast of New Caledonia, on her way to Nehone. Walton, J., held that the assured could not recover (*m*).

"Port" or "harbour" policies.

Ships are frequently insured at low premiums against harbour risks by policies called "port" or "harbour" policies.

A ship was insured by such a policy for a week "while at Leith." Evidence was given to prove that it was the custom at Lloyd's to treat "port" policies as ceasing to attach when the vessel unmoors with the intention of proceeding on her voyage. Accordingly, Mathew, J., held that the words "while at Leith" were equivalent to "while lying at the port of Leith," and that the risk terminated when the ship unmoored. The learned judge also intimated that a different construction might be put on the words if it could be shown that the underwriter intended to cover a larger risk (*n*).

In a later case Hamilton, J., held, after admitting evidence as to the meaning of "port risk," that in the absence of express words to the contrary, "the risk under a port risk policy ceases when the ship, being fitted and equipped for sea, and possessed of her clearances, crew, and, if necessary her cargo, commences to navigate upon her voyage, and no longer remains moored in the port in the course of preparing for the voyage" (*o*).

In Whittle *v*. Mountain (*p*) a houseboat was insured by a

(*m*) Maritime Ins. Co. *v*. Alianza Ins. Co., [1907] 2 K. B. 660.

(*n*) Hunting *v*. Boulton (1895), 1 Com. Cas. 120. A policy on a vessel in harbour "while securely moored" was held by Lord Ellenborough to allow of her being moved in the harbour. Anon. *v*. Westmore (1808), 6 Esp. 109. For the meaning of "laid up in port" with reference to a stipulation for return of premium, see *post*, Vol. II. § 1267.

(*o*) Mersey Mutual Underwriting Assn. *v*. Poland (1910), 15 Com. Cas. 205.

(*p*) [1920] 1 K. B. 447. The assured's intention was not to bring the houseboat back to the Hamble, but after overhauling to lay her up in

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time policy "whilst anchored in a creek off Netley, however employed. With liberty to shift." The policy contained a clause: "Including all risk of docking, undocking, changing docks and going on gridiron or graving docks as may be required during the currency of this policy." The house-boat was then anchored in the river Hamble, Southampton Water, which it was agreed between the parties was to be regarded as a creek off Netley. During the currency of the policy, the assured had her moved from the Hamble to a yard in the Itchen, seven miles distant, to be placed on a gridiron for overhauling and repairs, this yard being the nearest and most convenient with a gridiron, and she sank while being moved, close to the yard. Bailhache, J., held that, by reason of the liberty to shift, the houseboat was protected by the policy at the time of the loss. The judgment was affirmed by the Court of Appeal on a different ground, viz., that the taking of the houseboat to the yard was authorized by the docking clause. Bankes, L.J., was of opinion that the liberty to shift only meant to shift from one anchorage in the Hamble to another; and Scrutton and Atkin, L.JJ., while not expressing a definite opinion on this point, inclined to this view.

Fire policy on ship.

509. The question of the duration of the risk in a fire policy on a ship arose in a case in which the facts were as follow:—The policy was for a certain time on a steamship lying in the Victoria Docks, London, with liberty to go into a dry dock. In order to enable the ship to enter the dry dock, it was necessary to remove part of her paddle wheels. When she left the dry dock she was moored in the river for ten days, for the purpose of having her paddle wheels replaced before returning to the Victoria Docks, and before this operation was completed she was burnt in the river. The paddle wheels could have been replaced in the Victoria Docks, but it

the Itchen. It was, however, held that until the docking was completed, the question of the abandonment of the adventure did not arise. The case is under appeal to the House of Lords.

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was cheaper to do this in the river, and there was evidence that in similar cases it was usual to replace them outside the docks. In the docks there were appliances for extinguishing fire, and precautions were taken against fire, which were wanting in the river. The House of Lords held, affirming the decisions of the Court of Common Pleas and of the Exchequer Chamber, that the assured could not recover. The Lords and the judges were almost unanimous in considering that under the liberty to go into dry dock the ship was protected during the transit to and from the dry dock, but it was held that this protection could not be extended to protect her during her stay in the river for a different purpose (*q*). In the Exchequer Chamber Blackburn, J., expressed the opinion that there was the following distinction between an ordinary voyage policy and such a fire policy as this one; while in the case of a voyage policy a deviation destroys the policy, the learned judge thought that there was no reason why the ship should not be taken out of the place to which the policy attached and so cease for a time to be covered, and be then brought back to it, when the risk would again attach (*r*).

Inception and duration of the risk on freight.

510. The object of an insurance on freight is to protect the shipowner from being deprived, by any of the perils insured against, of the benefits he would otherwise derive from the affreightment of his ship or the carriage of his goods or those of another.

Distinction between inception of insurable interest and of the risk.

The duration of the risk on freight is a matter which, as we have already pointed out, is often confounded with the different question whether the assured had at the time of the

(*q*) Pearson *v.* Commercial Union Ass. Co. (1863), 15 C. B. N. S. 304; 33 L. J. C. P. 85; in the Exch. Ch. (1873), L. R. 8 C. P. 548; in the House of Lords (1876), 1 App. Cas. 498. See also Whittle *v.* Mountain, *supra*, § 508.

(*r*) L. R. 8 C. P. 549. Another case on the continuance of the risk in a fire policy is Grant *v.* Ætna Insurance Co. (1862), 15 Moo. P. C. 516. The insurance was for twelve months on a steamship "now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and Lakes." The ship never left the dock and was burnt after being there for eleven months, and the loss was held to be covered.

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loss an insurable interest in freight. Whether there be an insurable interest is a matter independent of the policy. If at the time of the loss the assured had no insurable interest, he cannot maintain an action, however the policy be worded. If on the other hand he had an insurable interest, the question arises whether the loss occurred within the limits of place or time fixed by the policy (*s*).

Thus, where a policy was effected on freight "at and from any port or ports of loading on the west coast of South America" to the United Kingdom, and the policy also contained a clause saying that the freight was to be covered "from the time of the engagement of the goods," the Court of Appeal held, that notwithstanding the "engagement" clause, the assured could not recover for a loss of freight due to the loss of the ship before she reached her first loading port in South America (*t*).

Commencement of risk on freight proper.

511. When the freight which is the subject of the policy is freight proper, *i.e.*, the price to be paid to the shipowner by the merchant for the carriage of goods in the ship on arrival, Arnould stated that the following rule (as to the commencement of the insurable interest and the attachment of the risk) was established by the cases (*u*):—"Where a cargo has been contracted for and is ready to be shipped on board at the time of the loss, and the ship, being otherwise in a condition to receive the cargo, is only prevented from doing so by the intervention of the perils insured against, the policy on freight attaches, and the underwriters are liable

(*s*) Arnould, in the chapter on insurable interest, confined himself to a statement of general principles, and in the present chapter discussed the question of insurable interest in freight at great length. Maclachlan adhered to this arrangement. In this edition, as in the three preceding ones, it has been thought advisable to deal fully with the question of insurable interest in its proper place, and much of the matter which in earlier editions was in this chapter has been transferred to that on insurable interest. See *ante*, §§ 262—279.

(*t*) The Copernicus (C. A.), [1896] P. 237; see also Jones *v.* Neptune Marine Ins. Co. (1872), L. R. 7 Q. B. 702.

(*u*) 2nd ed. p. 524; see also 2nd ed. pp. 288, 289, cited *ante*, § 266.

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for the loss of the whole freight which would have been earned on the voyage, even though no part of the cargo has ever been shipped at all" (*x*).

It has been submitted, after an examination of the cases on which the learned author relied, that there is an insurable interest in freight proper when the assured, having a valid contract for freight, has taken steps towards the earning of the freight (*y*), and the editors also submitted in the last edition before the Marine Insurance Act, 1906, came into force, that according to the later authorities the risk attached at the same time (*z*). It has also been suggested that there may perhaps be an insurable interest in freight as soon as a contract under which freight will be earned has been concluded (*a*).

"At and from" the place of loading.

The question of the attachment of the risk has been settled in accordance with Arnould's statement of the law, by the Marine Insurance Act, 1906, Rule 3 (d) in the First Schedule being as follows:—

> Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro ratâ* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo (*b*).

(*x*) The authorities cited are Montgomery *v.* Eggington (1789), 3 T. R. 362; Truscott *v.* Christie (1820), 2 Brod. & B. 320; Parke *v.* Hebson (*circa* 1820), cited *ibid.* 326; Warre *v.* Miller (1825), 4 B. & Cr. 538; Flint *v.* Flemyng (1830), 1 B. & Ad. 45; Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519.

(*y*) *Ante*, §§ 268—271, 278, 279a.

(*z*) See *ante*, §§ 270, 271.

(*a*) *Ante*, § 279.

(*b*) Mr. Arthur Cohen says: "This rule, if interpreted according to the ordinary meaning of the words, overrules certain cases" (he cites Parke *v.* Hebson, Truscott *v.* Christie, Warre *v.* Miller, Devaux *v.* J'Anson, Flint *v.* Flemyng, *supra*, note (*x*)) "which decided that, although the ship be not ready to receive the goods, the policy will, nevertheless, cover the freight in respect of these, if there be a binding contract for the shipment of them. It remains to be seen," he adds,

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Commencement of risk on freight of shipowner's own goods.

512. The only difference made by this rule between an insurance on freight proper and one on the freight of goods belonging to the shipowner himself is that as the shipowner cannot have a contract for the carriage of the goods, he must instead thereof have goods of his own in readiness to be shipped (*c*).

Devaux *v.* J'Anson.

In Devaux *v.* J'Anson (*d*) the policy was on freight "at and from Calcutta or any port or place on the Coromandel coast." The ship, having been repaired at Coringa, on the Coromandel coast, was about to be floated out of dry dock in order to be loaded in the river there, when she was lost. At that time the cargo, belonging to the shipowner, was lying in warehouse seven miles away, ready to be brought to the ship. It was argued that the shipowner could not recover for a loss of freight, because the ship was not ready to receive the goods and the goods were not ready to be put on board; but the Court held that the risk had already attached. All that they thought necessary to determine with regard to the cargo was "that it must have become the property of the parties insured by a contract made with a view to its being sent on board and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board when the ship arrives at the place of deposit" (*e*). If readiness to receive the cargo in Rule 3 (d) implies that the ship must actually be in a position to take the cargo on board, this decision is not consistent with the rule (*f*).

"whether the Courts will give a very strained interpretation to the word 'ready' by holding that the goods are ready to be shipped and the ship ready to receive them, if, but for the perils insured against, the goods would in the ordinary course of things have been shipped on board the vessel": Halsbury's Laws of England, vol. xvii. art. 775.

(*c*) See *ante*, §§ 268, 279.

(*d*) (1839), 5 Bing. N. C. 519.

(*e*) *Ibid.* p. 539. In Flint *v.* Flemyng (1830), 1 B. & Ad. 45, the assured also claimed for a loss of freight on his own goods; their situation at the time of the loss is not stated in the report.

(*f*) The Court did indeed say that the ship was at the time of the loss quite ready to go to sea, and to receive the cargo on board. Yet she was not then, in fact, able to take the cargo on board, and, as the loss shows, was liable to be prevented from ever reaching her actual loading place. See, however, as to the meaning of "readiness" in relation to a contract of affreightment, Leonis SS. Co., Ltd. *v.* Rank, Ltd., [1908] 1 K. B. 499. See also note (*b*), *supra*.

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Commencement of risk on chartered freight.

513. When the interest insured as freight is chartered freight, *i.e.*, a fixed sum stipulated to be paid to the shipowner by the terms of a charter-party for the use of his ship (or part of it) on an entire voyage therein described, the rule as to the attachment of the risk was thus stated by Arnould: "In such cases, as the so-called freight is secured to the shipowner by one entire contract for the whole voyage, it is clear that his inchoate right to such freight accrues from the very inception of the voyage described in the charter-party; and consequently, if commensurately insured, his risk under a policy on such freight commences from the same period" (*g*).

A series of cases, most of which have already been discussed in the chapter on insurable interest, shows clearly that the risk under the policy attaches under these circumstances (*h*).

Foley *v.* United, &c. Insurance Co. of Sydney.

Thus where a ship was chartered to proceed from Calcutta to Mauritius, and from Mauritius to Akyab, and at Akyab to load a cargo for the United Kingdom, a policy on this freight "at and from Mauritius" was held to attach as soon as the ship arrived at Mauritius: for there was already an inception of the charter-party voyage, and therefore an insurable interest, when the ship sailed from Calcutta (*i*).

Of course, if the insurance be "from" a place only, the policy cannot attach until the ship breaks ground on the voyage insured (*k*).

(*g*) 2nd ed. p. 532.

(*h*) Thompson *v.* Taylor (1795), 6 T. R. 478; Atty *v.* Lindo (1805), 1 B. & P. N. R. 236; Horncastle *v.* Suart (1806), 7 East, 400; Mackenzie *v.* Shedden (1810), 2 Camp. 431; Davidson *v.* Willasey (1813), 1 M. & S. 312; Ellis *v.* Lafone (1853), 8 Ex. 546; 22 L. J. Ex. 124; Foley *v.* United Fire and Marine Ins. Co. of Sydney (Exch. Ch.) (1870), L. R. 5 C. P. 155; Rankin *v.* Potter (1873), L. R. 6 H. L. 83. See *ante*, §§ 272—274.

(*i*) Foley *v.* United Fire and Marine Ins. Co. of Sydney (Exch. Ch.) (1870), L. R. 5 C. P. 155.

(*k*) Mar. Ins. Act, 1906, Sched. I. rule 2, *ante*, § 473.

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Rankin v. Potter.

A previous voyage, on which freight is being earned, is frequently in terms incorporated into the chartered voyage. If the policy on freight be intended to cover the freight to be earned on the latter voyage, it will no doubt sometimes be necessary to describe the freight specifically. Thus, in Rankin *v.* Potter (*l*), it was agreed by charter-party that the "Sir William Eyre," then on a voyage from the Clyde to New Zealand, should proceed to New Zealand with a cargo for owner's benefit, and thence to Calcutta, and there load a cargo for Liverpool for the charterer. The owners of the ship effected a policy on homeward chartered freight "at and from the Clyde to New Zealand," and it was not disputed that there was an insurable interest, and that the risk had attached, during the voyage to New Zealand. It is, however, apprehended that if the policy had been simply on freight, it would have covered the outward and not the homeward freight.

Barber v. Fleming.

The case of Barber *v.* Fleming (*m*) has established that there may be an insurable interest in chartered freight before the inception of the voyage described in terms in the charter-party. The policy was "on freight chartered or otherwise" at and from Bombay to Howland's Island, while there, and thence to the United Kingdom. The ship had been chartered on the 7th of August for a voyage from Howland's Island to the United Kingdom, and was required to be at Howland's Island on the following 1st of June; but the charter-party did not stipulate that she should sail direct. She sailed in ballast from Bombay to Howland's Island and was lost on the voyage thither.

The Court of Queen's Bench held that the insurable interest in the freight to be earned under the charter-party had commenced, and that the plaintiff could recover (*n*). What the position would have been if the ship had carried a cargo from Bombay to Howland's Island is a question which

(*l*) (1873), L. R. 6 H. L. 83.
(*m*) (1869), L. R. 5 Q. B. 59.
(*n*) See *ante*, § 275, where the case is discussed at length.

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was raised during the argument and referred to in the judgments; but none of the judges gave a definite opinion thereon.

Result.

514. A general rule to be deduced from the decisions, and applicable to all policies on freight, seems to be that the risk attaches as soon as the insurable interest begins, if this be consistent with the description of the voyage in the policy (*o*), provided also in some cases that it may have to appear from the policy, or from the circumstances, that the particular freight was intended to be covered.

The rule laid down by the Marine Insurance Act, 1906, with reference to the attachment of the risk on chartered freight under the ordinary English policy is the following:—

> Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety (*p*).

This rule, it is submitted, must be read subject to Rule 1 in the First Schedule to the Act, which provides that "where the subject-matter is insured 'lost or not lost,' and the loss has occurred before the contract is concluded, the risk attaches unless, at such time, the assured was aware of the loss, and the insurer was not." With this qualification Rule 3 (c) does not conflict with the general rule laid down in the text as the result of the authorities.

(*o*) This view seems to underlie the statement of Blackburn, J., in Jones *v.* Neptune Marine Ins. Co. (1872), L. R. 7 Q. B. 706:—"If the freight be in existence, as by the goods being ready to be loaded at the port named, and a peril happens which destroys the ship during the period of the specific voyage over which the policy is intended to apply, then the underwriters are responsible for the loss of freight, although the goods be not put on board; it is enough to prove it to have been in existence, and that it does not rest in mere expectancy and possibility." See also the judgments in Foley *v.* United Fire, &c. Ins. Co. (1870), L. R. 5 C. P. 155. Of course, the risk cannot attach unless the warranty of seaworthiness is satisfied. See *post*, § 686.
(*p*) Mar. Ins. Act, 1906, Sched. I. rule 3 (c).

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Freight of voyage to *terminus a quo* not covered. Bell *v.* Bell.

515. An insurance on freight "at and from" a place does not cover the freight on a voyage terminating at that place, for that freight is not at risk on the voyage described in the policy. Thus when freight was insured at and from Riga to the United Kingdom, and the ship was captured at Riga, it was held that the policy did not cover the freight on the outward voyage to Riga (*q*).

Where commencement of risk depends on a certain event.

516. In policies on freight, as in all other policies, when the commencement of the risk is made to depend on a certain event, the risk does not attach until the happening of the event.

Beckett *v.* West of England Ins. Co.

A ship was chartered for a voyage from Liverpool to Lagos, and thence with a cargo to the United Kingdom, at a lump sum for the round voyage, and a policy was effected on freight "at and from Lagos," "the insurance to commence on freight from the loading of the goods on board at as above." The ship had arrived at Lagos, and was lost before she had shipped any of her homeward cargo; and it was held that in consequence of the second of the two clauses cited, the first was so modified that the assured could not recover (*r*). If there had been any goods on board at the time of the loss he would have recovered for the freight of those goods (*s*).

Jones *v.* Neptune Marine Ins. Co.

A policy of reinsurance on chartered freight was effected "lost or not lost, upon freight payable in respect to this present voyage to be performed by the vessel 'Napier,' from Baker's Island to a port of discharge in the United Kingdom; the insurance on the freight beginning from the loading of the vessel." The vessel was wrecked whilst at Baker's Island after she had taken two-thirds of her cargo on board; and the question was, what was the effect of the latter branch of this clause, "beginning from the loading," upon

(*q*) Bell *v.* Bell (1810), 2 Camp. 475.

(*r*) Beckett *v.* West of England Ins. Co. (1872), 25 L. T. N. S. 739. See Rigby, L. J.'s, criticism on this decision, [1895] 1 Q. B. 509.

(*s*) Hopper *v.* Wear Marine Ins. Co. (1882), 46 L. T. N. S. 107.

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the former describing the insured voyage "from Baker's Island"? The majority of the Court, Mellor and Lush, JJ., held that the loading intended was a complete loading, and that the policy would have attached upon this being completed, although before the vessel sailed from Baker's Island. Blackburn, J., was of the same opinion as to the loading intended being a complete loading, but he was of opinion that the latter part of the clause did not enlarge the effect of the former, and consequently that the policy would not attach until the vessel sailed on her voyage. By the opinion of the whole Court the assured could not recover (*t*).

Where condition as to attachment of risk inapplicable. Hydarnes SS. Co. *v.* Indemnity Mutual Mar. Ass. Co.

In the following case a clause, which made the risk only attach on the freight of goods loaded at the *terminus a quo*, was rejected as being inapplicable to the voyage insured. The policy was "upon freight of meat at and from Monte Video" to any ports in the River Plate, including the Boca, and thence to the United Kingdom, and was expressly stated to cover any loss occasioned by breaking down of machinery until final sailing of the vessel. By a subsequent clause the insurance was declared to commence "upon the freight and goods or merchandise on board from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video." This clause, except the name Monte Video, was in print. The ship proceeded from Monte Video to the Boca, where a cargo of meat was ready for shipment. At the Boca her refrigerating machinery broke down, so that it became impossible to load the cargo. When the policy was effected both the underwriters and the assured knew that meat was never shipped at Monte Video, where there were no appliances for freezing meat. Under these circumstances the Court of Appeal held that the clause making the commencement of the risk depend on the loading of the meat was inapplicable, and that the policy had attached (*u*).

(*t*) Jones *v.* Neptune Marine Ins. Co. (1872), L. R. 7 Q. B. 702.

(*u*) Hydarnes SS. Co. *v.* Indemnity Mutual Marine Ass. Co., [1895] 1 Q. B. 500.

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The voyage being performed must be that in the policy. Sellar *v.* M'Vicar.

517. If the voyage which is being performed at the time of the loss is not covered by the policy, of course the assured cannot recover.

Freight valued at 500*l.* was insured on a voyage "at and from Demerara, Berbice, and any of the Windward and Leeward Islands, to London." By a verbal agreement with a Demerara house, the ship, then in that port, was to carry a cargo of colonial produce for them from Berbice to London, at the current rate of freight, and also take on some bricks and planks from Demerara to Berbice on the same terms. The ship was lost while proceeding from Demerara to Berbice with the bricks and planks on board, in virtue of this verbal agreement. The plaintiffs contended that the whole was one entire voyage on which freight was to be earned; but the Court were clearly of opinion that the voyage insured was a voyage at and from Demerara *or* Berbice to London, and that no such voyage had begun at the time of the loss, which took place on a voyage from Demerara to Berbice (*x*).

Ellis *v.* Lafone.

In the following case the contention that an advance of freight was not made in respect of the insured voyage was unsuccessful.

By a charter-party made at Monte Video, a vessel was to proceed to the Falkland Island, and thence to Santa Cruz in Patagonia, there to take in a cargo of guano, and to discharge it at a port in Europe; freight at 250*l.* a month, pay for one month to be made when the vessel sailed from the Falkland Islands, the balance at the port of discharge. There was a safe delivery of cargo at the Falklands, and an advance of 250*l.*, being one month's freight. She then loaded guano at Santa Cruz and completed the cargo with hides at Monte Video, where a new charter-party, in effect annulling the first, was made, by which the vessel was to proceed to Havre direct with the cargo then on board, freight (at the same rate as by the first charter) to be paid at the port of discharge,

(*x*) Sellar *v.* M'Vicar (1804), 1 B. & P. N. R. 23. The construction put upon the policy may be questionable, but this does not affect the principle of the decision. See Clapham *v.* Cologan (1813), 3 Camp. 382.

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after deducting 250*l.* received on account of that charter-party. The vessel sailed and went down at sea a total loss.

In an action by the charterers on a policy, "lost or not lost at and from Monte Video to Havre on 450*l.* freight advanced," it was contended for the underwriters that the plaintiffs could not recover for the advance of 250*l.*, on the ground that the sum had been paid in respect of the voyage to the Falkland Islands, and that the money remained no longer at risk after the termination of such voyage. The Court of Exchequer Chamber, however, held the plaintiffs entitled to recover, since that was not a separate sum paid in respect of the voyage to the Falkland Islands, but part of an entire sum payable for the whole voyage insured, which therefore remained at risk till the ship arrived in Havre, her port of discharge in Europe (*y*).

Insurance for part of the voyage.

518. When a ship is going to touch at a port short of that where the cargo is to be landed, the freight may be insured to the intermediate port only. The voyage to that port is not a different voyage from that on which the freight is earned; it is only a part of the larger voyage.

A ship with a cargo for Gothenburg sailed for Portsmouth to call there for convoy. A policy was effected on freight to Portsmouth, and the underwriter was not informed that the ultimate destination of the ship and cargo was Gothenburg. It was held that the assured could recover for a loss which happened before the ship reached Portsmouth (*z*).

Freight of goods loaded at an intermediate port.

519. If freight be insured from one port to another, and the assured, in pursuance of leave granted by the policy, takes goods on board at an intermediate port destined for the *terminus ad quem*, the freight on these goods is covered (*a*). When there is leave to trade at intermediate ports, the freight on any goods taken on board at any of these ports to be

(*y*) Ellis *v.* Lafone (Exch. Ch.) (1853), 8 Ex. 546; 22 L. J. Ex. 124.
(*z*) Taylor *v.* Wilson (1812), 15 East, 324; overruling Murdock *v.* Potts (1795), 2 Park, 634; Hall *v.* Brown (1814), 2 Dow, 367.
(*a*) Barclay *v.* Stirling (1816), 5 M. & S. 6.

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End of risk on freight.

520. The ordinary policy provides that the insurance on a vessel shall end after she has been moored twenty-four hours in good safety, and on goods when they are safely landed. Though this policy is commonly used for freight insurances, there is no clause determining the end of the risk on freight. Usually the freight is not payable until the goods are delivered. When this is so, it is submitted that, under a voyage policy to the place of discharge, the risk continues as long as the goods remain in the custody of the shipowner exposed to maritime perils, provided there be no unjustifiable delay in discharging them (*b*).

Time policy on freight.

521. Freight is often insured by time policies. So far as the duration of the risk is concerned, the rules relating to time policies on ships are applicable to insurances on freight (*c*).

In one case it was argued that a loss of freight could not be recovered because the voyage, if there had been no loss, would not have been completed within the time for which the insurance had been effected; for the freight could not be earned during the time covered by the insurance. But this absurd contention was overruled. It was held that as freight can be insured for part of a voyage, so also it can be for a limited period, during which it is at risk (*d*).

(*b*) Marshall, 225. Where the freight of a voyage from London to Madeira and Jamaica was agreed to be paid in wine to be put on board at Madeira, the Court of Common Pleas were of opinion that the risk under a policy on freight at and from London to Jamaica endured until the freight wine was safely carried to Jamaica in the ship. Atty *v.* Lindo (1805), 1 B. & P. N. R. 236.

(*c*) See *ante*, Chap. XVI.

(*d*) Michael *v.* Gillespy (1857), 2 C. B. N. S. 627; 26 L. J. C. P. 306.

PART II.

OF CERTAIN MATTERS THAT RENDER THE CONTRACT OF INSURANCE VOID OR UNAVAILABLE.

CHAPTER I.

MISREPRESENTATION.

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Of misrepresentation and concealment generally.

522. THE subject of Disclosure and Representations is dealt with in sects. 17 to 21 of the Marine Insurance Act, 1906. Of these, sect. 17 enunciates the general principle, casting a duty on both assured and insurer, and applying both to Disclosure and to Representations. The three following sections are in effect illustrations of sect. 17, and deal with the duty imposed thereby, only so far as it is to be performed by the assured. Of these three sections, the eighteenth and nineteenth relate to Disclosure, and the twentieth to Representations. Sect. 21, like sect. 17, is a general section.

Marine insurance is based on good faith.

In conformity, no doubt, with the law prior to the Act, the seventeenth section declares that: "A contract of marine insurance is a contract based upon the utmost good faith, and,

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if the utmost good faith be not observed by either party (*a*), the contract may be avoided by the other party" (*b*).

In almost every instance in which a policy of sea assurance is effected, the underwriter must rely solely on the good faith of the assured for supplying him with full and true information of many of those facts on which the character and nature of the risk, and consequently the rate of premium, depend. It is to the assured that all communications respecting the actual state of the property proposed for insurance, such as the time and place at which the goods are to be loaded, or the ship is to sail—the force and equipment of the vessel, her then situation, and progress in her voyage, &c.—are in the first instance addressed: he is thus the natural and sole depositary of much of that information, a full and true communication of which is absolutely essential to the underwriter in order that he may form a right judgment of the nature of the risk and the proper rate of premium.

Hence, on the true principles of equity and justice (*c*), the concealment or misrepresentation by the assured, whether wilful or not, of any facts which were calculated to influence, and did in fact influence (*d*), the underwriter (*e*) in taking the risk or fixing the rate of premium will give the latter the right to avoid the policy.

Provisions of Mar. Ins. Act as to representations.

Accordingly it is now expressly enacted by sect. 20 of the Marine Insurance Act, as follows:—

(1) Every material representation made by the assured

(*a*) Lord Mansfield in Carter *v.* Boehm (1766), 1 W. Bl. 594; 3 Burr. 1909, pointed out that the duty lay not only upon the assured, but also upon the underwriter, who, for instance, would not be allowed to retain a premium in respect of a policy made on a ship which he knew at the time to have arrived safely.

(*b*) In Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452, 463, Vaughan Williams, L. J., expressed the view that there might be a duty of disclosure under s. 17, although in the absence of inquiry there might be no such duty under s. 18, *infra*, § 575.

(*c*) As to the principle on which the rule is based, see *infra*, § 535.

(*d*) See *infra*, § 555.

(*e*) Arnould's words were (2nd ed. p. 541), "any such facts as might reasonably be supposed to have influenced the underwriter," &c. The text has been altered for reasons which will hereafter be discussed.

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or his agent to the insurer during the negotiations for the contract, and before the contract is concluded (*f*), must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

Contract not void, but voidable by innocent party.

523. It is commonly stated, both in the text-books and the cases, that the effect of a material misrepresentation or concealment is to avoid the insurance. Arnould uses this expression, which is not strictly correct. The party who has been guilty of a concealment or misrepresentation cannot, of course, avail himself of his wrongful act to treat the contract as void. The other party to the insurance can, however, elect either to treat the contract as valid or to repudiate it, in which latter case it is treated as void *ab initio* (*g*).

When must election to avoid be made.

The question then arises, when the election must be made. The Marine Insurance Act, 1906, is silent upon this point. In almost all the cases the fact has been that the concealment or misrepresentation by the assured was only discovered after a total loss had become known, or after the voyage insured

(*f*) As to these words, see sect. 21; and *post*, §§ 567—569.

(*g*) Mar. Ins. Act, 1906, ss. 17, 18 (1), *post*, § 575; sect. 20 (1), *ante*, § 522. Morrison *v.* Universal Marine Ins. Co. (1872—1873), L. R. 8 Ex. 40, 197.

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had terminated. Under such circumstances the question of election is of no practical importance and has never arisen. When, however, the underwriter becomes aware, before the voyage or period insured has come to an end, that he is entitled to avoid the contract, it may make a great difference to the assured whether the underwriter makes his election at once or delays making it. A prompt election may enable the assured to protect himself by taking out another policy, while a delay may render it impossible for him to effect an insurance at all, or to do so on as favourable terms as before.

It was not finally decided, in the only case in which this question arose, whether the party entitled to elect must do so within a reasonable time, or whether he may repudiate the contract at any time, unless in the meanwhile he has done something to affirm it, or unless the rights of third parties have intervened, or unless the other party to the contract has altered his position under the belief that the contract was a subsisting one.

Morrison *v.* Universal Marine Ins. Co.

524. In that case (*h*) the plaintiff's broker had effected an insurance with the defendants, without disclosing certain material information in his possession. In doing so he acted in good faith, believing that the information was incorrect. The slip was initialed on the 12th October, and on the same day the defendants' assistant underwriter became possessed of the information which had been withheld. On the 14th or 15th the defendants executed and delivered out the policy, without any protest or any notice that they would treat it as void. On the 19th news of the loss of the ship was posted at Lloyd's, and on the 20th the defendants gave notice to the broker that they did not consider the policy binding on them. At the trial, Blackburn, J., directed the jury that when the underwriter discovers that there has been a concealment or misrepresentation he is not entitled to wait until he hears that there has been a loss, and then repudiate the policy.

(*h*) Morrison *v.* Universal Marine Ins. Co. (1872—1873), L. R. 8 Ex. 40, 197.

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He must make his election, not, indeed, with hot speed, but in a reasonable time (*i*). The learned judge did not express an opinion on the question whether in delivering out the policy the underwriters had done an act which amounted to an election, and the jury found expressly that the defendants had not elected to treat the policy as subsisting. A verdict having been entered for the defendants, the Court of Exchequer (Cleasby, B., dissenting) ordered a new trial on the ground of misdirection. Martin, B., held that the jury should have been told that if the conduct of the defendants in delivering out the policy would induce the plaintiff to suppose that he had a valid policy, they were estopped from denying it. Bramwell, B., considered that delivering out the policy with knowledge of the concealment was *primâ facie* an election, and threw on the defendants the burden of showing circumstances to explain it (*k*).

The Court of Exchequer Chamber reversed this judgment (*l*). They accepted the verdict of the jury, that there had been no election in fact to affirm the policy, presumably on the ground urged by the defendants, that by usage the contract is deemed to be complete when the slip is initialed, and that the delivering out of the policy is a mere formal act which the underwriter is in honour bound to perform, even if he intends to dispute its validity, as without the policy no action could be brought. They considered that there was no evidence that the plaintiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, and it was not material to consider whether the plaintiff understood their conduct in delivering out the policy *without a protest* as amounting to an election to affirm it, unless under that belief he altered his position.

Question of time of election left undecided.

525. One question, as we have said, the Exchequer Chamber left undecided, namely, whether the underwriter must make

(*i*) Morrison *v.* Universal Marine Ins. Co. (1872), L. R. 8 Ex. 40, 47. See also per Bramwell, B., *ibid.* p. 55.

(*k*) L. R. 8 Ex. 40.

(*l*) L. R. 8 Ex. 197.

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his election in a reasonable time, or whether he may repudiate the contract at any time unless in the meanwhile he has elected to affirm it, or unless the rights of third parties have intervened, or the other party to the contract has altered his position under the belief that the contract was a subsisting one. The latter position is that maintained by the same Court, in Clough *v.* London and North-Western Railway Company (*m*), as to the rights of a person who has been induced by fraud to enter into a contract to rescind it. But it is nevertheless there pointed out that, although the party defrauded may keep the question open so long as he does nothing to affirm the contract, yet mere lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great might be conclusive to that effect.

It was not necessary for the Court of Exchequer Chamber to decide, in Morrison *v.* Universal Marine Insurance Company, whether Blackburn, J.'s, direction, that the election must be made in a reasonable time, was correct, and the Court expressly refrained from overruling this direction (*n*). The rule laid down in Clough *v.* London and North-Western Railway Company, and already referred to, was, however, cited in the judgment of the Court; and the opinion of the Court seems, therefore, to have been that the rule should be applied to contracts of marine insurance, whether the representation be fraudulent or innocent (*o*).

Its application to such contracts is, however, not free from difficulty. The Exchequer Chamber said that if, in consequence of the defendants' delay, Morrison had been induced to believe that the defendants waived their right to avoid the contract, and had consequently abstained from effecting an insurance elsewhere, the plaintiff would have been entitled to a verdict; but there was no evidence to that effect. Yet it

(*m*) (1871), L. R. 7 Ex. 34.

(*n*) See L. R. 8 Ex. p. 205.

(*o*) Mr. Arthur Cohen adopts this view: Laws of England, vol. xvii. § 794.

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must be difficult in most cases to determine to what extent the position of an assured has been altered by the delay in rescinding. In this particular case the Exchequer Chamber pointed out that the plaintiff had actually attempted, but failed, to effect further insurances, and therefore the delay could have made no difference. But if he had known that he was not protected by the defendants' policy, he might have offered a higher premium. The question whether the assured's position has been altered must often be a speculative one, which cannot be satisfactorily determined.

Policy ordered to be cancelled.

526. When a policy has been avoided for concealment or misrepresentation it may be ordered to be delivered up and cancelled (*p*).

Definition of a representation.

527. A representation, in the technical sense which the word bears in the law of insurance, may be stated to be:—

A verbal or written statement made by the assured to the underwriter, at or before the time of the making of the contract, as to the existence of some fact or state of facts calculated to induce an (*q*) underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it.

Classification of representations.

Such statement may either be—(1) a positive affirmation by the assured, as of his own knowledge and upon his own responsibility, that the facts represented either do or will exist (*r*); or (2) a mere declaration of his belief or expectation that such facts do or will exist; or (3) a mere communication of information which he has received from others respecting them.

(*p*) Rivaz *v.* Gerussi (1880), 6 Q. B. D. 222; Brooking *v.* Maudslay (1888), 38 Ch. D. 636.

(*q*) For "an," Arnould (2nd ed. p. 542) had "the." Arnould here seems to have used "representation" as equivalent to "material representation." The reasons why the editors have substituted "an" for "the" are explained in note (*f*), § 554. A statement which is not a material representation in the technical sense may, nevertheless, if fraudulent, vitiate the contract: see § 536. For statements made in answer to enquiries, see § 555.

(*r*) See *post*, § 542, as to representations of future facts.

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The Marine Insurance Act recognizes the first two of these classes of statements, by declaring (sect. 20 (3)) that "a representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief." The third class is not specially noticed. It may be regarded as a branch of the first class. For if an assured states that he has received certain information, this is a distinct representation, not indeed as to the accuracy of the information, but of the fact that such information has actually been received. In this work we will call the first class positive representations; and denominate the two other classes respectively representations of belief (*s*) and representations of information (*t*).

Representations may be either oral or written.

528. First, then, a representation is a verbal or written statement made by the assured or his agent to the underwriter at the time of the making of the contract: in point of actual practice it generally consists of either verbal communications made, or written instructions shown, by the broker to the underwriter at the time the risk is proposed to him. When made verbally, Lord Mansfield used to urge that every representation should be entered by the broker in his book at the time, and preserved as an evidence of the real terms on which the contract was made (*u*).

Distinction between a representation and a warranty.

529. A representation, to have any effect, must, as we have seen, be made at or before the time of entering into the contract, therefore necessarily before the subscription of the policy. It is never, in terms, inserted in that instrument, though there seems to be no reason why this should not be done, if the parties wish it (*x*). This, in fact, constitutes the main distinction in form between a representation and a warranty, viz., that a representation may be made either orally or in writing, and need not be introduced into the

(*s*) These are dealt with in §§ 545—551.
(*t*) See § 552.
(*u*) Pawson *v.* Watson (1778), 2 Cowp. 785, 788.
(*x*) See *post*, § 532.

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policy; whereas a warranty must always be in writing and inserted in the policy, or incorporated therein by reference (*y*).

No statement not actually written or referred to on the face of the policy will be construed as a warranty: though the paper on which the statement is written be wrapped up with the policy, or even wafered to it at the time of subscription, it cannot be more than a representation (*z*).

The same statement, indeed, which when made orally, or in writing distinct from the policy, by the broker to the underwriter, is construed as a positive representation, would if written on the face of the policy in almost all cases amount to a warranty (*a*). Thus, where a broker, in effecting a policy on a ship, showed the underwriter, in order to induce him to take the risk, written instructions in which it was stated with reference to the ship, "she mounts twelve guns and twenty men," this was construed as a positive representation; but had these same words been written on the face of the policy they would have been held to constitute a warranty (*b*).

Wherever, therefore, the representation is a positive statement of some fact (*c*) material to the risk, it is only distinguishable in form from a warranty by not being written on the face of the policy.

Difference in effect between a warranty

530. From this distinction in form arises a very important distinction in effect. As a representation is not inserted on

(*y*) Mar. Ins. Act, 1906, s. 35 (2). See also the *dicta* of Lord Mansfield in Pawson *v.* Watson (1778), 2 Cowp. 785; M'Dowell *v.* Fraser (1779), 1 Dougl. 260; and of Lord Abinger in Cornfoot *v.* Fowke (1840), 6 M. & W. 378.
(*z*) Pawson *v.* Barnevelt (1778), 1 Dougl. 12, n. 4; Bize *v.* Fletcher (1779), *ibid.* See, however, *post*, § 629, as to clauses wafered or gummed to the policy; and cf. Pearce *v.* Gardner, [1897] 1 Q. B. 688, C. A., as to memoranda satisfying sect. 4 of the Statute of Frauds.
(*a*) See Yorkshire Ins. Co. *v.* Campbell, [1917] A. C. at p. 221.
(*b*) Pawson *v.* Watson (1778), 2 Cowp. 785.
(*c*) As to representations of "future facts," or so-called "promissory representations," see *post*, §§ 538—544. They are not expressly recognized by the Mar. Ins. Act, 1906.

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the face of the instrument, the assured is not tied down to the same rigid and literal compliance with its terms as he is in the case of a warranty. Unless a warranty is true to the letter and fulfilled with the most scrupulous exactness, the insurer is discharged from liability (*d*), for in such cases there is the breach of an express stipulation which the assured himself has inserted in the instrument as one of its terms. In the case of a representation, on the other hand, the very fact that the assured has declined to insert on the face of the policy the statement which he has yet represented to be true shows that he does not intend to be bound down to this exact and rigorous accuracy, and accordingly a substantial compliance with the terms of a representation is all that is required (*e*).

Thus, to take an illustration from the case already cited, had the words "she mounts twelve guns and twenty men" been written on the face of the policy, this would have been a warranty, and the policy would have been void had the ship carried one gun or one man less than the stipulated number: but as these words were in fact only shown by the broker to the underwriter before subscribing the policy to inform him of the probable risk he would incur, and were not inserted in the policy, they were held to be only a representation; and the policy was not avoided by the ship's carrying a force of men and guns not literally the same with that stated in the representation, but in point of strength, convenience, and for the purpose of resistance, even more favourable to the risk (*f*).

Only a material misrepresentation avoids the policy.

531. It further appears by the definition that a representation is a statement of the existence of some fact or state of facts "calculated to induce an (*g*) underwriter more

(*d*) Mar. Ins. Act, 1906, s. 33 (3).
(*e*) Mar. Ins. Act, 1906, s. 20 (4), *ante*, § 522; Pawson *v.* Watson, *infra*.
(*f*) Pawson *v.* Watson (1778), 2 Cowp. 785; see also Von Tungeln *v.* Dubois (1809), 2 Camp. 151; Nonnen *v.* Kettlewell (1812), 16 East, 176.
(*g*) See note (*q*), § 527.

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readily to assume the risk by diminishing the estimate he would otherwise have formed of it": facts, the statement of which may reasonably be presumed likely to have such an influence on the judgment of a prudent underwriter, are called "material facts"; a statement of such facts is called a material representation (*h*); and it is the falsehood of such a representation only that will, at any rate in the absence of fraud, have the effect of avoiding the policy.

Hence further distinguished from a warranty.

And this constitutes a further distinction between a representation and an express warranty. In the case of a warranty all questions of the materiality or immateriality of the fact warranted are entirely excluded; the sole inquiry is whether it be or be not warranted that the fact is or shall be so and so. If it be warranted, then, however unimportant the fact may be to the risk, however little its existence or non-existence may have influenced the judgment of the underwriter as to the rate of premium, the thing warranted must be absolutely true or literally performed, otherwise the policy will be void as from the date of the breach of the warranty. The falsehood of a representation, on the other hand, will produce no effect on the policy unless the fact misrepresented be material.

When statements in the policy can be construed as representations.

532. Although as a general rule all positive statements and stipulations relating to the risk or the subjects of insurance will, if inserted in the policy, be construed as express warranties, yet there can be little doubt that if a positive statement of material facts were inserted in the policy with an express stipulation that it should be construed not as a warranty, but as a representation, such express stipulation would prevail over the general rule (*i*).

It must also be borne in mind that the rule now under consideration is confined to positive representations, and does not extend to statements of belief or information; which latter would in certain cases unquestionably be construed as

(*h*) Mar. Ins. Act, 1906, s. 20 (2), *ante*, § 522.
(*i*) 2 Duer, 645.

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nothing more than representations, though inserted in writing in the policy.

Thus where the words "ship expected to be loaded between the 13th and 20th of September," were inserted in the policy, this was construed as a representation that the ship had not been loaded within the knowledge of the assured before the 13th of September; and as it turned out that he, in fact, knew she had, the policy was held void on this account (*j*).

Cases in which a representation is implied from the language of the policy.

533. The language of the policy may itself be such as to imply a representation, which will thus virtually form a part of the written instrument. Thus where an insurance was effected on ship (*k*) and cargo at and from Genoa to Dublin, "the adventure to begin from the loading to equip for the voyage," Lord Mansfield held that these words plainly implied a representation that Genoa was the port of loading, and as she had loaded not at Genoa but at Leghorn, this being held material, his Lordship considered that the policy was void for misrepresentation and concealment (*l*). So where in an insurance on goods the words "to return five per cent. for convoy and arrival" were inserted in the policy, Lord Eldon was of opinion that these words clearly amounted to a representation that it was probable the vessel would sail with convoy, or at all events that there was a chance she would do so; and as it appeared that the assured knew, when the policy was effected, that the ship had actually sailed without convoy, his Lordship held the misrepresentation fraudulent and the contract void (*m*).

Cases in which representation has

534. In one case the Court of Session has held that a representation can be inferred from the silence of the assured.

(*j*) Stewart *v.* Morrison, Millar on Ins. 59; and see some American decisions to the same effect, cited by Judge Duer, vol. ii. pp. 721—738. See sect. 20, sub-sect. 5, of the Mar. Ins. Act, 1906, *ante*, § 522.

(*k*) The insurance is stated in the report to be on the ship only. Arnould is, however, probably right in saying that the policy was on ship and cargo.

(*l*) Hodgson *v.* Richardson (1764), 1 W. Bl. 463; 1 Park, Ins. 412. See, as to this case, *post*, § 605.

(*m*) Reid *v.* Harvey (1816), 4 Dow, 97.

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A ship had been transferred by a fictitious sale to the Belgian flag, to avoid inspection as provided by the Merchant Shipping Act, 1873. The assured, when effecting the insurance, did not inform the underwriter, who had on a former occasion insured the ship as British, of the change of flag. The Court held that the policy was void by reason of misrepresentation and concealment, leading the underwriter to believe that the ship was British. It is submitted, however, that the representation made in effecting a previous insurance cannot be considered to have been renewed by implication, and that the decision can only be supported on the ground of concealment (*n*).

In Fitzherbert *v.* Mather (*o*), an agent, after posting a letter stating that a ship had sailed, heard that it had been lost. The post had not yet left, but he did not write to report the loss. The Court of King's Bench held that by not doing so he had represented that the ship was safe when the post left. The letter, when it left the hands of the agent, stated his information correctly. The editors submit that his subsequent omission to write was not a misrepresentation, but a concealment of material information.

There may no doubt, however, be cases in which a representation will be inferred from the silence or conduct of a party.

The ground upon which misrepresentation avoids the policy.

535. Formerly it appears to have been laid down in some cases, and assumed in others, that the ground upon which the misrepresentation of a material fact avoided the policy was actual fraud or a wilful intention on the part of the assured to deceive the underwriter (*p*). This ground, however, was long since entirely abandoned, and the principle firmly estab-

(*n*) Hutchinson *v.* Aberdeen Sea Ins. Co. (1876), 3 Ct. of Sess. Cas. (4th Ser.) 682.

(*o*) (1785), 1 T. R. 12.

(*p*) See the *dicta* of Lord Mansfield in Pawson *v.* Watson (1778), 2 Cowp. 785; and Bize *v.* Fletcher (1779), 1 Dougl. 12, n.; the *dictum* of Lord Tenterden in Flinn *v.* Tobin (1829), Moody & Malk. 367; and the remarks of Duer, Lecture on Representation, 112, 113, n. 3.

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lished that the misrepresentation from mistake, ignorance, or accident, of any material fact, however innocently made, will avoid the policy quite as much as in cases where such misrepresentation arises from a wilful intention to deceive (*q*).

Former English doctrine.

Later still, the doctrine favoured by the English Courts was that in the case supposed, although no pretence existed for alleging actual fraud, yet the policy was to be considered void on the ground of constructive or legal fraud—*i.e.*, such conduct on the part of the assured as, though it does not imply any moral turpitude in himself, yet, from the effect it has in fact of misleading the underwriter, is in legal language said to be fraudulent (*r*).

Judge Duer's doctrine.

This doctrine was questioned by Judge Duer, who contends that the true ground on which the falsity of a material representation avoids the contract, in cases where no actual fraud can be imputed, is that a positive representation on a material point is an essential part of the contract of insurance, though not inserted in the policy (*s*); and this appeared to Arnould to be the sounder view (*t*).

In Blackburn *v.* Vigors, Lord Esher took exception to Duer's theory on the ground that if it be correct "the contract should never be set aside, or treated as void on the ground of concealment (or misrepresentation); the contract should stand and be treated as broken by the assured." Duer's view, said

(*q*) The cases that establish this position are the following: M'Dowell *v.* Fraser (1779), 1 Dougl. 260; Fillis *v.* Brutton (1782), 1 Park, Ins. 414; Fitzherbert *v.* Mather (1785), 1 T. R. 12; Feise *v.* Parkinson (1812), 4 Taunt. 640; Dennistoun *v.* Lillie (1821), 3 Bligh, 202; per Lord Abinger in Cornfoot *v.* Fowke (1840), 6 M. & W. 378. Per Willes, J.:—"There is no doubt that a material misrepresentation, though perfectly honest at the time, made with the intent that it should be acted on by the insurer, and which has led to the policy being granted, will defeat the policy." Anderson *v.* Pacific Fire & Marine Ins. Co. (1872), L. R. 7 C. P. 65, 68.

(*r*) See the judgment of Lord Abinger in Cornfoot *v.* Fowke (1840), 6 M. & W. 378; and the *dicta* of Baron Parke in Elkin *v.* Jansen (1845), 13 M. & W. 658.

(*s*) 2 Duer, Ins. 648—655, s. xiv.; and 3 Kent, Com. 282.

(*t*) 2nd ed. vol. i. p. 549.

Lord Esher, would raise new complications (*u*). Phillips explains the effect of a misrepresentation or concealment in the contract on the ground of a condition, implied by the fact of entering into the contract, that there is no misrepresentation or concealment, and his proposition was in that case adopted by all the judges in the Court of Appeal and by Lord Watson in the House of Lords (*x*). It is submitted that this is the proper ground on which to base the rule.

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Phillips' doctrine.

536. If the purpose of the representation be fraudulent—that is, to deceive the underwriter by inducing him to believe that which the assured at the time knows to be false, or does not know to be true—the policy, it is said, will be equally avoided whether the false statement be material to the risk or not (*y*).

In cases of fraud a misrepresentation may avoid the policy without being material.

It is submitted that this proposition is subject to the qualification that the fraudulent statement must in fact have influenced the underwriter when he undertook the risk. Speculations as to the materiality of a fraudulent statement made with a view to a particular end cannot be permitted when the end has been attained thereby (*z*), and where the purpose of a falsehood is to induce the underwriter to enter into the contract, there is no doubt, as Arnould says, a presumption that such has been its effect (*a*). But the presump-

(*u*) Blackburn *v.* Vigors (1886), 17 Q. B. D. 553, 561.

(*x*) *Ibid.* 562, 578, 583; 12 App. Cas. 539; 1 Phillips, Ins. s. 537. See also Pickersgill *v.* London & Prov. Mar. & General Ins. Co., Ltd., [1912] 3 K. B. 614.

(*y*) 1 Marshall, Ins. 452; 3 Kent, Com. 283; 1 Duer, Ins. 80, 83, 614; 1 Park, Ins. 405; and Roberts *v.* Fonnereau, there cited; see also Sibbald *v.* Hill (1814), 2 Dow, 268; per Lord Esher, The Bedouin, [1894] P. 1, 12. The Mar. Ins. Act, 1906, has no express reference to this point, but by sect. 91 (2) the rules of the common law continue to apply, save in so far as they are inconsistent with the provisions of the Act.

(*z*) See per Lord Chelmsford, L. C., in Smith *v.* Kay (1859), 7 H. L. Cas. at p. 759, cited by Smith, L. J., in Gordon *v.* Street, [1899] 2 Q. B. 646.

(*a*) As to the strength of such a presumption at the present time, when the parties to an action are competent witnesses, see per Lord Blackburn in Smith *v.* Chadwick (1884), 9 App. Cas. 196.

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tion cannot be conclusive, so as to preclude evidence to the contrary (*b*), and prevent the application of the general principle that a fraud will not avoid a contract unless it has induced one of the parties to enter into the contract (*c*).

To avoid the policy, the loss need not be connected with the misrepresentation.

537. It is not necessary, in order to avoid the policy on the ground of misrepresentation, that the loss should have arisen from a cause connected with the fact or circumstance misrepresented. Thus, if the assured represent that the ship or goods are neutral property, and they are in fact the property of a belligerent, he shall not recover even for a loss occasioned by shipwreck, whether the mis-statement was made through mistake or from design to deceive (*d*).

Where no actual fraud, assured entitled to a return of premium.

If the policy be avoided by a mere misrepresentation without actual fraud, the assured is entitled to a return of premium. If, however, the representation was false within his own knowledge, and made with the intention to deceive, this fraud will disentitle him to a return of premium (*e*).

Positive representations subdivided into affirmative and promissory.

538. Positive representations have been subdivided into—1. Affirmative; 2. Promissory; the former averring the actual existence of the fact to which they relate, the latter that such fact shall or will thereafter exist (*f*).

Representations, though affirmative in form, may be promissory in effect.

This distinction, however, is often one more of form than substance, as in fact many positive representations, even when in terms affirmative, in effect are promissory. Thus where it is represented that a vessel is neutral, or has a licence to trade, or has a certain armament or a certain kind of cargo, the mere affirmation of these facts as existing at the time is unimportant; it is the implied promise that, as far as depends

(*b*) 1 Phillips, s. 540.

(*c*) Per Romilly, M. R., Pulsford *v.* Richards (1853), 17 Beav. 87, 96; per Jervis, C. J., Canham *v.* Barry (1855), 15 C. B. 597, 617; and see *post*, § 555.

(*d*) Per Holt, C. J., Skinner, R. 327; 1 Marshall, Ins. 452; 1 Park, Ins. 405.

(*e*) Mar. Ins. Act, 1906, s. 84 (1); *post*, §§ 1247a, 1256.

(*f*) See *post*, §§ 542—544, for a discussion of the doctrine of promissory representations.

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on the assured, they shall be and continue unchanged throughout the duration of the risk, that alone gives value to the representation.

Thus, to take an instance in point. In the case of Pawson *v.* Watson (*g*) the representation made by the broker in effecting a policy on the ship was in these words:—"She mounts twelve guns and twenty men." Although affirmative in point of form, it is plain that this representation was promissory in its meaning; for when the policy was effected the ship, which, as appears by the report, did not sail for a month afterwards, had not a single gun or man on board; so that the representation, unless construed to refer to a future event, was false when made. The whole judgment of Lord Mansfield plainly shows that he took it to be, what undoubtedly it was, not a mere assertion of the actual force of the vessel at the time, but a stipulation that she would sail with the armament described on the voyage insured (*h*). Had the representation just stated been thus expressed:—"She is to (or 'She will') mount twelve guns and twenty men," it would have been an instance of a representation promissory in terms as well as in effect (*i*).

Is there any difference between a promissory and an affirmative representation?

539. It is an important question, whether there is any difference between an affirmative representation and a promissory representation, as to the ground on which, if false, they will avoid the policy? In other words, whether the positive misrepresentation of a future fact, material to the risks, will just as much avoid the policy, in the absence of actual fraud, as the positive misrepresentation of a past or existing fact equally material?

(*g*) *Ante*, § 530.

(*h*) See 2 Duer, 766, whose language Arnould adopted almost without a change.

(*i*) See the discussion, *post*, §§ 542—544. Even if the promise, express or implied, be not binding, the representation "She mounts twelve guns" may be considered to mean that this is her usual armament, and that it is expected that she will sail with it on the voyage insured. The representation "She will mount twelve guns" must at any rate be a representation of expectation or belief.

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Opinion of Lord Tenterden.

It appears from the cases of Flinn *v.* Headlam (*k*) and Flinn *v.* Tobin (*l*), that Lord Tenterden was of opinion that this distinction exists. They were actions on the same policy, and the facts were that, to induce the underwriters to take a risk on a ship about to sail with a cargo of rock salt, the broker represented that the ship would only take fifty or sixty tons of rock salt, which would put her in light ballast trim. The ship sailed the day after the policy was signed, with 160 tons of rock salt on board, being a full and very heavy cargo. In the earlier action, Flinn *v.* Headlam, the counsel for the plaintiff contended that if the underwriters meant to insist upon it as part of the contract, that only a certain quantity of rock salt should be carried in the vessel, they should have had it inserted in the policy; and Lord Tenterden advised the jury to find for the defendant if they thought that a material representation was made by the broker as to the rock salt then actually on board, but to find for the plaintiff if they thought that the representation was as to the cargo expected to be shipped, or that the underwriter was not influenced by the representation (*m*). In the later case, Flinn *v.* Tobin, Lord Tenterden directed the jury that the defendant was not entitled to a verdict on the ground of a misrepresentation of the cargo which the ship was to carry, unless it was fraudulent. "The mere fact of a misrepresentation, without fraud," he said, "will not be enough to prevent the plaintiff's recovering; for the contract between the parties is the policy, which is in writing, and cannot be varied by parol."

(*k*) (1828), 9 B. & Cr. 693.

(*l*) (1829), 1 Mood. & Malk. 367. Arnould stated that Flinn *v.* Headlam was the later case, but this is a mistake. Flinn *v.* Headlam was tried in 1828, and a rule *nisi* for a new trial, obtained in Michaelmas term of that year, was discharged on the 4th July, 1829. Flinn *v.* Tobin was tried on the 27th July, 1829.

(*m*) A certificate of seaworthiness was produced to the underwriter, and a verdict for the assured was upheld by the Court of King's Bench on the ground that the jury were right if they thought that the underwriter relied on the certificate (see *infra*, § 555). The correctness of Lord Tenterden's ruling was not challenged.

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Distinction between effect of affirmative and promissory representation seems untenable.

540. This distinction, however, even when confined to the sole case of promissory representations, seemed to Arnould to be opposed to the principles on which parol evidence of representation has been admitted in any case, and to be irreconcilable with express authorities of the greatest weight.

The principle on which the false affirmation of the actual or past existence of a material fact avoids the contract in cases where there is no actual fraud, is, that the underwriter only engaged to be liable upon the faith that such fact existed, so that the falsity of the statement is a breach of a condition precedent that the contract should be free from misrepresentation. It is evident that this principle must apply equally to the case in which the assured falsely, though not fraudulently, affirms, in positive terms, that some material fact shall or will hereafter exist; in this case the basis of the underwriter's liability is the future existence of the fact: the falsity of the positive statement, that the fact will exist, is as completely a breach of the condition on which he engaged to be liable, as the falsity of the statement that the fact had existed, or was existing; on principle, therefore, there seems no ground for this distinction, and it is also quite irreconcilable with previous authority (*n*).

Dennistoun *v.* Lillie.

541. Instead of citing all the cases which show that the doctrine of the Courts has been that representations strictly promissory, although made in good faith, must be substantially complied with in order to sustain the policy, a decision to this effect of the highest English tribunal, presided over by Lord Eldon, may suffice.

An insurance on ship and goods from Nassau (New Providence) to Clyde (in Scotland) was effected on the 18th June, 1814. On that occasion the broker showed the underwriters a letter, dated the 2nd April, and received by the owners the day before the policy was effected, in which it was stated,

(*n*) See Edwards *v.* Footner (1808), 1 Camp. 530; Dennistoun *v.* Lillie (1821), 3 Bligh, 202; see also the American cases to the same effect collected by Duer, 2 Ins. 741—743, 749—769.

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"The Brilliant," the ship insured, "will sail on the 1st of May." In point of fact it turned out that the ship had sailed on the 23rd April, and on the 11th of May had been captured by an American privateer. These facts were wholly unknown to the parties by whom the representation was made.

At the trial of the appeal in the House of Lords, it was contended for the plaintiff that the statement of a future event, such as an intended day of sailing, could be no more than an expectation, and therefore could not avoid the policy, unless fraudulent.

Lord Eldon, however, held that the policy was avoided by the misrepresentation. "There is a difference," said Lord Eldon, "between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk" (*o*).

This case, then, has been generally regarded as an explicit authority for the position, that a positive promissory representation of a material fact will, if false, avoid the policy though no actual fraud can be alleged.

Edwards *v.* Footner.

So, where a representation was made some time before the ship sailed, to the effect that she "was to sail" with convoy and a certain armament, so that the representation was both promissory in its terms, and related to an actually future fact, Lord Ellenborough held, that not having been substantially complied with, it avoided the policy, though made without actual fraud (*p*).

Upon the authority of previous cases, then, the distinction assumed by Lord Tenterden appeared to Arnould to be untenable.

Arnould's conclusion.

It was therefore laid down by Arnould (*q*), as the conclusion to be safely derived from all the authorities, that the

(*o*) Dennistoun *v.* Lillie (1821), 3 Bligh, 202. The proceedings in the Scotch Courts are briefly reported in 1 Shaw's Appeal Cases, 22.
(*p*) Edwards *v.* Footner (1808), 1 Camp. 530.
(*q*) 2nd ed. p. 557.

positive representation of a future fact, material to the risks, will, if false, avoid the policy, though it may not be actually fraudulent. Sect. 541.

542. The view expressed in the text and the reasoning on which it is based have been reproduced from the earlier editions of this work. It is nevertheless desirable to point out that the general law relating to "representations of future facts" has been declared, since this work first appeared, to be different from the law as stated in the text. The later decisions (none of which, however, relates to marine insurance) are to the effect that what has been called a representation of a future fact (if anything more than an expression of intention or expectation) can only have legal effect as a contract or promise (*r*). "There is a clear difference," says Mellish, L. J., "between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise" (*s*). Regarded as a promise, a representation that something will be done seems to be an express term of the contract in the nature of a warranty, which ought therefore to be in writing, and either included in or incorporated by reference into the policy.

Promissory representations considered.

General law as to representations of future facts.

543. On the other hand, it will be said that the decision in Dennistoun *v.* Lillie, being one of the House of Lords, has definitely established a different rule with regard to contracts of marine insurance. It may, however, perhaps be argued that Dennistoun *v.* Lillie, which Arnould and Judge Duer

The English cases as to promissory representations.

(*r*) Jorden *v.* Money (1854), 5 H. L. C. 185; per Lord Selborne, L. C., in Maddison *v.* Alderson (1883), 8 App. Cas. 467, 473; and in Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352, 360.
(*s*) Beattie *v.* Lord Ebury (1872), L. R. 7 Ch. 777, 804.

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both regarded as putting the matter beyond doubt, is not as clear an authority as they considered. The letter, though dated the 2nd of April, was not shown to the underwriters until the 18th of June, nearly two months after the ship had in fact sailed; and it may be possible to contend that inasmuch, as Lord Eldon said, the question was whether the representation was one "of an expectation or a statement as of a past fact" (*t*), he regarded the production of the letter by the broker on the 18th of June as a representation by him of an event which was then past, viz., that the ship had remained in port until the 1st of May. It does not, however, appear from the report that this was the point upon which the underwriters were relying; and the fact that Lord Eldon distinguished the case from Bowden *v.* Vaughan (*u*) (in which case the statement certainly related to a future event), on the ground that in Bowden *v.* Vaughan the policy was effected by the owner of the goods (who had no control over the event), strongly supports the view that his Lordship considered the representation one relating to a future, and not to a past, event.

Apart from Dennistoun *v.* Lillie, there is certainly authority in the English cases in support of the doctrine of promissory representations. Though the term "promissory representation" is not to be found in the reports, it has undoubtedly been decided in this country that a representation relating to a future event over which the assured has control will avoid the policy if it be not substantially satisfied (*x*); and it has also been decided that a representation which in terms relates to an existing fact, may, in effect, be promissory, and require that something shall be done or some state of things exist in the future. Thus, a representation that a ship is of a certain nationality has been held to imply

(*t*) 3 Bligh, 209. So, on p. 205, it appears that the judge admiral considered the letter as having held forth to the underwriters that the ship remained in harbour till the 1st of May.

(*u*) (1809), 10 East, 415.

(*x*) Edwards *v.* Footner (1808), 1 Camp. 530; and see Bowden *v.* Vaughan (1809), 10 East, 415.

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an undertaking that she shall be documented as a ship of that nationality (*y*).

The American cases.

In the United States the validity of a promissory representation was clearly recognized in the earlier cases (*z*). In later cases a different view prevailed (*a*), and there are two cases, the earlier one on a marine policy, the later one on a fire policy, which are express decisions that such a representation is nothing more than a statement of intention or expectation, even when relating to something within the control of the assured (*b*). In the later case the doctrine of promissory representations was vigorously impugned by Chancellor Walworth, in a judgment of great ability, which, however, ignores most of the decisions opposed to his view. More recently, again, the existence of promissory representations has been recognized (*c*). The whole subject is discussed at great length by Duer, who after an examination of the authorities upholds the validity of promissory representations (*d*). This view is also shared by Phillips (*e*), and by Marshall (*f*), to whom the use of the term "promissory representation" seems to be due.

Conclusion.

544. Apart from any argument to be derived from the provisions of the Marine Insurance Act, 1906, the result

(*y*) Steel *v.* Lacy (1810), 3 Taunt. 285; Von Tungeln *v.* Dubois (1809), 2 Camp. 151.

(*z*) See Vanderheuvel *v.* Church (1801), 2 Johns. 127, 173, n.; Murray *v.* Alsop (1802), 3 Johns. Cas. 47; Suckley *v.* Delafield (1804), 2 Caines, 222; Alsop *v.* Coit (1815), 12 Mass. R. 40.

(*a*) See Rice *v.* New England Mar. Ins. Co. (1827), 4 Pick. 439; Allegre *v.* Maryland Ins. Co. (1830), 2 Gill & Johns. R. 136. See also a criticism of the doctrine of promissory representations by Gray, J., in Kimball *v.* Ætna Ins. Co. (1865), 9 Allen (Mass.), 540.

(*b*) Bryant *v.* Ocean Ins. Co. (1839), 22 Pick. 200; Alston *v.* Mechanics Ins. Co. (1842), 4 Hill, 329.

(*c*) Lunt *v.* Boston Marine Ins. Co. (1881), 6 Fed. R. 562; *S. C.*, after second trial (1883), 17 Fed. R. 411; Snare & Trieste, &c. Co. *v.* St. Paul Fire & Mar. Ins. Co. (1919), 258 F. R. 425.

(*d*) See 2 Duer, Ins. Lect. xiv. pp. 657 *et seq.*; and notes ii. and vi. thereto, pp. 721, 749. The authorities in the United States are reviewed in the American notes to Barber *v.* Fletcher, Campbell's Ruling Cases, vol. xiii. pp. 536—539.

(*e*) 1 Phillips, Ins. s. 553.

(*f*) Ins. 4th ed. p. 345.

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seems to be that, unless Dennistoun *v.* Lillie is a sufficiently clear authority to establish the doctrine of promissory representations in relation to marine insurance, the question is one which must be considered an open one. On the one hand it may be argued that there is no authority or reason for saying that the law as to representations is not the same with respect to contracts of marine insurance as it is with respect to other contracts; *i.e.*, that no representation other than a representation relating to an existing fact can have any effect on the contract, and that when it is sought to give such effect to any statement relating to the future, it can only be by showing that such statement amounts to a warranty, and as such is properly incorporated into the formal contract.

On the other hand it may be said that the general rules of law relating to representations do not necessarily apply to contracts of marine insurance. The law on the latter subject has been developed at common law without reference to the decisions which have been given in relation to other contracts, and it cannot be disputed that in some respects, *e.g.*, the materiality of a misrepresentation, the law as to marine insurance differs widely from the general law. The cases other than Dennistoun *v.* Lillie are of course open to review; but some weight must be given to the fact that for the greater part of a century the rule embodied in them has been recognized by most, if not all, textwriters of authority. From the nature of the contract and the circumstances under which it is effected, the representations made to the underwriter have necessarily a special importance. This may be a reason for upholding the rule that when a representation relates to a future event within the control of the assured, there is an implied condition that the representation shall be substantially satisfied.

The provisions of sect. 20 of the Marine Insurance Act, 1906 (*g*), however, seem to be inconsistent with the doctrine

(*g*) *Ante*, § 522.

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of promissory representations. The classification of representations in the third sub-section, which was apparently intended to be exhaustive, ignores them. For it seems difficult to call a representation of this nature one as to a matter of fact—an expression which is properly applied to existing facts, and not to things which are not facts in the present, but may become so in the future. Moreover, the wording of sub-sect. 4 points to facts, of which the present truth or falsity can be predicated. Nor is a promissory representation, as such, a representation as to a matter of expectation or belief, which satisfies the requirements of the law if made in good faith (*h*). It seems probable, therefore, that the law as laid down in Jorden *v.* Money (*i*) now applies to contracts of marine insurance, as it does to other contracts, and that the doctrine of promissory representations, whatever foundation there may have been for it before the Act, has ceased to exist since the Act came into force (*k*).

Distinction between positive promissory representations, and statements of expectation.

545. There is a great distinction to be drawn between such positive promissory representations and those representations of belief or expectation, which we have placed in a distinct class, and come now in the course of the inquiry to consider. The former are positive statements that certain material facts shall or will exist; the latter are merely expressions of an expectation or belief that they either will or do exist. The former, if binding under the existing law, involve a stipulation that unless facts take place substantially corresponding with those specified the underwriter shall not be liable on the policy; the latter imply no stipulation of the kind, and their falsification accordingly can only avoid the policy in cases of actual fraud (*l*).

(*h*) See § 545.

(*i*) *Ante*, § 542.

(*k*) This is also the opinion of Mr. Arthur Cohen: Laws of England, vol. xvii. § 808.

(*l*) A view of the nature of a representation as to expectation, belief, or intention, for which there is high judicial authority, is that

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Accordingly it is expressly provided by the Marine Insurance Act (*m*) that "a representation as to a matter of expectation or belief is true if it be made in good faith."

When false statements of expectation avoid the policy.

A moment's consideration will show that this distinction is well founded. If a man assures me positively that certain events over which he has a control, and without which I should decline entering into the contract with him, shall take place in a given way, and I enter into the contract on the faith of that positive assurance, I may fairly be entitled to contend that such statement must substantially be made good in order to make me liable on such contract. If, however, he merely tells me that he believes or expects that such events will happen in a certain way, and I choose to enter into the contract upon the mere chance of such belief or expectation turning out well founded, I have no right to be released from my contract on its proving fallacious, for its failure was a contingency which I ought to have contemplated on entering into my contract. If, indeed, I can show that, with a design to deceive me, he represented himself as expecting or believing that which he knew at the time to be impossible or untrue, and thereby influenced me, I shall be released from my contract on the ground of this his actual fraud.

such a representation is one of fact; that fact relating, however, not to the subject-matter of the expectation, but to the condition of mind of the person making the statement. Thus, if I say "I expect or believe" that a certain state of facts does or will exist, though it is true that I do not make any statement as to the actual or future existence of such facts, I may be said to make an affirmative representation as to the present condition of my mind. See per Bowen, L. J., in Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459, 483. On this view, it is unnecessary to make a distinction between a representation of an existing fact and one of belief, and the statement that the element of fraud must also be present in order to invalidate a contract on account of a false representation of belief is also superfluous, for it is impossible to make a false representation as to one's own belief without at the same time being conscious that the representation is false. Therefore, when the representation is regarded as one of an existing fact (*i.e.*, the state of a man's mind), it is evident that there must almost of necessity be fraud, when the representation is false.

(*m*) Sect. 20, sub-sect. (5), *ante*, § 522.

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Statement made without knowledge whether true or false.

546. The result would appear to be the same if, with the intention to deceive me, he stated his belief or expectation of that with regard to the possibility or truth of which he knows nothing either one way or the other (*n*).

Thus, if with the intention to deceive, the owner of a ship states to the underwriter that he believes the ship to be neutral, knowing nothing on the subject, and having no reason to believe either way, the better opinion would seem to be, that this representation, if false, would avoid the policy (*o*).

It has this effect, however, only when made with the intention to deceive. Thus, where a broker employed to effect a policy on certain ships engaged in the African trade represented that they were "expected to leave the coast of Africa in November or December," when, in fact, they had all left in May: this, though material to the risk, yet, not having been made fraudulently, was held not to be a representation, but a mere expectation, into the grounds of which the underwriter ought to have inquired before he relied on it (*p*).

When positive statement considered only an expression of expectation.

547. When it is evident from the position of the parties and all the circumstances of the case, that a statement, though in terms a direct and positive assertion, must, in fact, be regarded as a mere expression of expectation or belief, or opinion, it will be so construed.

If, for instance, the owner of a ship, meaning to deceive, were to state that he believed, or expected, she would sail long after, or long before, some day on which she had actually sailed, this misrepresentation would, doubtless, be held to

(*n*) Per Maule, J., Evans *v.* Edmonds (1853), 13 C. B. 777, 785; see also Derry *v.* Peek (1889), 14 App. Cas. 337.

(*o*) Lord Mansfield in Pawson *v.* Watson (1778), 2 Cowp. 787, laid down the contrary; but the observations of Maule, J. (*ubi supra*), of Marshall (Ins. 453), and of Duer (2 Ins. 710, 711), seem unanswerable in favour of the other view.

(*p*) Barber *v.* Fletcher (1779), 1 Dougl. 306. It appears from the report that there was no allegation of actual fraud. See also the remarks made on this case by Bayley, J., in Bridges *v.* Hunter (1813), 1 M. & S. 15.

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avoid the policy; if, however, the owner of goods intended to be embarked on board the same ship were to make a similar statement, as to the time of the ship's sailing, without knowledge either the one way or the other, such statement ought to be looked upon as totally immaterial; for, coming from such a quarter, the underwriter must have received it as the mere expression of an opinion, and if he meant to act upon it, was bound to inquire into the grounds upon which it was founded (*q*). This principle has been extended to cases in which the statement is, on the face of it, a positive promissory representation or explicit engagement for the existence of future facts, where made in the absence of fraud by parties who have no interest in the subject, or control over the event, to which the statement refers.

Cases in illustration.

548. Thus, where a broker, employed to effect a policy on goods for a party who had no interest in the ship, represented that "the ship," which was then at Lisbon, "was to sail in a few days," and the ship did not, in fact, sail for a month, Lord Ellenborough and the Court of King's Bench held that this statement, though material to the risks, having been made by the owner of the goods, who had no control over the time of the ship's sailing, must be regarded merely as the expression of a probable expectation, which, as it appeared to have been made *bonâ fide*, could not avoid the policy (*r*).

Bowden *v.* Vaughan.

Hubbard *v.* Glover.

A broker employed to procure an insurance on a ship, for a homeward voyage from St. Petersburg or Cronstadt to London, in order to induce the underwriter to take the insurance as a summer risk, told him, on the 13th of June, just before the policy was effected: "The ship has sailed some time (*i.e.*, from London), and must now be at Gottenburg. There is a cargo ready for her (*i.e.*, at Cronstadt), and she is sure to be an early ship." The ship in fact did happen to be at Gottenburg when this statement was made, but at Cronstadt found no cargo ready for her; and in consequence of the delay thus caused, did not begin her voyage from Cronstadt to London till after the winter risk had begun. Lord Ellenborough held that this did not avoid the policy, as the statement must have been understood by the underwriters to mean nothing more than that a cargo had been ordered, and the expression of a probable belief that it would be ready for the ship at Cronstadt, so that she might be expected to be an early ship (*s*).

(*q*) Duer on Representations, 95—97; 2 Duer, Ins. p. 664.
(*r*) Bowden *v.* Vaughan (1809), 10 East, 415.

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549. This principle of decision applies *à fortiori* where it appears from the terms in which the statement is made that the broker cannot intend it to be taken as a positive assertion of the existence of a fact within his own knowledge. Where a broker, employed to effect an insurance on a ship "at and from Messina to her port or ports of discharge in the Channel," stated to the underwriter, at the time of effecting the policy, "that the ship was then (28th June) either near Messina or at Messina, or on her homeward voyage"; and it turned out in fact that the ship, although she had sailed from London a fortnight before this statement was made, yet had not sailed from Falmouth till two days after it (*i.e.*, on 30th June): Gibbs, C. J., held at the trial, and the Court of Common Pleas confirmed his decision, that this was not a positive representation, but merely the expression of an opinion formed by the broker from knowing the time at which the ship had sailed from London; and therefore, although if he had stated it positively as a fact, it might have bound the assured to a substantial compliance; yet, as he merely stated the ship to be in one of three situations, and did not allege specifically in which, that the very form of the statement showed that it was merely to be taken as a computation, which, though erroneous, could not avoid the policy in the absence of fraud (*t*).

Statements which from their terms were intended to be only of expectation or belief.

Brine *v.* Featherstone.

(*s*) Hubbard *v.* Glover (1812), 3 Camp. 313. It is submitted that, with the modern means of communication, a statement that there was a cargo ready would generally not be held to be a mere expression of belief.

(*t*) Brine *v.* Featherstone (1813), 4 Taunt. 869. In other words, the

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Anderson *v.* Pacific, &c. Ins. Co.

At the time of effecting a policy on the freight of the "Clarendon" "from Belize to Rendez-vous Point, thence back to Belize, and thence to London," Rendez-vous Point being unknown to either of the parties, the master's letter was shown to the underwriter containing this passage:—"It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." It was proved on the trial that Rendez-vous Point was a dangerous place for a vessel to anchor during the hurricane months; but the jury found that the pilot and master considered it was not dangerous, and a verdict was thereupon directed for the plaintiffs.

On a motion for a new trial the Court of Common Pleas refused to grant a rule. Willes, J., said: "There is no doubt that a material misrepresentation, though perfectly honest at the time, made with the intent that it should be acted on by the assurer, and which has led to the policy being granted, will defeat the policy." The question, however, continued the learned judge, was whether the statement in question amounted to an absolute statement of fact, or only to a statement of opinion. If the latter, it might be, if the opinion was one which the writer of the letter really did not entertain—a conclusion which the jury would easily have arrived at, if they thought no person could honestly have entertained such a belief—that the assured would be bound. But the jury had found that it was an opinion honestly formed. The learned judge ended by saying that the words did not amount to an absolute statement of a fact, the effect of them being that it was considered by the pilot a safe place, and that from information received from the pilot and from his own inspection, the master also considered it quite safe. Therefore, fraud being out of the question, there was no misrepresentation (*u*).

representation was considered to relate only to the broker's general belief; and it was not shown that he had said he believed anything which he had not in fact believed.

(*u*) Anderson v. Pacific Fire and Marine Ins. Co. (1872), L. R. 7 C. P. 65.

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Positive misstatements, merely wrong inferences from facts truly communicated, will avoid the policy. M'Dowell *v.* Fraser.

550. If, however, the form of statement be positive (there being nothing in the circumstances to show that it was not so intended), then, although the error may merely consist in a wrong computation from facts truly communicated, the positive nature of the statement will tie the assured down to a substantial compliance, and its falsehood, in fact, will avoid the policy.

Thus a broker, having been informed that a ship was seen in the Delaware five days after she had sailed from New York, understood this to mean, as by the usage of mercantile men it well might, five days after she had sailed from Sandy Hook, which he knew to have been on the 6th of December, and he consequently stated as a positive fact that the ship "was seen safe in the Delaware on the 11th of December"; this was held to be a representation which must be substantially complied with, although it was shown to be a mere mistake arising from the fact that the party giving the information to the broker meant that he had seen the ship five days after she had sailed, not from Sandy Hook, but from New York quay, which was some days previously (*x*).

Ground of distinction between these cases.

551. The ground of distinction between these two classes of cases is, that from the one mode of statement the underwriter must necessarily have inferred that the assured did not mean to affirm the fact positively; and from the other he must equally have inferred that he did. In cases of the former kind the underwriter ought not, as a cautious man, to take the risk without inquiring into the grounds of the assured's expectation, belief, or opinion; otherwise the law presumes that he relies and acts exclusively on his own judgment, and he has no right to complain of the consequences of having done so.

Statements professedly founded on information.

552. A third class (*y*) of representations consists of those in which the assured neither states positively the actual or

(*x*) M'Dowell *v.* Fraser (1779), 1 Dougl. 260.

(*y*) For the classification of representations, see *ante*, § 527.

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future existence of a fact, nor his belief or expectation of its existence; but either (1) Qualifies his statement by adding that it is made on the information of others; or (2) Merely submits the information in its whole extent to the underwriters, leaving them to draw their own conclusions from it (*z*).

What compliance therewith necessary.

In these cases the assured is bound, not to any substantial compliance with the statement made, but only to show that such statement corresponded with the information he really received; in other words, he is not answerable for the truth of the facts, but only for the truth with which he has stated the information received.

Responsibility of the assured for information derived from his agent.

553. If, however, the information so communicated by the assured to the underwriter proceeds from an agent of the assured, whose duty it was to give the intelligence (*a*), the assured is just as responsible for the truth of the information as he would be for the truth of a positive representation made by himself of the same facts. The principle here is, that what is known to the agent is impliedly known to the principal (*b*).

The following case illustrates this principle:—

Fitzherbert *v.* Mather.

Thomas, a corn-factor at Hartland (in Devonshire), shipped by order a cargo of oats on the 16th September to a consignee at Portsmouth on account of the assured. The same day he wrote to an agent of the assured at Poole stating

(*z*) 2 Duer, Ins. 707.

(*a*) In Blackburn *v.* Vigors (1886), 17 Q. B. D. at p. 563, Lord Esher said that the agent "whose duty it was to give the intelligence" means in this context "the agent who effects the insurance." The editors, however, consider that this passage clearly means, as taken literally it ought to mean, that if the assured submits to the underwriter information received from an agent whose duty it is to keep him informed, he is responsible for any misrepresentation contained in that information. In this sense the rule is analogous to that laid down by the House of Lords in the same case in relation to concealment. See next chapter, "Concealment." Lord Esher, it may be noticed, thought that no agent was under a duty to keep his principal informed as to the matters affecting the subject of the insurance.

(*b*) See Blackburn *v.* Vigors (1887), 12 App. Cas. 531.

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that he had that morning shipped the oats, that the ship had sailed immediately, but that he was afraid the wind was coming from the westward and would force her back: he also the same day wrote to the same effect to another agent of the assured in London, adding these words:—"I wish the whole safe to hand. This evening appears stormy." These letters, though written on the 16th, did not by the then course of post leave Hartland till 1 P.M. on the 17th, early on the morning of which day Thomas knew of the loss of the ship, which had been driven back by the wind and wrecked on the night of the 16th off Hartland Pier. He, however, sent no further information to the London agent, who, having on the 20th received the letter which left Hartland on the 17th, and also an order from the assured to procure an insurance, submitted these letters to the underwriters as his instructions, and upon them procured a policy to be effected on the oats, "lost or not lost, from Hartland to Portsmouth."

The Court held that the policy was void on the ground of misrepresentation. The assured himself was innocent, yet as he had built his information on that of his agent (Thomas), and the agent had been guilty of misrepresentation, the assured himself ought to suffer for it. "This policy," said Lord Mansfield, "was effected by misrepresentation, because the underwriter was warranted on the information of the agent (*i.e.*, Thomas) to take for granted that on the 17th of September, at 12 or 1 o'clock" (the usual post-time at Hartland was about 1 or 2 o'clock), "the ship was safe; for the agent gave an account of the ship being loaded, and said nothing of what had happened to her. Then there was strong ground to believe, on this letter, that she was safe when the post came away" (*c*).

(*c*) Fitzherbert *v.* Mather (1785), 1 T. R. 12, 15. See per Buller, J., *ibid.* 16:—"According to plaintiff's letter, the insurance was not to be made till Thomas's letter arrived; it was therefore the foundation of the insurance." The editors submit that the agent was guilty not of misrepresentation (for what he wrote was true at the time), but of concealment in not sending news of the loss to supplement his letter.

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Misrepresentation or concealment by the master.

As long as the master is acting as agent for the owner in his general capacity as master, so long it is his legal duty to communicate and truly represent all material facts connected with the ship; and his fraud or neglect in the discharge of that his duty, if it have operated, in fact, to mislead the underwriter, will avoid the contract as much as a concealment or misrepresentation by the assured himself (*d*).

What representations are material. Test of materiality.

554. As we have already seen, when no actual fraud can be imputed, a representation, although false, will not avoid the policy unless it be material (*e*). It becomes important, therefore, to inquire what it is that makes a representation material. Every representation is deemed to be material which is of such a nature as would be likely to induce a prudent underwriter to take the risk, or to take it at a lower premium than he otherwise would. The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of an underwriter (*f*). Thus the Marine Insurance Act, 1906,

The principle, however, which Arnould rests on this case is not affected by this criticism.

(*d*) Gladstone *v.* King (1813), 1 M. & S. 35. Phillips (vol. i. p. 341, 2nd ed.) cited the American case of Ruggles *v.* General Interest Ins. (1827), 12 Wheaton, S. C. R. 408, as *contra;* but Judge Duer satisfactorily shows that no such doctrine can fairly be deduced from the case cited, 2 Ins. 791—796. Phillips (Ins. s. 549) states his position thus: "A policy made under an essential misunderstanding by both of the parties, into which they are purposely and fraudulently led by a third, whether he be agent of both, or one, or neither, is void." This proposition, however, is criticized by Lord Esher in Blackburn *v.* Vigors, 17 Q. B. D. at p. 564; and see also the same case in the House of Lords (1887), 12 App. Cas. 531.

(*e*) As to the effect of a fraudulent but immaterial misrepresentation, see *ante*, § 536; *post*, § 558.

(*f*) This is substantially Maclachlan's definition of materiality, which agrees with those of Marshall (1 Ins. 449), of Phillips (1 Ins. ss. 524—526), and of the Marine Insurance Act. Arnould says (2nd ed. vol. i. p. 565): "Every representation is to be deemed material which there is just reason to believe either determined the underwriter to insure, or influenced his estimate of the premium." He continues: "The test of materiality is the probable influence of the statement made on the mind of the underwriter. It is not absolutely necessary that the fact

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provides (*g*) that "a representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

A misrepresentation may be material, though it has no direct bearing on the state or condition of the subject of the proposed insurance. For this rule Arnould cited Sibbald *v.* Hill (*h*). In that case a merchant induced an underwriter at Leith to effect insurances at eight guineas per cent. by representing that this was the premium which he had given for insurances on the same risk at London, whereas the premiums which he had in fact paid were from fifteen to twenty-five guineas. The House of Lords, on the motion of Lord Eldon, held that the policy was vitiated by the misrepresentation. Sibbald *v.* Hill was clearly a case of fraud (*i*), and may therefore not be a conclusive authority for cases of innocent misrepresentation (*k*). Nevertheless, the correctness of Arnould's statement is confirmed by the definition of materiality in sect. 20 (2) of the Marine Insurance Act, 1906 (*l*), and by the decisions on the question of materiality in relation to concealment (*m*).

represented should have any direct bearing on the state or condition of the subject of the proposed insurance: it is sufficient that it either in fact did exert, or may reasonably be presumed to have exerted, an influence over the mind of the underwriter in determining him to assume a responsibility he would not otherwise have undertaken." This statement agrees with Judge Duer's view. Mar. Ins. vol. ii. p. 680. The difference between the two definitions is that according to Arnould and Duer a perfectly innocent misrepresentation of a matter which underwriters in general would consider unimportant would avoid the policy, if the particular underwriter could convince the jury that it had in fact influenced his mind. The Mar. Ins. Act, however, leaves no room for any further doubt upon the point.

(*g*) Sect. 20, sub-sect. 2.

(*h*) (1814), 2 Dow, 263.

(*i*) See, however, the judgment of Brett, L. J., in Rivaz *v.* Gerussi (1880), 6 Q. B. D. at p. 229.

(*k*) See *ante*, § 536.

(*l*) *Ante*, § 522.

(*m*) See *post*, § 589.

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A misrepresentation which did not influence the underwriter will not avoid the policy.

555. Even where the representation is of material facts, yet it was Arnould's view that if it satisfactorily appears that it did not influence the judgment of the underwriter, its falsity will be held not to avoid the policy. Thus, where the fact stated was "that the vessel would only carry as much rock salt as would put her in ballast trim," but it appeared that a certificate of the ship's fitness to proceed on her voyage with a cargo of rock salt was shown to the underwriters before they signed the policy, Lord Tenterden told the jury to consider whether the underwriter was guided by the certificate or the representation, and the jury, under this direction, having found for the assured, saying they thought the representation was not material, the Court of King's Bench, on motion for a new trial, refused to disturb the verdict (*n*).

When there is a presumption that the underwriter was influenced by a

Some facts there are which have so plain and direct a bearing on the estimate of the risk that a misrepresentation as to any of them will, in all cases, avoid the policy, unless

(*n*) Flinn *v.* Headlam (1829), 9 B. & Cr. 693. The facts of this case are somewhat inadequately stated in the report, and are partly to be gathered from the report of the case of Flinn *v.* Tobin (an action on the same policy) in M. & M. 367. The jury, in finding that the representation was not material, must have meant that under the circumstances it had not in fact influenced the mind of the underwriter. Taken by itself, it was clearly material in the sense which this word is now recognized to bear in marine insurance law. Phillips (Ins. s. 681) criticizes the decision, and is of opinion that the assured cannot be allowed to prove that a material misrepresentation did not influence the underwriter; but his definition of materiality is different from that now established in this country. See Phillips, Ins. s. 524. The editors submit that the rule stated by Arnould is correct, although the evidence in Flinn *v.* Headlam may not have justified its application. The Mar. Ins. Act, however, if the language used in sect. 20, sub-sect. 1, is construed literally, supports Phillips' view; and there is a passage in the judgment of Vaughan Williams, L. J., in Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. at p. 460, citing an opinion of Scrutton, J., which apparently favours this construction of the Act. But the decision of the case did not turn upon this point, and such a construction involves an anomalous state of the law. For it is clear that, apart from marine insurance, even a fraudulent misrepresentation gives no right to rescind a contract, when it has not influenced the party to whom it was made. See *ante*, § 536. Mr. Arthur Cohen supports the editors' submission: Laws of England, vol. xvii. § 809.

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the assured can show to the satisfaction of the jury that the judgment of the underwriter was not, under the circumstances, influenced by the misrepresentation.

Thus, positive representations of the day on which the ship has sailed (*o*), or on which she was last seen in safety (*p*), of the kind of armament she is fitted out with, the number of men with which she is manned (*q*), her age (*r*), and the nature of the cargo she is to carry (*s*), being all of them statements of facts manifestly material to the risk, and almost necessarily affecting the underwriter's estimate of it, will, if false, avoid the policy, unless the assured can show conclusively that the underwriter was not in fact influenced by them. In the absence of such proof the presumption is the contrary, and against the policy (*t*). In Scotland it has been held that a representation, in effecting a time policy, that a particular voyage was contemplated, was immaterial, as under the policy the assured could at will change the destination of the ship (*u*).

Representations made in answer to questions.

The circumstance that a representation relates to facts which, though material to the risk, the assured is not bound to disclose, as the age, structure or condition of the vessel, and generally all those points which are included in the warranty of seaworthiness (*x*), will not prevent its avoiding the policy, if not substantially true, when it is made in answer to inquiries by the underwriter.

According to Phillips, the question of materiality cannot

(*o*) Anderson *v.* Thornton (1853), 8 Ex. 425; Fillis *v.* Brutton (1782), 1 Park, Ins. 414; Dennistoun *v.* Lillie (1821), 3 Bligh, 202; Arnot *v.* Stewart (1817), 5 Dow, 274.

(*p*) M'Dowell *v.* Fraser (1779), 1 Dougl. 260.

(*q*) Pawson *v.* Watson (1778), 2 Cowp. 785; Edwards *v.* Footner (1808), 1 Camp. 530.

(*r*) Ionides *v.* Pacific Fire & Marine Ins. Co. (1871), L. R. 6 Q. B. 674; (1872), L. R. 7 Q. B. 517.

(*s*) Flinn *v.* Headlam (1829), 9 B. & Cr. 693.

(*t*) See per Lord Blackburn in Smith *v.* Chadwick (1884), 9 App. Cas. at p. 196.

(*u*) Harvey *v.* Seligman (1883), 10 Ct. of Sess. Cas. (4th ser.) 680.

(*x*) Shoolbred *v.* Nutt (1782), 1 Park, 492; Haywood *v.* Rodgers (1804), 4 East, 590.

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be raised when a representation is made in answer to an inquiry. "A party," he says, "in making a contract has a right to the advantage of his own judgment of what is material; and if, by making specific inquiry, he implies that he considers a fact to be so, the other party is bound to it as such" (*y*). The fact of the inquiry being made is clear evidence that the representation has influenced the mind of the underwriter. Yet when the inquiry relates to a matter which is not material (in the sense in which "material" has been defined), it may be doubted whether an honest, though inaccurate, answer will give him the right to avoid the policy (*z*).

Misrepresentation of contents of Lloyd's lists.

556. Although underwriters at Lloyd's are generally presumed to know the contents of Lloyd's lists (*a*), a positive misrepresentation of a fact material to the risk, the truth as to which may be ascertained by merely referring to Lloyd's lists, will be held to avoid the policy unless distinct proof can be adduced that the underwriter actually did inspect the lists. The presumption is that he relied upon such representation, and not upon the lists (*b*).

Rate of premium as a test of materiality.

Where the facts represented are not thus manifestly material to the risk, a presumption as to the materiality of the representation may be founded on the rate of premium. If the premium is much lower than is required in the absence of such representation, the fair presumption is that the representation induced the underwriter to take the risk at the lower

(*y*) 1 Phillips, Ins. s. 542. See Kerr *v.* Union Marine Ins. Co. (1904), 130 Fed. R. 415.

(*z*) See per Lord Esher in The Bedouin, [1894] P. 1, 12:—"If he (*i.e.*, the assured) is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers it falsely, *with intent to deceive*, though it may not be a material fact, it will vitiate the policy."

(*a*) See *ante*, § 77; *post*, §§ 614—616.

(*b*) Mackintosh *v.* Marshall (1843), 11 M. & W. 116. There is an opinion not in accord with this decision, attributed to Erle, C. J., in Foley *v.* Tabor (1861), 2 F. & F. 662.

premium; if the premium were higher than, or the same as, usual, the presumption would be the other way (*c*). Sect. 556.

Materiality a question for the jury.

557. "Whether a particular representation be material or not is, in each case, a question of fact" (*d*), a question which falls exclusively within the province of a jury (*e*). Whether the jury, in forming their judgment on this point, are to be left to draw their conclusions simply from the facts, or to be aided by the opinions of witnesses of experience and skill, such as underwriters, insurance brokers, and merchants, is a point on which the authorities are not agreed. This point will be dealt with in the chapter on "Concealment" (*f*).

Whether evidence of skilled witnesses admissible.

What amounts to a substantial compliance with a representation.

558. We proceed now to inquire when a representation will be regarded as falsified by fact.

It is provided by the Marine Insurance Act, 1906 (*g*), that "a representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer." Also that "a representation as to a matter of expectation or belief is true if it be made in good faith" (*h*).

A representation may in general terms be said to be falsified where the facts to which it relates turn out not to correspond with the statements or stipulations it contains.

In case of fraud any variance may avoid the policy.

If the representation be made with the intent to deceive, any want of correspondence between the facts as they occur and the facts as stated, however trivial, or however immaterial to the nature of the risk, will avoid the policy, on the

(*c*) See, as to presumptions from the rate of premium, Court *v.* Martineau (1782), 3 Dougl. 161; Bridges *v.* Hunter (1813), 1 M. & S. 18, 20; see also Tate *v.* Hyslop (1885), 15 Q. B. D. 368.

(*d*) Mar. Ins. Act, 1906, s. 20, sub-s. 7, *ante*, § 522.

(*e*) M'Dowell *v.* Fraser (1779), 1 Dougl. 260; Shirley *v.* Wilkinson (1781), 1 Dougl. 306, n.; Willes *v.* Glover (1804), 1 B. & P. N. R. 14; Mackintosh *v.* Marshall (1843), 11 M. & W. 116, 121; Duer on Representations, 78, 196, n. xxii., and the cases there cited.

(*f*) *Post*, § 626.

(*g*) Sect. 20, sub-sects. 4, 5.

(*h*) See *ante*, §§ 545, 546.

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ground of actual fraud (*i*), unless it be clearly proved that the representation did not influence the underwriter (*k*).

Thus, to take a case put by Judge Duer: Suppose the owner of a vessel insured "at and from" a foreign port has intelligence of her sailing, and also that a certain number of her crew had died since the commencement of the voyage, if he states truly the fact and time of her sailing, but yet, fearing the effect of the whole truth on the mind of the underwriter, represents the number of deaths to be fewer than he knows to have occurred, then, although the remaining crew may still be abundantly competent to perform the voyage, and the misrepresentation consequently be immaterial to the risk, yet this falsity of statement, being intentional, will avoid the policy (*l*).

In the absence of fraud only a substantial compliance with the representation is required.

559. In cases, however, where there is no actual fraud, the rule is different. The result of all the cases is that, although a warranty, being in terms written on the face of the policy, will avoid it unless fulfilled to the letter, yet a representation, forming no part of the policy, will, in the absence of actual fraud, be satisfied by a substantial compliance, and will not be deemed falsified unless departed from in some material point. In the words of Lord Mansfield, "A representation may be equitably and substantially answered, but a warranty must be strictly complied with" (*m*).

Thus, to take an illustration from a case already more than once referred to, where the representation made as to the ship was, "she mounts twelve guns and twenty men," and it turned out that the ship, in fact, had on board only nine

(*i*) According to Duer, the presumption that the insurer was induced by the falsehood to enter into the contract should prevail in all cases, except where it is apparent that had the truth been known in its whole extent, it could not possibly have varied the terms of the contract; and where the misrepresentation is intentional, such a case can hardly be expected to occur. The underwriter is entitled to the benefit of any uncertainty. 2 Duer, Ins. 692, 693.

(*k*) See *ante*, § 555.

(*l*) 2 Duer, Ins. 692.

(*m*) De Hahn *v.* Hartley (1786), 1 T. R. 345.

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carriage-guns and sixteen men, yet, as she had also on board six swivels and nine boys, and as it was satisfactorily proved that with this force she was stronger than she would have been with twelve carriage-guns and twenty men, Lord Mansfield held that there had been a substantial compliance with the representation, *i.e.*, no such falsification of it as to avoid the policy (*n*). Had these same words been inserted in the policy as a warranty, the policy would have been avoided by her carrying one man or one gun less than the exact number specified.

So if a ship which is only represented as neutral, and which, in fact, belongs to a neutral state, be documented and navigated according to its laws, condemnation for breach of neutrality will not avoid the policy, though it would be otherwise if she were warranted neutral (*o*).

A statement that a vessel had been last metalled in 1867 was held to be substantially true, where the bottom had been then overhauled and new metal put on where required, so that the bottom was in as good a state as if it had been entirely re-metalled (*p*).

Wherever, in fact, there is no intention to deceive, the falsity of the representation, in order to avoid the policy, must produce such an alteration of the risk represented to the underwriter, as to lead to the reasonable conclusion, that, had the truth been known, he would either not have signed the policy at all, or would have asked a higher premium for so doing. If, upon the whole of the evidence, it appears doubtful whether such would be the effect of the non-correspondence of the facts with the statement, the assured is

(*n*) Pawson *v.* Watson (1778), 2 Cowp. 785.

(*o*) Von Tungeln *v.* Dubois (1809), 2 Camp. 151; see also Nonnen *v.* Kettlewell (1812), 16 East, 176; where the same point was determined in a case where the assured had represented that his property was neutral, but refused to warrant it as such. See also Christian *v.* Ditchell (1797), Peake's Additional Cases, 141, as to what will satisfy a representation that ship is to sail with convoy.

(*p*) Alexander *v.* Campbell (1872), 41 L. J. Ch. 478.

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entitled to the benefit of the doubt, and the policy shall stand in force (*q*).

Representations require more or less strict compliance according to their nature.

560. Under this rule different degrees of strictness in compliance will be required in case of different representations. For instance, positive representations, with regard to the time of the ship's sailing, where that fact is material to the risk, must be complied with almost as literally as express warranties to the same effect. In the case of sailing vessels, the smallest difference is often very material, as in the case mentioned by Lord Ellenborough, of two vessels, "one of which sailed to Nova Scotia and back before the other had made any material progress in her voyage, only from the advantage of having a few hours' start" (*r*).

Hence, where in an assurance "at and from," the broker's instructions stated the ship to be ready to sail on the 24th of the month, and the broker represented the ship to be in port when in fact she had sailed on the 23rd, this was held such a falsity as to avoid the policy (*s*). So where the representation was that the ship "will sail in the month of October," which by the usage of trade was shown to mean "between the 25th of October and the 1st or 2nd of November," and the ship, in fact, sailed on the 11th of October, this was held fatal to the policy (*t*). So where the broker, proceeding on a false computation founded on a misconception of intelligence truly communicated to him, stated to the underwriter that the ship "was seen safe in the Delaware on the 11th," whereas, in fact, she had been taken on the 9th, this was held such a misrepresentation as to avoid the policy (*u*).

(*q*) Where there is actual fraud, the presumption, according to Duer, is the other way: see *ante*, § 558, note (*i*).

(*r*) In Kirby *v.* Smith (1818), 1 B. & Ald. 672, 674.

(*s*) Fillis *v.* Brutton (1782), 1 Park, Ins. 414; 1 Marshall, Ins. 462, 465.

(*t*) Chaurand *v.* Angerstein (1791), Peake, N. P. 43.

(*u*) M'Dowell *v.* Fraser (1779), 1 Dougl. 260. And see the principle of the above cases further illustrated in that of Arnot *v.* Stewart (1817), 5 Dow, 274.

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Where, however, it appears reasonable to conclude, from the whole circumstances of the case, that the failure to comply with the strict terms of the representation has not substantially altered the nature of the risk, as described in the policy, such non-compliance will not discharge the underwriter's contract (*x*).

Underwriter signing a policy inconsistent with representation waives compliance therewith.

561. Moreover, if the underwriter subscribe a policy, inconsistent in its terms with those of a representation made to him before doing so, he waives his right to require a substantial compliance with the representation, or to insist on a failure therein as avoiding the policy (*y*).

A representation may be withdrawn before the contract is concluded.

A representation may be withdrawn or corrected at any time before the contract is concluded, either expressly, by a declaration from the assured to the underwriters that he was mistaken or will not be held to a compliance with the representation, or impliedly, by a subsequent qualifying or controlling statement (*z*).

Does a representation falsified in all cases avoid the insurance *ab initio?*

562. If the representation relates to a fact, the existence of which is to precede the commencement of the risk, its substantial truth when the policy attaches is indispensable; and if then false the policy will be avoided. If, however, the representation promises either expressly or impliedly that certain facts shall continue to exist, as where it states that the vessel is provided with a certain armament, is neutral,

(*x*) Bize *v.* Fletcher (1779), 1 Dougl. 12, n., 284.

(*y*) *Ibid.*

(*z*) Mar. Ins. Act, 1906, s. 20, sub-s. 6; Carter *v.* Boehm (1766), 3 Burr. 1905; Dawson *v.* Atty (1806), 7 East, 367; Edwards *v.* Footner (1808), 1 Camp. 530. Dawson *v.* Atty, says Maclachlan (Arnould, 6th ed. p. 543), is a remarkable decision, as there was nothing to qualify or cancel the first statement. Lord Ellenborough, however, continued of the same mind when Edwards *v.* Footner was before him, and this case was referred to and approved of by him. In Kerr *v.* Union Marine Ins. Co. (1904), 130 Fed. R. 415, the Circuit Court of Appeals held that a representation that a ship had not sailed, made more than a month before the policy was effected, was in the circumstances not only material, but also a continuing representation, and that as it had not been corrected, the policy was avoided.

Sect. 562. &c., and this promissory representation is falsified by facts arising subsequently to the policy having attached (*a*), Judge Duer thinks, by analogy to the doctrine which prevails in the case of warranties (*b*), that this will not relate back so as to avoid the policy *ab initio*, but that the underwriter will be liable for losses that have taken place between the commencement of the risk and the failure to comply with the representation (*c*).

It should seem also that if such breach of a promissory representation be transitory in its nature, it will not exonerate the underwriter from liability for subsequent losses not connected with, or in any degree arising from it (*d*).

Thus, again, to take a case put by Judge Duer: If the master of a vessel represented to be neutral should, on being lawfully detained by a belligerent cruiser, refuse to produce the necessary documents of national character, this, by rendering the ship liable to seizure, would undoubtedly be failure to comply with the implied promissory representation, that the ship should continue neutral throughout the voyage. If the ship on this distinct ground were captured and condemned, the underwriter would, unquestionably, not be liable for the loss; but if she were released, and continued her voyage, and were afterwards lost by the perils of the seas, the better opinion would seem to be, that the assured ought not to be deprived of his indemnity on account of the previous failure to comply with the representation of neutrality (*e*).

Promissory representations falsified

563. There can also be little question that, as in the case of warranties, if promissory representations are falsified after

(*a*) This passage, like the others relating to promissory representations, is preserved subject to the criticism of the doctrine of promissory representations, *ante*, §§ 542—544.

(*b*) See *post*, § 634.

(*c*) 2 Duer, Ins. 696.

(*d*) Duer in suggesting this rule confines it to losses not proceeding from the act or will of the assured. 2 Ins. 697.

(*e*) 2 Duer, Ins. 697, 698.

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by an act of the home government, by force or unavoidable accident.

the policy has attached, by an act of the home government (*f*), by irresistible force or unavoidable accident, the validity of the contract will not be affected thereby. Thus, where the government, to which a vessel represented neutral belongs, becomes involved in war after the policy has attached, this, although materially affecting the risks, would not, it seems, avoid the policy (*g*).

So, if it were represented that a vessel should sail with convoy, or a certain armament, and peace be proclaimed before the voyage commenced, it would manifestly be unreasonable to exact the performance of this representation as a condition of the underwriter's liability (*h*).

Construction of representation.

The words are to be taken in their plain and obvious meaning.

564. In the construction of representations, the primary rule is to take the words in their plain and obvious meaning, and in that sense in which it is most reasonable to conclude that they were understood by the underwriter (*i*).

Thus, it has been determined in the United States, in the case of a policy effected at Boston on a New York ship, that a representation on the part of the assured, residing at New York, that she was "coppered," must have been understood by the Boston underwriters to have been used in the sense which it bears in New York (*k*).

All that would reasonably and necessarily be inferred by mercantile men from the language employed will be considered as forming part of the representation.

Ratcliffe *v.* Shoolbred.

Thus, where the assured, knowing that the ship had sailed from the coast of Africa in the course of the 2nd of October, simply stated to the underwriter "that the ship was on the coast the 2nd of October," this representation was construed as meaning that the last intelligence left the ship on the coast, and that no advice of her actual sailing had been

(*f*) See, however, *post*, § 636.

(*g*) 2 Duer, Ins. 699.

(*h*) *Ibid.*

(*i*) See Sibbald *v.* Hill (1814), 2 Dow, 263.

(*k*) Hazard *v.* New England Marine Ins. Co. (1834), 8 Peters, S. C. R. 557; 1 Phillips, Ins. 566.

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received: and the jury, under the direction of Lord Mansfield, found that the policy was void for misrepresentation and concealment (*l*).

Kirby *v.* Smith.

So, where the owner of a ship, in order to induce the underwriters to take an insurance on her "from Elsinore to Hull," stated to them that the ship "was all well at Elsinore on the 26th of July," Bayley, J., said that "the natural conclusion from this representation would be that she was left there well at that time"; and therefore, as it appeared that she had sailed from Elsinore, to the owner's knowledge, on the 26th of July, six hours before the vessel on board which he himself had left that port, the Court held the policy void for misrepresentation and concealment (*m*).

Words designedly ambiguous.

565. If the language of the representation be designedly ambiguous, the underwriter, if deceived, would be discharged from all liability upon the policy on the ground of fraud.

Words obviously ambiguous, without fraud.

If in the absence of fraudulent design there be such obvious ambiguity as might have suggested doubts to the underwriter as to the meaning of the representation, and impelled him to seek an explanation from the assured, and if he omit to do so, he will not be permitted to avail himself of the representation not being true in the sense in which he understood it. This rule will especially hold where the form of the statement itself shows that in all probability it was not meant as a positive representation; or where it suggests on the face of it, as by reference to other sources of information, that it is not to be taken as a complete statement of the case (*n*).

Freeland *v.* Glover.

Thus, where a policy was effected on a ship "lost or not lost at and from twenty-four hours after her arrival at her first place of trade on the coast of Africa, during her stay and trade on the coast, and at and from thence to Liverpool," and the assured had submitted to the underwriters, before the

(*l*) Ratcliffe *v.* Shoolbred (1780), 1 Park, Ins. 413.
(*m*) Kirby *v.* Smith (1818), 1 B. & Ald. 672, 675.
(*n*) Brine *v.* Featherstone (1813), 4 Taunt. 869; Freeland *v.* Glover (1806), 7 East, 457.

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subscription of this policy, a letter from the master containing the latest intelligence as to the then state and condition of the ship, but referring to a former letter from the master on the same subject, which was not exhibited; the Court held that the mention of the former letter, in the second, ought to have put the underwriters upon an inquiry as to the nature of the first communication, and that they were not entitled to complain of the suppression of the first letter as a concealment (*o*).

When representation must be construed with reference to usage.

566. The words of a representation, equally with those of the policy itself, must, if technical or of peculiar mercantile import, be construed with reference to the usage of trade. Thus, where it was represented that a ship was to sail "in the month of October," evidence was admitted to show that this, by the usage of trade, meant that she was to sail "between the 20th of October and the 1st or 2nd of November"; and as she actually did sail on the 11th of October, this was held a failure to comply with the representation that avoided the contract (*p*).

Chaurand *v.* Angerstein.

Representation refers generally to the time of making the contract.

567. A representation, in order to have any effect upon the policy, must have been made "during the negotiations for the contract, and before the contract is concluded" (*q*). And the contract "is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped" (*r*). Every representation is construed to mean that the facts represented are then true, and that no other facts bearing on the representation are then known to the assured.

(*o*) Freeland *v.* Glover (1806), 7 East, 457.
(*p*) Chaurand *v.* Angerstein (1791), Peake, N. P. 43.
(*q*) Mar. Ins. Act, 1906, s. 20, sub-s. 1.
(*r*) *Ibid.* s. 21.

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What has been stated before this time is liable to be qualified or controlled by what passes at such time.

Former doctrine. Dawson *v.* Atty.

Formerly the practice to consider the contract binding as soon as the slip was initialed was not recognized by the Courts, and the material time, in questions of misrepresentation or concealment, was the time when the policy was subscribed (*s*).

Now the initialing of the slip concludes the contract.

568. Among merchants, however, the initialing of the slip was always regarded as the making of the contract, and since the statute 30 Vict. c. 23, the Courts have recognized this course of business (*t*); and accordingly it was held, that after the initialing of the slip any fresh fact coming to the knowledge of the assured need not be communicated to the underwriters, however material it might be (*u*).

So also any misrepresentation made after the agreement for the insurance, as by the signing of a slip, will not avoid the policy, for it did not influence the underwriter in accepting the risk (*x*).

Ionides *v.* Pacific Fire, &c. Ins. Co.

A broker agreed with an insurance company for an open policy for 5,000*l.* on hides by ship or ships, to be declared, and the slip was signed. Hides to the value of 2,455*l.* were shipped on an old French ship called the "Socrate." There was a new Norwegian ship called the "Socrates," and the broker, believing this to be the ship on which the hides were shipped, made a statement to that effect and wrote out a second slip for a policy for 2,455*l.* on hides per the "Socrates," to be issued in respect of the agreed insurance, and in the policy the hides were described as shipped on the "Socrates." The Court decided that the misnomer was of no consequence, as the company had bound themselves to

(*s*) See Dawson *v.* Atty (1806), 7 East, 367, and note (*z*) on § 561.

(*t*) *Ante*, § 34.

(*u*) Cory *v.* Patton (1872), L. R. 7 Q. B. 304; (1874), L. R. 9 Q. B. 577; Lishman *v.* Northern Maritime Ins. Co. (1873), L. R. 8 C. P. 216; in the Exch. Ch. (1875), L. R. 10 C. P. 179.

(*x*) Ionides *v.* Pacific Fire & Marine Ins. Co. (1871), L. R. 6 Q. B. 674; in the Exch. Ch. (1872), L. R. 7 Q. B. 517.

insure hides on board any ship selected by the assured, and the representation was subsequent to the agreement for the insurance (*y*). Sect. 568.

Representation may be withdrawn before contract concluded.

569. The assured, it has already been said (*z*), is at liberty before the contract is concluded to withdraw or qualify any previous representation, by which he does not wish to be bound. It has been held that when the underwriter has, after initialing the slip, become aware that material facts have not been disclosed to him, and has afterwards executed a policy without protest, he is not estopped from setting up the defence of concealment (*a*). The reason is, that an underwriter who has initialed a slip is in honour bound, according to the practice of underwriters, to execute a stamped policy, if only to enable the assured to sue him. It seems to follow that when a misrepresentation has been corrected after the slip has been initialed, the mere fact that the underwriter has executed a policy is not in itself enough to prevent him from claiming to avoid the contract on the ground of the misrepresentation. It must depend on the circumstances of the particular case whether the underwriter has in fact elected to treat the contract as a binding one, or whether he is estopped from saying that he has not so elected (*b*).

Effect of issue of policy after correction of misrepresentation.

What diligence necessary in correcting misrepresentation.

570. A representation should be forthwith corrected in case there be reason to suppose that it cannot be sustained as made. Thus, where the agent of the assured, after hearing of the loss of the ship, allowed the post to go with his previous letter uncontradicted, inducing others to suppose that she was safe when the post left, such omission was held to amount to a misrepresentation, on the part of the agent, which avoided the policy (*c*).

(*y*) Ionides *v.* Pacific Fire & Marine Ins. Co., *supra*.

(*z*) *Ante*, § 561.

(*a*) Morrison *v.* Universal Marine Ins. Co. (Exch. Ch.) (1873), L. R. 8 Ex. 197.

(*b*) See *ante*, §§ 523 *et seq.*

(*c*) Fitzherbert *v.* Mather (1785), 1 T. R. 12. The editors have already

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It has been held in the United States, but before the days of the electric telegraph, that although the assured or his agents are bound to act with promptitude and despatch in countermanding an order for insurance founded on false intelligence, they are not bound to resort to extraordinary means of communication for this purpose; they need not send an express unless that be the usual mode (*d*).

Misrepresentation to the first underwriter extends to all.

571. Where there are several underwriters to the same slip or policy, a representation of a material fact to the underwriter whose name stands first extends to all the rest, so that each, when it proves false, may avail himself of the defence. The ground of this rule is the reasonable presumption that the others subscribed from the confidence reposed by them in the skill and judgment of him whose name stood first, and their belief that he had duly ascertained and weighed all the circumstances material to the risk (*e*). This rule, however, is subject to many limitations.

Limitations on this rule.

(1) It only extends to representations pertinent to an ordinary insurance.

It must strictly be confined to intelligence relating to the proposed insurance, with regard to which it is reasonable to suppose that the first underwriter would require information, and without being informed of which, it may be presumed, he would not have accepted the risk. It cannot, therefore, extend to such representations as relate to matters of collateral agreement, which a subsequent underwriter can have no reason to infer, from the terms of the policy, to have been communicated to the first.

expressed the view that this case is one of concealment rather than of misrepresentation. *Ante*, § 553, note (*c*).

(*d*) See Greene *v.* Merchant Ins. Co. (1830), 10 Pickering, Mass. R. 402; M'Lanahan *v.* Universal Ins. Co. (1828), 1 Peters, S. C. R. 186; 1 Phillips, s. 561. See, however, Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511.

(*e*) The English cases which establish the rule are Pawson *v.* Watson (1778), 2 Cowp. 785; Barber *v.* Fletcher (1779), 1 Dougl. 306; Stackpole *v.* Simon (1779), 2 Park, Ins. 933; Marsden *v.* Reid (1803), 3 East, 572; Feise *v.* Parkinson (1812), 4 Taunt. 640; Forester *v.* Pigou (1813), 1 M. & S. 9, 13; Bell *v.* Carstairs (1810), 2 Camp. 543. The rule has been adversely criticized. The editors have, however, been informed that a broker at Lloyd's, having written out the slip, usually tries first to obtain the signature thereto of some underwriter with a high reputation for experience and prudence, and that, if he succeeds, it is easy to obtain further subscriptions. This practice seems to them to afford a strong argument in favour of the rule.

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Thus, in Pawson *v.* Watson, Lord Mansfield held, that a representation that "the ship mounts twelve guns and twenty men," being in effect an engagement that the ship should sail with that armament, could not affect subsequent underwriters, to whom it had never been communicated, merely upon proof that it had been made to the underwriter whose name stood first in the policy. "A representation to the first underwriter," says his Lordship, "has nothing whatever to do with that which is the agreement or the terms of the policy; no man who underwrites a policy subscribes, by the act of underwriting, to terms of which he knows nothing, but he reads the agreement and is governed by that: matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of the first underwriter, who is a good man, which another will therefore give faith and credit to, but not to a collateral agreement which he can know nothing of" (*f*).

Of course, if the representation to the first underwriter be not of material facts, it cannot avail a subsequent one; and if it was of such a nature that it ought to have put the first underwriter on further inquiry, it will be equally imputed to the negligence of the subsequent underwriter that no such inquiry was made (*g*).

(2) Formerly the rule was only applicable to the policy.

572. Until the decisions under 30 Vict. c. 23, the applicability of this rule was restricted to the policy, because the slip could not even be given in evidence for any purpose whatever (*h*); but since the slip may be given in evidence

(*f*) 2 Cowp. 788.

(*g*) Barber *v.* Fletcher (1779), 1 Dougl. 306.

(*h*) Marsden *v.* Reid (1803), 3 East, 572. In this case the names of the underwriters appeared in a different order on the policy from that on the slip; but the slip was not admissible in evidence, as the law then stood, to show that the underwriter to whom a representation had been made stood first in order on the slip though not on the policy.

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whenever it is material (*i*), the rule becomes applicable to either the policy or the slip, and will probably, in consequence of the state of facts, be more frequently applied to the latter than the former.

(3) The rule includes only representations that lower the terms.

573. A still further limitation of the same rule is, that it only applies where the tendency of the representation is to induce the underwriters to take the risk on lower terms.

Where the first underwriter was called to prove a representation made to him, the tendency of which would have been to increase the estimate of the risk, Lord Tenterden decided, at Nisi Prius, that this evidence was not admissible as against a subsequent underwriter (*k*).

The rule not favoured.

Even under these limitations the English Courts have regarded the rule with great jealousy, and on many occasions have expressed their dissatisfaction with it. Heath, J., on one occasion said, that "the evidence had been admitted rather on precedent than on reason" (*l*); and Lord Ellenborough—"Whenever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification; it may depend on the time and circumstances under which that communication was made; but on the mere naked unaccompanied fact of one name standing first on the policy, I should not hold that a communication made to him was virtually made to all the subsequent underwriters"; and his Lordship said that the question was one of such magnitude that if it should arise he should direct it to be put on the record for the opinion of all the judges (*m*).

Where the first underwriter

574. Of course, if the subscription of the first underwriter is obtained under a secret agreement or understanding that

(*i*) See Mar. Ins. Act, 1906, s. 89, *ante*, §§ 34 *et seq.*
(*k*) Robertson *v.* Majoribanks (1819), 2 Stark. N. P. 573, 575; 2 Duer, Ins. 779.
(*l*) Brine *v.* Featherstone (1813), 4 Taunt. 869.
(*m*) In Forester *v.* Pigou (1813), 1 M. & S. 13.

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it is not to be binding, and for the sole purpose of leading others to insure, the exhibition of the policy or slip thus subscribed is justly regarded as a fraud on the subsequent underwriters, and on that ground avoids the policy (*n*). This rule, it is said, will extend to the case of any prior underwriter, though his name may not be first in the policy (*o*).

is a mere "decoy duck," this avoids the contract.

(*n*) Whittingham *v.* Thornburgh (1690), 2 Vernon, 206; Wilson *v.* Ducket (1761), 3 Burr. 1361; see also the observations of Lord Eldon in Sibbald *v.* Hill (1814), 2 Dow, 263. The first underwriter in such cases has been called in England, a decoy duck; on the Continent, a dolphin, who leaps from the water that others may follow. 1 Emerigon, c. ii. s. 4, p. 43.
(*o*) 2 Duer, 679.

CHAPTER II.

CONCEALMENT.

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Definition and general principles.

575. CONCEALMENT, in the law of insurance, is the suppression of, or neglect to communicate, a material fact within the knowledge of one of the parties which the other has not the means of knowing, or is not presumed to know. A material fact is one which is calculated, if communicated to the other of the parties, to induce him either to refrain altogether from the contract or not to enter into it except on more favourable terms (*a*). Defined in these terms, the principle is equally applicable to the assured and the underwriter.

The contract is one *uberrimæ fidei* (*b*), and on the plainest principles of equity such a contract which one party has thus been induced to enter upon from his ignorance of the thing concealed shall not be enforced against him by the other who has concealed it. Whether such suppression of the truth arise from fraud (that is, from a wilful intention to deceive for the party's own benefit), or merely from mistake, negligence, or

(*a*) See *post*, § 589; 1 Marshall, Ins. 463; 1 Phillips, s. 531; and per Tindal, C. J., in Elton *v.* Larkins (1832), 5 C. & P. 392.

(*b*) See Mar. Ins. Act, 1906, s. 17, *ante*, § 522.

accident, the consequences will be the same (*c*). Nor is it any excuse that the assured, knowing the fact, failed to recognize its materiality, and for this reason refrained from disclosing it (*d*). The ground, in short, on which the policy is avoided is that the party has been, in fact, deceived, not that the other party has intended to deceive him.

Principles on which concealment avoids the policy.

As we have seen in the preceding chapter (*e*), it is a condition of this contract, implied by law as a matter of public policy, that the contract is free from misrepresentation or concealment; and if there is a breach of this condition, either by misrepresentation or concealment of a material fact, the contract is voidable. Fraud in its effect goes beyond the condition; for if fraud be present in either form, whether of misrepresentation or concealment, it avoids the policy, although the subject misrepresented or concealed be not a material fact (*f*).

Generally speaking, as the facts lie most within the peculiar knowledge of the assured, it is the underwriter who avails himself of the defence of concealment; yet he, as well as the assured, is bound to disclose all circumstances, peculiarly within his own knowledge, in any degree affecting the risk. Thus, if the underwriter, at the time of subscribing the policy, knew that the ship had arrived safe, the contract will be void as to him, and an action will lie against him to recover back the premium (*g*).

Provisions of

The assured's duty as regards Disclosure is particularly

(*c*) Carter *v.* Boehm (1766), 3 Burr. 1909; Ratcliffe *v.* Shoolbred (1780), 1 Park, Ins. 413; 1 Marshall, Ins. 464; Shirley *v.* Wilkinson (1786), 1 Dougl. 306, n.; Thompson *v.* Buchanan (1782), 4 Br. P. C. 482; per Willes, J., Anderson *v.* Pacific Fire & Mar. Ins. Co. (1872), L. R. 7 C. P. 65, 68; *per cur.* Ionides *v.* Pender (1874), L. R. 9 Q. B. 531, 537.

(*d*) See Hewitt Brothers *v.* Wilson, [1914] 3 K. B. 1131; [1915] 2 K. B. 739.

(*e*) *Ante*, § 535.

(*f*) *Ante*, § 536.

(*g*) Per Lord Mansfield in Carter *v.* Boehm (1766), 1 W. Bl. 594; 3 Burr. 1909; *ante*, § 522, note (*a*); see also 3 Benecke, System des Assecuranz, c. x. pp. 90, 91.

Sect. 575. the Mar. Ins. Act as to concealment.

enunciated in the eighteenth and nineteenth sections of the Marine Insurance Act, 1906, as follows:—

Sect. 18.—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Sect. 19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Sect. 576. Time of concealment.

576. The duty to disclose ceases to exist as soon as the contract is concluded; and as already stated in respect of Representations (*h*), by the express provision of the Marine Insurance Act, 1906 (*i*), following the decisions of the Courts, the contract is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not (*j*). Consequently anything coming to the knowledge of either party afterwards, however material it may be, need not be communicated to the other, notwithstanding a policy has not yet been executed in accordance with the slip (*k*).

When policy altered or rectified.

Where a broker was instructed to effect a policy on goods, and by mistake effected one on the ship, and the underwriter afterwards agreed to an alteration of the policy, it was held that the broker was bound to disclose a material fact which had come to his knowledge between the execution of the policy and the rectification of the mistake (*l*). The reason, as Duer points out, is that the underwriter was under no obligation to make the alteration. By doing so he was really making a new and distinct insurance. If on the other hand the alteration does not make a new contract, but merely declares the true meaning of the contract already concluded, this reasoning does not apply, and there is no necessity to disclose the information acquired after the making of the contract (*m*).

In case of re-insurance.

It has been pointed out by Duer, and agrees with what has been said, that the duty of an underwriter who effects a

(*h*) *Ante*, §§ 522, 567.

(*i*) Sect. 21.

(*j*) When, however, the policy tendered to the underwriter and executed by him does not correspond with the slip, it is no defence that a fact material to the risk described in the slip, but not to that described in the policy, was not disclosed. British & Foreign Mar. Ins. Co. *v.* Sturge (1897), 77 L. T. 208; 2 Com. Cas. 204.

(*k*) Ionides *v.* Pacific Fire & Mar. Ins. Co. (1871), L. R. 6 Q. B. 674; (1872), 7 Q. B. 517; Cory *v.* Patton (1872), L. R. 7 Q. B. 304; Lishman *v.* Northern Maritime Ins. Co. (1873), L. R. 8 C. P. 216; (1875), 10 C. P. 179.

(*l*) Sawtell *v.* Loudon (1814), 5 Taunt. 359.

(*m*) 2 Duer, 427.

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re-insurance to communicate his information relates to the time when he effects the re-insurance, not to the time when the original insurance was made. Therefore he must disclose material information which has come to his knowledge between the making of the original contract and the making of the contract of re-insurance (*n*).

Policy effected by an agent in ignorance of a material fact known to his principal.

577. If an agent, in ignorance of a loss that has happened, effect an insurance for his principal who knew of the loss at the time the contract was concluded, but "too late to communicate it to the agent" (*o*), the policy will not be avoided by the concealment; if on the other hand the principal, knowing of the loss in time to communicate it to the agent, effected the contract through an agent who was ignorant of it, the non-communication of the fact of loss will of course vitiate the policy (*p*). For, by the Marine Insurance Act, 1906, "an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him" (*q*).

Duty of principal to send information to agent.

Material facts, brought to the knowledge of the assured after orders given to insure, ought to be forwarded with the utmost degree of reasonable diligence, so as to reach the underwriter before the insurance is actually effected (*r*). When the principal can communicate by telegraph with his

(*n*) 2 Duer, 429.

(*o*) Mar. Ins. Act, 1906, s. 19 (b).

(*p*) 2 Valin, l. 3, c. 6, art. 40.

(*q*) Sect. 19 (a). If the final words "communicated to him" include communications which ought to have been made to the agent by third parties, such as his own servants, the result will be that a principal may have to suffer because his agent has not been kept properly informed by such third parties. If so, these words go beyond any decision upon this point. For the construction of the preceding words "ought to be known by him," the authorities afford scarcely any assistance.

(*r*) Grieve *v.* Young (1782), Millar, Ins. 65. It has been held in the United States that the diligence required of the principal is not in every case the utmost possible diligence that might be exacted, but a reasonable diligence to be judged of under all the circumstances of the particular case. McLanahan *v.* Universal Ins. Co. (1828), 1 Peters, 170. See the cases in 1 Phillips, s. 561.

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agent, it is no doubt usually his duty to do so in case of a loss (*s*).

If, owing to the fraud, negligence, or mistake of the agent, material information, or an order from his principal countermanding the insurance, do not reach the agent in time, a policy effected by him in ignorance of the information or of the order will be vitiated. It has been held not to be negligence in an agent to effect a policy in the morning before calling at his office, where news of a loss awaited him (*t*).

When knowledge of agent is imputed to principal.

578. Sect. 18 (1) of the Marine Insurance Act, 1906, declares that "the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him." This statement generalizes a principle which has been laid down with reference to matters known to agents of the assured, upon whom he relies for information. There are certain persons employed by shipowners and owners of cargo, such as masters and trading agents, whose duty it is to keep their employers informed of all matters affecting the property which it is sought to insure. If one of these agents has withheld information of a material fact from his principal which he might, in the ordinary course of things, have communicated to the latter at the time when the insurance is effected, the contract can be avoided by the underwriter on account of the non-disclosure of this fact, which, if the agent had done his duty, the principal would have been able to disclose. In such a case it may be said that the knowledge of the agent is the knowledge of the principal (*u*).

Rule laid down in Proudfoot *v.* Montefiore.

The law on the subject of concealment through the fault of an agent who has taken no part in negotiating the insurance was comprehensively laid down by the Court of Queen's

(*s*) See Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511.

(*t*) Wake *v.* Atty (1812), 4 Taunt. 493.

(*u*) Per Lord Watson and Lord Macnaghten, Blackburn *v.* Vigors (1887), 12 App. Cas. 531, 540, 542.

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Bench in a judgment (*x*) which, with some qualifications, was adopted by the House of Lords in Blackburn *v.* Vigors. "If an agent," said the Court, "whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it."

Agents whose knowledge is imputed to principal.

579. In Blackburn *v.* Vigors the House of Lords held that it is not every agent whose knowledge can be deemed to be the knowledge of his principal. "Some agents," said Lord Halsbury, "so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts and intentions and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal" (*y*). The agent whose knowledge is deemed to be that of his principal must

(*x*) Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511, 521.
(*y*) 12 App. Cas. 537, 538.

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be one to whom the principal looks for information concerning the property insured (*z*).

The master of a ship and the general agent of a shipowner for the transaction of his shipping business are agents whose knowledge will be deemed to be the knowledge of the shipowner (*a*). Similarly, in one case, the consignor and shipper of a cargo, who was directed to send the shipping documents to the agent who effected the insurance (*b*), and in another case the general representative of the assured at a foreign port (*c*), have been held to be agents with whose knowledge the owner of cargo is affected. There is an imperfectly reported Scotch case in the House of Lords, in which it seems to have been decided that a policy was vitiated owing to the knowledge of a clerk of the assured that a loss had taken place (*d*). Whether this be the *ratio decidendi* or not, it is certainly the duty of a clerk to disclose to his employer whatever information he receives in regard to the latter's business, and it is submitted that the employer is responsible for not disclosing a fact which was within the knowledge of his clerk.

Lloyd's agents in foreign ports are not the agents of the individual underwriters at Lloyd's, and therefore the latter are not affected with knowledge of matters known to the former (*e*).

Insurance broker not under a duty to send information to his principal.

580. An insurance broker who is employed to obtain an insurance on a particular risk is not one of the agents whose duty it is to give information to the principal. Therefore, a

(*z*) Per Lord Watson, *ibid.* 541; per Lord Macnaghten, *ibid.* 542.
(*a*) Gladstone *v.* King (1813), 1 M. & S. 35; per Lord Halsbury, 12 App. Cas. 537; per Lord Watson, *ibid.* 540.
(*b*) Fitzherbert *v.* Mather (1785), 1 T. R. 12. For the facts of this case, see *ante*, § 553. The decision was approved in Proudfoot *v.* Montefiore, *infra*, and much discussed in Blackburn *v.* Vigors (1886), 17 Q. B. D. 553; (1887), 12 App. Cas. 531.
(*c*) Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511.
(*d*) Stewart *v.* Dunlop (1785), Park, vol. i. p. 446.
(*e*) Wilson *v.* Salamandra Ass. Co. of St. Petersburg (1903), 8 Com. Cas. 129.

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policy is not avoided by concealment or by the non-disclosure of facts, unknown to the principal, but within the knowledge of an insurance broker employed by him, but *through whom the policy in question was not made*.

The case in which this was decided was as follows:—

Blackburn v. Vigors.

Blackburn & Co., of Glasgow, the plaintiffs, finding that a ship on which they were insurers was overdue, instructed Rose, Murison & Co., of the same place, to procure a re-insurance, and the latter applied to their London agents, Rose, Thompson & Co., for that purpose. One hour later on the same day, Murison was informed of facts tending to show that the ship had been lost some days previously. Soon after came the reply from London quoting a higher rate than the limit fixed. Murison showed the plaintiffs the reply, and then, without communicating to them the information as to the loss, telegraphed in the name of the plaintiffs to London, and thus put the plaintiffs in direct communication with their agents in London, through whom re-insurances to the amount of 800*l.* were effected in London the same afternoon; but as rates continued to rise, the plaintiffs closed their communications with Rose, Thompson & Co., and next day through their own brokers, Roxburgh & Co., in London, effected the policy with the defendant Vigors. The ship had, in fact, been lost some days before the plaintiffs tried to re-insure; but they and Roxburgh & Co. both acted in good faith and did not conceal any material fact within their knowledge.

The Court of Appeal decided (Lord Esher dissenting) that the insurance effected by Roxburgh & Co. was void on account of the concealment by Murison (*f*). Lindley, L. J., held that the assured could not take advantage of the ignorance in which they had been improperly kept by someone whose legal, or even whose moral, duty it was to inform them of the facts concealed. Lord Esher declined to follow, or distinguished, the cases on which the majority of the Court relied.

(*f*) Blackburn *v.* Vigors (1886), 17 Q. B. D. 553.

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He thought that the underwriter cannot be assumed to rely upon the diligence and accuracy of an agent of the assured of whose existence, as in this case, he could not have had a suspicion: further, that there was no agent or servant of a shipowner, still less of an owner of cargo, whose implied duty it is to make an immediate communication of information. Lord Esher, therefore, held that a contract of insurance is not vitiated by the concealment of any agent, other than an agent by or through whom the contract was made.

The House of Lords held, as has already been said, that the insurance is not vitiated by the non-disclosure to the underwriter of facts unknown to the assured, but within the knowledge of an agent of his, unless the agent is one to whom the principal looks for information relating to the property insured. They considered that a broker employed to effect an insurance on a particular risk is not an agent whose knowledge can be imputed to his principal, except, of course, in respect of insurances effected by him. He is not employed to gain such knowledge, nor can any insurer suppose that he has knowledge, in the ordinary course of his employment, like the master of a ship or the owner himself, as to the condition or history of the property. Consequently, the House of Lords held that the assured could recover on the policy effected by Roxburgh & Co. (*g*).

Some stress was laid by Lord Halsbury, in Blackburn *v.* Vigors, upon the fact that Murison's agency had terminated when the policy was effected with the defendant. It is submitted that this fact was immaterial. If the agent be one whose duty it is to communicate his information to his principal, the underwriter is entitled to assume that he did, while his agency lasted, fulfil this duty. If the agent has done so, the principal will, in his turn, be able to disclose the information to the underwriter when the policy is effected, and it can make no difference that in the meanwhile the agency has been terminated.

(*g*) 12 App. Cas. 531.

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Reason why knowledge of agent imputed to principal.

581. Two reasons have been given in earlier cases for the rule, under which the assured has been affected with the knowledge of an agent who has taken no part in the negotiations for the insurance. One is, that where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed (*h*). The other is, that if the agent could conceal material information without hazard to the principal, the latter might instruct his agent to remain silent on the subject (*i*). It is true that in such a case the assured would himself be guilty of a fraud which would vitiate the insurance, but the insurer would often be ignorant of the fraud, or not in a position to prove it. The correct way, however, of regarding the question is, no doubt, as was said by Lord Watson, that the underwriter contracts on the basis "that all material facts connected with the property insured, known to the agent employed for that purpose, have been by him communicated in due course to his principal" (*k*).

Proudfoot v. Montefiore.

582. In the case of Proudfoot *v.* Montefiore, the plaintiff, in Manchester, employed an agent at Smyrna, who purchased and shipped for him there a cargo of madder, of which he advised the plaintiff on the 12th January. The agent forwarded the shipping documents on the 19th. The ship sailed on the 23rd and went ashore the same day, whereby there was a total loss of the cargo. Next day the agent had intelligence of the loss, and might have telegraphed the casualty to his principal immediately, but refrained on purpose that his principal might insure the cargo. On the 26th, which was the earliest post-day for England, he announced the loss to his principal by letter. Meanwhile, before the arrival of that letter but after the loss had been posted on

(*h*) Fitzherbert *v.* Mather (1785), 1 T. R. 12, 16; Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511, 522. As to the general principle, see Farquharson *v.* King, [1902] A. C. 325.

(*i*) Gladstone *v.* King (1813), 1 M. & S. 35.

(*k*) 12 App. Cas. p. 541.

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Lloyd's Lists, the principal effected an insurance on the cargo. It was held, that the policy was void on the ground of the non-disclosure (*l*).

Ruggles *v.* General Interest Ins. Co.

583. In the course of their judgment the Court, besides reviewing the English decisions and approving of them, considered the American case of Ruggles *v.* General Interest Ins. Co. (*m*), before Story, J., and expressed their disapprobation of the decision, and of the reasoning by which the learned Judge supported it. In that case, on the 9th February the assured, resident at Newport, Rhode Island, effected a policy in Boston on the sloop "Harriet" for six months in the coasting trade of the United States. That vessel had sailed on the 12th January previous, and was totally lost on Cape Hatteras on the 19th of the same month, and between that date and the date of the policy the master had purposely refrained from communicating the loss to her owner in order that he might have time to insure. The learned judge, in the face of these facts, sustained the validity of the policy, on the ground that the master was not an agent for the purpose of effecting the insurance. This decision was affirmed by the Supreme Court, not only on this ground, but also on another and somewhat curious ground, viz., that by the loss of the vessel the master had ceased to be the agent of the assured (*n*). The latter ground of the decision of the Supreme Court was said by the Court of Queen's Bench, in Proudfoot *v.* Montefiore, to be very unsatisfactory (*o*) and untenable; and the view taken by the Supreme Court of the relation between the captain of a ship and his owners is also criticised by Lord Halsbury, in Blackburn *v.* Vigors (*p*), by Duer (*q*), and by Phillips (*r*).

(*l*) Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511.

(*m*) (1825), 4 Mason, 74.

(*n*) (1827), 12 Wheaton, 408. The principle that the loss put an end to the master's agency was applied in Folsom *v.* Mercantile Mutual Ins. Co. (1871), 8 Blatchford, R. 170; *S. C.*, in the Supreme Court (1873), 18 Wallace, 237.

(*o*) L. R. 2 Q. B. 521.

(*p*) 12 App. Cas. 538.

(*q*) 2 Duer, 423.

(*r*) 1 Phillips, s. 549.

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Exception to rule made in two English cases.

584. There are two English cases which, if correct, created an exception to the general principle as to the effect on an insurance of the non-communication of a material fact. These cases, however, though not overruled, have been adversely criticised, and are of doubtful authority. The exception is, that when an agent whose duty it is to keep his principal informed omits, without fraud, to inform his principal of an occurrence causing an average loss, and thereby prevents the principal from disclosing the occurrence, the insurance is not entirely avoided. The only consequence is, that the underwriter is not liable for the average loss.

Gladstone v. King.

In Gladstone *v.* King (*s*), the vessel had been driven on the rocks in Manchineal Harbour, Jamaica, and got off again, seemingly without injury; and the master, with no fraudulent intent, omitted to mention it in a letter to his owner; but on arriving home the vessel was examined and found to have sustained damage from the rocks to the extent of 15 per cent. Lord Ellenborough and the rest of the Court held, that a policy effected by the owner after the receipt of the master's letter was not void, but that the partial loss, the only claim in the action, was an implied exception out of the policy. "If this principle be new," said his Lordship, "it is consistent with justice and convenience." The effect of it in respect of the assured was, that he neither recovered his loss nor, as the policy was held to be valid, got back his premiums.

Stribley v. Imperial Mar. Ins. Co.

In the other case (*t*), the ship whilst lying off Mazagan, in an open roadstead, the usual place of loading, had been driven out to sea by a hurricane from her anchorage, with loss of her anchor and chain; but no mention of this had been made by the master in a letter written to his owner a week after it had happened, and consequently no mention was made of it by the owner to the underwriter at the time of effecting the policy. This was the last letter the owner had from the master, and the ship after leaving Mazagan was

(*s*) (1813), 1 M. & S. 35.

(*t*) Stribley *v.* Imperial Mar. Ins. Co. (1876), 1 Q. B. D. 507.

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never again heard of. The claim was for a total loss of the ship, as to which the Court, on the application of the defendants, ordered a new trial on a question of concealment by the owner himself (*u*). There was no claim for the particular average loss of the anchor and chain, but both Blackburn and Lush, JJ., appear to have recognized the authority of Gladstone *v.* King, and to have been prepared to hold that, in the absence of fraud, the concealment of the particular average loss would render such loss irrecoverable, but would not affect the validity of the policy as a whole.

Criticism of these decisions.

585. A grave objection to these two decisions is, that the ultimate effects of any mishap must in many cases be a matter of speculation. For this reason it is not just to the underwriter merely to exempt him from liability for the damage caused directly by the occurrence. The facts of Gladstone *v.* King itself show the danger of the rule which Lord Ellenborough laid down. For in that case the ship had sustained serious damage without those on board being aware of it, and although the voyage was safely accomplished, the risk was certainly increased by the accident. Lord Ellenborough said: "No mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy." Yet this was purely an *ex post facto* argument, and the test whether a matter is material to be disclosed is certainly not whether it has or has not *in fact* been the cause of loss to the underwriter.

It is not impossible to imagine a partial loss which will not affect the risk. If, for instance, a lost anchor be replaced, as Lush, J., assumed, in Stribley *v.* Imperial Marine Insurance Co., had been done (*x*), the loss of the anchor is in itself no concern of the underwriter when he is not liable for the loss. But when, as must usually have happened, the loss of the anchor is caused by bad weather it is material that the underwriter should know that the ship had been subject to weather bad enough to cause the loss of an anchor. In fact,

(*u*) See *post*, § 592.

(*x*) (1876), 1 Q. B. D. 514.

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it can so rarely happen that information about an occurrence which has caused a partial loss is not material to the risk, that it would have been wiser not to make in favour of the assured the dangerous exception to the general principle which Gladstone *v.* King established.

Gladstone *v.* King was, however, said by the Court of Queen's Bench, in Proudfoot *v.* Montefiore, to have been well decided; but that expression of opinion was accompanied by language wholly subversive of the decision so approved of, in so far as that decision sustained the validity of the policy notwithstanding the concealment of a material fact (*y*).

Lord Esher expressed the opinion, in Blackburn *v.* Vigors, that Gladstone *v.* King was wrongly decided (*z*). He, however, took this view on the wide ground that the assured was not responsible for concealment on the part of any agent, except one through whom the contract was made; and his criticism is deprived of most of its force by the fact that the House of Lords laid down a contrary rule. Still Lord Halsbury's judgment shows that he also did not approve of Gladstone *v.* King (*a*), and Lord Watson said: "I have a difficulty in comprehending the principle upon which the Court, in Gladstone *v.* King and Stribley *v.* Imperial Marine Insurance Co., held that the innocent non-communication of a material fact by an agent who was the *alter ego* of the ship-owner merely created an exception from the policy. In both these cases the Court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract which the insurer would have made for himself if the fact had been communicated to him" (*b*).

The editors submitted before the Marine Insurance Act, 1906, was passed that the decision in the two cases in question cannot be supported. Their view is confirmed by the

(*y*) See the passage from the judgment of the Court cited *ante*, § 578.
(*z*) 17 Q. B. D. 567, 568.
(*a*) Blackburn *v.* Vigors (1887), 12 App. Cas. 536.
(*b*) 12 App. Cas. 540.

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fact that the Act does not mention the exception to the duty of disclosure, for which these cases are an authority.

But even if these cases be good law, an occurrence which has caused a partial loss may nevertheless be material to be disclosed; for, independently of the partial loss, the occurrence may have some effect on the risk. This point was quite overlooked by the Court in Gladstone *v.* King, but not in Stribley *v.* Imperial Marine Insurance Co. For Blackburn, J. (though holding that the loss of the anchor was excepted from the policy), and Quain, J., both said that the jury should have been asked whether the loss was a fact material to be communicated (*c*).

When the agent must telegraph.

586. In the case of the loss of the subject of the insurance, an agent whose duty it is to keep his principal informed is, no doubt, bound to send him information of the loss by telegraph, when this is practicable (*d*). It cannot, however, be supposed that it is the agent's duty to send information by telegraph of every occurrence which, if known to his principal, ought to be disclosed by the latter. It is submitted that it must be a question of fact in each case whether the agent has used such means of communication as were reasonable under the circumstances (*e*).

Concealment by the agent who effects the insurance.

587. In Blackburn *v.* Vigors, the House of Lords were careful to point out that their decision, that an insurance broker is not an agent whose knowledge can be imputed to his principal, had no reference to an insurance effected by the particular broker. "Where the employment of the agent is such," said Lord Halsbury, "that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is, I think, correct." And his Lordship further remarked: "The reason why, if he (the broker) had effected

(*c*) 1 Q. B. D. 512, 514.
(*d*) Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511.
(*e*) See *ante*, § 577.

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the insurance, his knowledge, unless he communicated it would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment (*f*). Thus an insurance broker or other agent who effects a policy is bound to communicate to the underwriter all the material facts within his knowledge, from whatever source he may have obtained his information" (*g*). And now the Marine Insurance Act, 1906, expressly provides that where an insurance is effected by an agent, the latter must disclose to the insurer "every material circumstance which is known to himself" (*h*).

Concealment by an agent through whom the insurance is effected.

588. Sometimes an agent employed to effect an insurance, instead of dealing direct with the underwriter, acts through an intermediate agent. Whenever two or more agents have been employed in the transaction on behalf of the assured, the concealment of a material fact within the knowledge of any agent *through whose agency, whether mediately or directly, the insurance has been effected* vitiates the policy. This was decided in a case on another policy effected for the plaintiff in Blackburn *v.* Vigors on the same risk (*i*).

Blackburn, in Glasgow (as has been mentioned in connection with Blackburn *v.* Vigors) instructed Murison & Co., a firm of insurance brokers there, to re-insure a ship which was overdue. Thereupon Murison & Co. telegraphed to their London agents to effect the re-insurance. Soon afterwards Murison & Co. received information, of which their principals were ignorant, tending to show that the ship was lost. They did not disclose the information, but put their

(*f*) 12 App. Cas. pp. 538, 539; see also per Lord Watson, *ibid.* p. 541; per Lord Macnaghten, p. 542.

(*g*) *Ibid.*; Blackburn *v.* Haslam (1888), 21 Q. B. D. 144; see also Lynch *v.* Dunsford (1811), 14 East, 494.

(*h*) Sect. 19 (a), *ante*, § 575; the section proceeds to declare what such an agent is deemed to know. As to this, see *ante*, § 577.

(*i*) Blackburn *v.* Haslam, *supra*. See also Republic of Bolivia *v.* Indemnity Mutual Mar. Ass. Co. (1908), 14 Com. Cas. 156, 166.

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principals into communication with their London agents, who ultimately effected the re-insurance through another firm of London brokers. The jury found that there was no new negotiation commenced, but that the policy was effected in pursuance of the original agency. On these findings a Divisional Court held that the concealment avoided the policy. "It is the negotiation," they said, "that is tainted, and the contract is void because it is founded upon the negotiation; and through however many hands the offer of an insurance may pass, if there be a concealment by the assured or his agent, the policy is avoided" (*k*). The distinction between this case and Blackburn *v.* Vigors lies in the fact that the policy sued on in Blackburn *v.* Vigors was effected by an independent firm of brokers, who received their instructions direct from Blackburn. If the latter had opened a new and independent negotiation with Murison's London agents by giving a fresh order for the policy, it seems to follow from Blackburn *v.* Vigors that the concealment by Murison would not have affected the policy (*l*).

Information "in the ordinary course of business."

588a. Sect. 18 (1) of the Marine Insurance Act charges the assured with knowledge not only of facts known to his agents which ought to have been, but were not, communicated to him, but also (according to a recent decision of the Court of Appeal) with information which has in fact, in the ordinary course of business, reached his office, though such information may not actually have come to the knowledge of himself or any of his servants. The plaintiffs in perfect good faith re-insured with the defendants the cargo of the SS. "Vigo." But a few hours before they effected the re-insurance contract, a "casualty slip" had reached the office of their underwriter (Mr. Diaz) containing information of a fire on the vessel. This "casualty slip" had been sent round by Lloyd's in the ordinary course of business to their sub-

(*k*) 21 Q. B. D. 153. The fact was one which within the meaning of sect. 19 (a) of the Marine Insurance Act ought to have been communicated to the agent who actually effected the insurance.

(*l*) 21 Q. B. D. 150.

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scribers, amongst whom were not only Mr. Diaz, but also the defendants. Owing, however, to press of business in Mr. Diaz' office nobody there took any notice of it when received, so that no one in fact knew of its contents when the re-insurance was effected. It was admitted that the object of sending such slips was to give information to insurers relevant to risks already undertaken. It was held by the Court of Appeal, affirming the decision of Bailhache, J., that the information contained in the slip was a circumstance which, in the ordinary course of business, ought to have been known by the plaintiffs, and that the plaintiffs therefore, being deemed to know it, had no answer to the defendant's plea of concealment.

It was further contended on behalf of the plaintiffs that as the defendants also received the slip, they too ought to had known its contents, and an argument was addressed to the Court based on sect. 18 (3) (b) of the Act. The answer, however, was that the defendants at the time when they received the slip were not *on the risk* on the "Vigo," and therefore its contents at that time could have had no interest for them. There was no reason, therefore, why the defendants should have known of this information (*m*).

Circumstances are immaterial if they would not have influenced a prudent insurer.

588b. The Act (*n*) declares that "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

It appears that there may be a circumstance which is actually material to the risk, but which, nevertheless, is not a "material circumstance" within the meaning of the Act, because *in the circumstances* an ordinary prudent insurer's mind would have been unaffected, even if he had been informed of it. In other words, he would not have appreciated its materiality. For example, on the 31st July, 1914,

(*m*) London General Ins. Co., Ltd. *v.* General Marine Underwriters' Assn., Ltd., [1920] 3 K. B. 23; [1921] 1 K. B. 104.

(*n*) Mar. Ins. Act, 1906, s. 18, sub-s. 2.

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when war between this country and Germany was imminent, the owners of the "Baku Standard," a British ship, which was then chartered to a German firm, effected an insurance against war risks on her freight. The outbreak of war on the 4th August made it illegal for the shipowners to carry out the contract contained in the charter-party owing to the charterers being alien enemies and thereby, according to a decision of the House of Lords in a case (*o*) which came before them two years later, effected a total loss of freight by restraint of princes. It was proved, however, that it would never have occurred to a prudent insurer in 1914 that the enemy character of the charterer could increase the risk on the freight policy, and that the insurer's judgment would not have been influenced by knowledge of the fact that the charterers were German. The learned judge (Atkin, J.) on these grounds held that the defence of concealment was invalid (*p*).

Material facts defined.

589. The duty on the part of the assured to disclose material facts is not limited to facts which have a direct bearing on the extent of the risks or dangers to which the subject of the insurance will be exposed. All facts are material which would affect the mind of a rational underwriter, governing himself by the principles on which underwriters in practice act, as to either of the following points: 1st, whether he will take the risk at all; 2nd, at what premium he will take it (*q*).

(*o*) British & Foreign Mar. Ins. Co. *v.* Sanday & Co., [1916] 1 A. C. 650.

(*p*) Associated Oil Carriers, Ltd. *v.* Union Ins. Society of Canton, Ltd., [1917] 2 K. B. 184; and see *infra*, § 597.

(*q*) Ionides *v.* Pender (1874), L. R. 9 Q. B. 531; Rivaz *v.* Gerussi (1880), 6 Q. B. D. 222; Thames & Mersey Mar. Ins. Co., Ltd. *v.* "Gunford" Ship Co., Ltd., [1911] A. C. 529; Mar. Ins. Act, 1906, s. 18, sub-s. 2, *ante*, § 575. See also § 554, *ante*. In Glasgow Ass. Corpn. *v.* Symondson (1911), 16 Com. Cas. at p. 119, Scrutton, J., is reported to have said: "The material facts are as to the subject-matter, the ship, and the perils to which the ship is exposed." He, however, apparently agreed that other circumstances might in a particular case be proved by evidence to be material. The learned judge cannot have intended in

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Rivaz *v.* Gerussi.

A series of four open policies on fruit and produce from Greece and the Ionian Islands to Liverpool or London "by ship or ships" was effected at several successive dates in the year 1875, the one to follow and succeed the other of them *seriatim*. At the time of effecting the later two of these policies respectively, declarations of shipments had been made on the earlier two of the four policies, but they remained unexhausted to a large amount in consequence of the shipments having been declared very much under their real value. It was after the safe arrival of the respective cargoes and to enable the assured to place other cargoes under protection of the policies already exhausted by previous shipments, that these declarations under value were made. In this state of facts there was a total loss of a large shipment of produce sunk in the Thames, which was declared on the apparently unexhausted policies, and on the policies which had been effected to follow. The jury, having regard to the effect of what seemed to be the unexhausted state of the earlier policies in inducing the underwriters to subscribe the later policies, found that the declarations under value were a material fact which had been fraudulently concealed at the time of negotiating the two later policies; and the Court of Appeal sustained their finding, and held that the underwriters were entitled to have the later policies set aside and cancelled (*r*).

all cases to limit "material facts" in any such way as the words which we have quoted, if taken by themselves, would suggest. Any such limitation appears to be inconsistent with the express words of sect. 18 (2) of the Mar. Ins. Act, 1906.

(*r*) Rivaz *v.* Gerussi, *supra*. In effect the fact which the jury found to be material seems to be, that the assured had under similar policies been guilty of dishonest practices in fraud of the underwriter, the inference being that he would resort to similar practices under the later policies. In the United States it has been held that an assured is not bound to say anything about his own character. He is "not bound nor could it be expected that he should speak evil of himself." New York Bowery Co. *v.* New York Fire Ins. Co. (1837), 17 Wend. N. Y. R. 359; approved by the Supreme Court in Sun Mutual Ins. Co. *v.* Ocean Ins. Co. (1882), 107 U. S. (17 Otto), 485. But see Gordon *v.* Street, [1899] 2 Q. B. 641, where a jury found that a money-lender.

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It may even be the duty of an assured who desires to protect himself against a particular and unusual risk to inform the underwriters what that precise risk is, and not to content himself with using words wide enough to cover it (*s*).

Excessive valuation.

Similarly, excessive valuation may be a circumstance material to be communicated.

Ionides *v.* Pender.

Part of a cargo insured to Vladivostock consisted of 222 casks of whisky, the cost, charges and insurance of which amounted to 973*l.*, but which were valued for insurance at 2,800*l.* It was in evidence that excessive valuation, to such an extent as here, was considered by underwriters to be a speculative risk, which one class of underwriters would not take at all, and another class would take only if a sufficient premium were offered; that 25 per cent. added was not unusual; and that in one case 30 per cent. added had been taken by the former class; but that beyond this it became a speculative risk. The excuse offered by the assured was that the excess represented expected profits at Vladivostock, which was not at the time of shipment within the geographical range of the Russian Custom House, but was to be shortly brought within that line, when a heavy duty would be imposed; and that a paper was shown to the English underwriter, containing these words, but in German: "On spirits with anticipated profits, however high or low." The underwriter saw the German words, but did not understand them. The jury could not satisfy themselves whether the valuations were fraudulent or not, but found that they were excessive and that it was material for the underwriter to know that they were excessive. On these findings the verdict was entered for the defendant underwriter, which the Court refused to disturb (*t*).

notorious for his oppressive practices, had been guilty of fraudulent concealment in contracting under an assumed name, and the verdict was upheld by the Court of Appeal.

(*s*) Cheshire *v.* Thompson (1919), 24 Com. Cas. 114, 198.

(*t*) Ionides *v.* Pender (1874), L. R. 9 Q. B. 531; see also Herring *v.* Janson (1895), 1 Com. Cas. 177; Gooding *v.* White (1913), 29 T. L. R. 312.

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Insurances based on excessive valuations may tempt the assured to resort to foul play to bring about a loss; or they may have a tendency to make him less careful than he otherwise would be in selecting the ship or the master, or in safeguarding the adventure, and also a tendency to diminish the efforts which, in case of disaster, he ought to make to minimize the loss as far as possible. These considerations are the foundation of the rule that excessive valuations must be disclosed (*u*). Cases, however, occur rarely in which the insurers seek to avoid a policy on a ship on the ground that there was no disclosure of the fact that the valuation therein was excessive (*x*), because the insurers usually have ample information about the vessel, which enables them to form a fairly accurate estimate of her value.

The Gunford.

Yet, even though in a particular case there be no duty to make any disclosure with regard to the valuation of the subject-matter insured, there may be other contracts of insurance which place the assured or his servants who have the management of the property in the position of making a profit out of its destruction. When such is the position, the House of Lords held in the recent case of the "Gunford," that the existence of the other insurances must be disclosed (*y*). The action was brought on two policies on hull, and at the date of the policies the vessel was worth about 9,000*l.* to sell, and the freight at risk was about 4,800*l.* (*z*). The following were the insurances effected on behalf of the

(*u*) See the passage in the judgment of the Court in Ionides *v.* Pender (1874), L. R. 9 Q. B. at pp. 538, 539.

(*x*) Herring *v.* Janson was such a case; but the insurance was on a foreign yacht, and the jury found for the assured.

(*y*) Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529. See also Pickersgill *v.* London & Prov. Ins. Co., [1912] 3 K. B. 614.

(*z*) Lord Loreburn, L. C., said that one-half of the freight had been paid in advance and was not at risk. This was a mistake. The voyage insured by the freight policies was from Rotterdam to Hamburg, and while there and thence to Santa Rosalia. The advance freight was paid at Hamburg, and the whole freight was at risk during the voyage from Rotterdam to Hamburg.

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owners (a limited company) to cover their interest in the adventure:

Hull, valued at 18,500*l.*	£19,000
Freight, valued at 5,500*l.*	5,500
Disbursements by "p.p.i." policy .	4,600
Total	£29,100

The payments on account of which it was sought to justify the insurance of disbursements were made for the purpose of earning the freight and covered by the insurance of the gross freight, or were for repairs, outfit and premiums ordinarily included in insurances on ship.

All the business of the ship (including the employment of her officers and the effecting of insurances) was transacted by the manager of the company, who had taken out on his own behalf insurances by "p.p.i." policies on disbursements to the amount of 6,500*l.* The disbursements which he purported to insure were moneys owing to him by the company, in respect of which he had no insurable interest. The underwriters made no objection to the valuations of the ship and freight (*a*), but they pleaded non-disclosure of the existence of the insurances on disbursements effected on behalf of the company and of the manager. The House of Lords, reversing the decision of the Court of Session, held that both sets of disbursement policies ought to have been disclosed, although (1) they were insurances on other subject-matters than those covered by the policies on which the action was brought, (2) they were mere "honour" policies, involving no legal liability to pay, (3) the insurances for 6,500*l.* were effected by the manager of the company on his own behalf.

When the duty of disclosure attaches.

590. The duty attaches at the time of effecting the insurance, and cannot depend on subsequent events (*b*), for the

(*a*) For the remarks of Lord Shaw and Lord Robson about the valuation of a ship as part of the going concern of a business, see *ante*, § 343. When the cost of the freight insurance is taken into consideration, the freight was only over-insured to a small extent.

(*b*) See the *dicta* of Mansfield, C. J., in Lynch *v.* Hamilton (1810),

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effect of a concealment in avoiding the policy is to be determined not by its eventual relation to the nature of the risk, but with reference to its immediate influence on the judgment of the underwriter. Consequently, although the intelligence concealed may turn out to be wholly unfounded, or the loss to arise from a cause totally unconnected with the fact concealed, the policy will be nevertheless avoided. It will be noticed that the Marine Insurance Act, 1906, states that the "circumstances" which must be disclosed include "any communication made to, or information received by, the assured," without any qualification as to the truth of the communication or information (*c*).

Events subsequent to the making of the contract do not affect the question of materiality.

Seaman *v.* Fonnereau.

The agent of the assured, before effecting the policy, held a letter from the captain of another ship, stating that he had been in company with the ship insured and lost sight of her all at once at twelve o'clock at night, that she had been reported leaky the day before by her captain, and that a hard gale had ensued the next day. It was held that this intelligence ought to have been communicated to the underwriter, and that the policy was avoided by its suppression. Yet in point of fact the inference suggested by the intelligence turned out to be unfounded, and the ship was lost, not by perils of the sea, but by capture, and that a week after the period to which the letter referred (*d*).

Lynch *v.* Hamilton.

A policy was effected on goods on board "ship or ships" from the Canary Islands to London, by an agent of the assured, who, at the time, knew that a portion of the goods to be insured were on board the "President" and also that the "President" had been reported at Lloyd's as at sea, deep and leaky. He did not inform the underwriter that the "President" was one of the ships on which part of the goods insured had been loaded, so that the underwriter had no means of applying the intelligence at Lloyd's to the risk.

3 Taunt. 44; and of Lord Ellenborough in Lynch *v.* Dunsford (1811), *S. C.* in error, 14 East, 497; and of the Court in Stribley *v.* Imperial Mar. Ins. Co. (1876), 1 Q. B. D. 507.

(*c*) Sect. 18, sub-s. 5, *ante*, § 575. See *post*, § 602.

(*d*) Seaman *v.* Fonnereau (1743), 2 Str. 1183.

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Under these circumstances the Court of Common Pleas held, and the Court of King's Bench confirmed their decision, that the suppression of this fact by the assured avoided the policy, although it turned out that the intelligence at Lloyd's was unfounded, the "President" never having been deep or leaky on any part of the voyage insured, and having been lost, not by perils of the seas at all, but by capture, which occurred three weeks after the period referred to in Lloyd's intelligence (*e*).

Result of the authorities.

591. The result therefore is, that every concealment of a material circumstance whether by design or mistake, avoids the policy; and that it has this effect, although the intelligence suppressed should ultimately turn out to be untrue, or the loss to have arisen from a cause quite different from that which the intelligence, if communicated, might have given reason to apprehend.

Practical rule for brokers.

The practical rule for policy brokers and other agents, therefore, is to disclose to the underwriter all they know respecting the proposed adventure, and not to exercise their own judgment as to the materiality of any part of the information they possess; for if they do not disclose the whole, and what is kept back appears to the jury to be material, the policy will be avoided, though the concealment was without any intention of fraud, and arose merely from an error of judgment (*f*).

Fraud.

If fraud enter into the contract, it makes no difference whether the thing concealed be material or not (*g*).

Minute disclosure unnecessary.

A minute disclosure of every material circumstance is not required. The assured complies with the rule if he discloses sufficient to call the attention of the underwriter to the matter in such a way that, if the latter desires further information, he can ask for it (*h*).

(*e*) Lynch *v.* Hamilton (1810), 3 Taunt. 37; Lynch *v.* Dunsford (1811), 14 East, 494, *S. C.* in error.

(*f*) See *per cur.* in Shirley *v.* Wilkinson (1781), 1 Dougl. 306, n.

(*g*) *Ante*, § 536.

(*h*) Asfar *v.* Blundell (C. A.), [1896] 1 Q. B. 123, 129; Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452.

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Materiality of concealment a question of fact.

The question whether the circumstance concealed is material is in each case one of fact, and essentially one for the jury (*i*).

Time of sailing or being last heard of.

592. The time of the ship's sailing, or the time of her being last heard of, are facts which, one or other, must enter into and form part of every conceivable case. But whether in any particular case, this or that, as it happens to be, is a material fact to be disclosed on occasion of proposing to insure, is often a question of critical and perplexing difficulty. The criterion of the materiality of any fact has been already stated. Beyond this, it seems that nothing more definite can be laid down. What seemed to be a more definite rule, laid down by so high an authority as Tindal, C. J., must now be considered as set aside.

That learned judge, in Elton *v.* Larkins (*k*), said: "The law clearly is, that a party is not bound to communicate the time of sailing of a ship, unless at the time of effecting the policy the ship is what is called a missing ship. If the underwriter inquires and a false answer is given, that will vitiate the policy; but it is not generally necessary *à priori* that the assured should communicate the time of sailing."

The following case, however, shows clearly that circumstances may make it necessary to disclose the time of sailing or when the ship was last heard of:—

Stribley *v.* Imperial Mar. Ins. Co.

A policy on ship "at and from Mazagan" was effected by the plaintiff on the 26th of February, who, at the time of effecting it, made no mention of a letter received by him on the 24th of January, from the master of the ship, dated the 9th of January, and stating that he had had a fine passage out, that he had commenced loading, but had had very bad weather and did not know when he would finish; he would write again. The master never did write again; and the ship after sailing from Mazagan was never again heard of. The main question put to the jury by Grove, J., following the above authority of Tindal, C. J., was, whether the ship

(*i*) See *post*, § 626; Mar. Ins. Act, 1906, s. 18, sub-s. 4.
(*k*) Elton *v.* Larkins (1831), 5 C. & P. 392.

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was, at the time of effecting the policy, an overdue ship? The jury found in the negative, and a verdict was entered for the plaintiff. On motion by the defendant for a new trial on the ground of misdirection, the Court, Blackburn, J., presiding, held that the proper question for the jury was whether the contents of the master's letter, the dates at which it was written and received, and the time that had elapsed since anything had been heard of the vessel, were not facts which might properly have influenced the underwriter as to the accepting of the risk. "I think," said Blackburn, J., "the test is whether a fair and reasonable underwriter, looking at this letter and the circumstances under which it was received, would say, 'I think this is a speculative risk, which I will either decline to take, or if I do take it, it shall be at a greater premium than is usual.'" Inasmuch as the proper question had not been put to the jury, a new trial was ordered (*l*).

Cases in which news of the ship has been held material.

593. The following are some of the cases in which the concealment of the time of the ship's sailing, or of circumstances relating to the time when she was likely to sail, has been held fatal to the policy. A shipowner, on the 22nd of February, having information that his ship had sailed from the coast of Africa on the 2nd of October, directed his broker, "as the ship had been rather long, and he did not think it prudent to run so large a risk at so critical a time," to effect an insurance on her "at and from the coast of Africa to the West Indies," adding, "We expect to hear of her soon," and ordering the broker to communicate to the underwriters "that the ship was on the coast on the 2nd of October," but saying nothing of her having sailed on that day. Lord Mansfield directed the jury that the plaintiff having concealed a material part of the information he received, it was a fraud, and the underwriters were not liable (*m*).

Ratcliffe *v.* Shoolbred.

M'Andrew *v.* Bell.

So where the assured on the 24th of November received a letter from Lisbon, written on the 8th of November, inform-

(*l*) Stribley *v.* Imperial Marine Ins. Co. (1876), 1 Q. B. D. 507.
(*m*) Ratcliffe *v.* Shoolbred (1780), 1 Marshall, Ins. 466; 1 Park, Ins. 413.

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ing him that the ship was then ready to sail from that port, but he did not effect an insurance on her until the 2nd of December, after the arrival from Lisbon of another vessel which had sailed at the same time as the ship insured, and then without communicating to the underwriters the letter he had previously received: Lord Kenyon held that the keeping back this letter avoided the policy, considering, upon the whole evidence, that the plaintiff did not intend to insure till he believed the ship to be missing (*n*).

Webster *v.* Foster.

All ships sailing to the Baltic used to touch at Elsinore to pay Sound dues, and were entered in a list called the Sound List; to voyage from Liverpool to Elsinore could then be performed in from fourteen to eighteen days, and the list be brought to England in ten or twelve; so that in thirty days at the most it could be known here whether a ship sailing from Liverpool had or had not touched at Elsinore. Hence, where an insurance was effected on the 23rd of October on a ship from Liverpool to the Baltic, and it appeared that the ship had sailed from Liverpool on the 7th of September, or more than six weeks (forty-six) days before the policy was effected, and no news had been heard of her down to that time, Lord Kenyon told the jury that the plaintiffs, at the time they procured the policy to be effected, must have suspected the ship to be a missing ship, and ought, therefore, to have communicated to the underwriter the time of her sailing (*o*).

In this case also his Lordship remarked as a suspicious circumstance, that, though the plaintiffs were in London at the date of the policy, and could have effected it there, they had chosen to get it effected at Hull. It also appeared that the underwriters inquired of the broker the time of the ship's sailing, and that he told them he knew nothing about it, having received no information from the plaintiff on the subject.

Willes *v.* Glover.

The voyage from Berderygge to London was often performed in four or five days, and when the weather was not

(*n*) M'Andrew *v.* Bell (1795), 1 Esp. 373.
(*o*) Webster *v.* Foster (1795), 1 Esp. 407.

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favourable, in about ten days. On the 13th of December the consignees in London received from the shipper of the goods in Berderygge a letter dated the 30th of November, saying: "I think the captain will sail to-morrow; but should he not be arrived in your port, be so kind as to make the insurance as low as you possibly can on my account." The consignees accordingly effected an insurance on the goods "from Berderygge to London" the day after receiving this letter, and without communicating it to the underwriters. It turned out that the ship did not in fact sail till the 24th of December, yet the Court held the suppression of the letter to be a fatal concealment, and though the jury had found for the plaintiff on the ground that the concealment was not material, they sent the case down for a new trial, in which a verdict was given for the defendant (*p*). It appeared, moreover, to the Court from the terms of the shipper's letter that, in his opinion, a high premium would probably be exacted if the ship had not arrived before his letter; the letter, therefore, seemed to them material to be communicated to the underwriters with a view to the premium (*q*).

Bridges *v.* Hunter.

An insurance was effected, on the 12th of November, on wines by the "Stag," "at and from Oporto to Liverpool," "to return four guineas per cent. for convoy and arrival." Twelve days before effecting this insurance the plaintiff had received two letters, written from Oporto: one dated the 11th of October, stating, "We are loading the wines on board the 'Stag,' Captain Wheatley, who pretends to sail after to-morrow"; the other dated the 13th of October, enclosing the bills of lading, which were filled up with the words, "With convoy." Neither of these letters was communicated to the underwriters. The "Stag," it appeared, did sail

(*p*) Willes *v.* Glover (1804), 1 B. & P. N. R. 14.
(*q*) *Ibid.* 16. Maclachlan submitted, on the high authority of Maule, J., in Mackintosh *v.* Marshall (1843), 11 M. & W. 119, that the only illegal suppression was of the date of the expected sailing, and that if that date had been communicated the letter, containing besides only an expression of opinion or of apprehension founded on nothing that was unknown to the underwriter, need not have been shown. Arnould, 6th ed. p. 565, n.

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from Oporto on the 13th of October, but, failing to come up with convoy, put into Lisbon. The convoy with which she ought to have sailed arrived in London without her on the 30th of October, and on the 1st of November a list of the ships that had sailed with it was entered at Lloyd's, in which the name of the "Stag" was not included. The underwriters contended that if these two letters had been communicated, they would, on reference to the convoy list at Lloyd's, have ascertained that the ship was a missing ship. Lord Ellenborough told the jury that the question was, whether a disclosure of these letters would probably have varied the judgment of the underwriter, so as to have induced him either to decline subscribing the policy or to demand a higher premium; that if such might have been the consequence of a disclosure of them, they were material letters to be communicated. The jury, notwithstanding, found a verdict for the plaintiff; but the Court, thinking they had come to a wrong conclusion on the facts, granted a new trial (*r*).

Cases in which news of the ship was held immaterial.

594. In the three following cases the facts concealed were held to be immaterial on the question whether the ship was a missing ship. In connection with them it must be remembered that the materiality of the facts concealed is a question for the jury, and that in a more recent case it has been held that the question whether the facts showed that the ship was overdue is not the only one to be considered (*s*).

Foley *v.* Moline.

The non-communication of a letter, showing that a vessel was out only nine days on the voyage from Youghal to Weymouth, which usually took eight or ten days, was held not such a concealment as would avoid the policy (*t*).

Littledale *v.* Dixon.

A policy was effected at Whitehaven on the 8th January upon the "Cumberland," "at and from Barbadoes to Liverpool," in consequence of a letter of orders from a Liverpool broker, in which he said: "The 'Cumberland,' we expect, will have taken her departure from Barbadoes on the 26th of

(*r*) Bridges *v.* Hunter (1813), 1 M. & S. 15.
(*s*) Stribley *v.* Imperial Marine Ins. Co. (1876), 1 Q. B. D. 507.
(*t*) Foley *v.* Moline (1814), 5 Taunt. 430.

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November; the 'Barton' sailed on the 24th, and arrived at Liverpool last Sunday (the 5th January), but she is coppered, and a remarkably fast vessel." This letter was shown to the underwriters at the time of effecting the policy; but it was not communicated that the "Agreeable," also coppered and remarkably fast, which had left Barbadoes on the 29th November, had also arrived at Liverpool on the 5th of January. The "Cumberland" was not coppered, was full built, and a slow sailer, and was not considered a missing ship at the time the letter of orders was written. Evidence was also given that knowledge of the arrival of the "Barton" and "Agreeable" could not have varied the premium. Upon these facts the jury found for the plaintiff, and the Court of Common Pleas refused to disturb their verdict (*u*).

Elton *v.* Larkins.

An insurance was effected on the "Fanny," "at and from Cadiz to London," on the 29th of December, at which time the plaintiff held a letter from the captain, stating that she was to sail on the 22nd of November. This letter the plaintiff did not communicate. It was in this case that Tindal, C. J., laid down the doctrine already cited, which is no longer the doctrine of the English Courts (*x*), and accordingly put it to the jury as the main question, whether the "Fanny," having been out thirty-seven days from Cadiz to London at the time of effecting the policy, could fairly be called a missing ship; and the jury having found for the plaintiff, the Court refused to disturb their verdict (*y*). In a more recent case, facts tending to show that the ship had been out forty-one days on a voyage from Seville to London, were held material (*z*).

Facts which tend to show that the ship is missing.

595. Besides the time of the ship's sailing, all facts must be fully and fairly communicated, which would lead a reasonable underwriter to infer that the ship was a missing ship when the policy was effected.

(*u*) Littledale *v.* Dixon (1805), 1 B. & P. N. R. 151. Marshall thinks this case wrongly decided; Duer, however, adduces cogent reasons for upholding its authority. 2 Ins. 544, 545. It may safely be said that the Court of Appeal also would uphold the verdict.
(*x*) *Ante*, § 592.
(*y*) Elton *v.* Larkins (1831), 5 C. & P. 86, 385; (1832), 8 Bing. 198.
(*z*) Elkin *v.* Jansen (1845), 13 M. & W. 655.

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Rickards v. Murdock.

A merchant at Sydney consigned goods to England by the "Cumberland" (which had sailed from Sydney about the end of April, and was to sail from Van Diemen's Land about the last week in May), and sent an order to insure this risk by the "Australia" (which sailed from Sydney on the 20th of May), directing his London correspondents to wait thirty days after the arrival of the "Australia" before effecting the insurance on the "Cumberland," in order to give the latter ship every chance of arriving. This order by the "Australia" was retained for thirty-six days, and then, as the "Cumberland" had not arrived, and two ships had in the meantime come in, which had left Sydney after the "Australia," they procured an insurance, informing the underwriters of the time the "Cumberland" had sailed from Sydney, and was expected to sail from Van Diemen's Land, but not stating when, or by what ship, the order to insure had arrived, nor how long and why they were to wait before effecting the policy. The jury having found this a material concealment, the Court refused to disturb their verdict, being unanimous that the time when the order to insure was received, and the delay which had been interposed before insuring, were facts which ought to have been communicated to the underwriters (*a*).

Westbury v. Aberdein.

Two ships, the "Fruiter" and the "King George," sailed from Malaga for London; the first on the 9th of October, the second on the 10th. They were frequently in sight of each other till the 21st of October, when the "Fruiter," off Oporto, parted company with the "King George" in a gale. The "Fruiter" arrived in London on the 30th of October, and with knowledge of these facts, the plaintiff, on the 3rd of November, effected a policy on the "King George" "at and

(*a*) Rickards *v.* Murdock (1830), 10 B. & Cr. 527; see *S. C.* at N. P., Danson & Ll. 221; and Ll. & Wels. 132.

Sed quære as to the part of the letter which required the delay, and stated the reason. No one can doubt its having an effect—a most prejudicial effect; but it is not on that ground, surely, a proper subject of discovery, since it would be the occasion of blind prejudice, and therefore an impediment to the exercise of sound judgment. See *post*, § 596, that a direction not to insure until a reasonable risk has been run need not be disclosed.

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from Malaga to London," informing the underwriter of the time at which the two ships had sailed from Malaga, but not that the "Fruiter" had seen the "King George" off Oporto on the 21st. The "King George" had in point of fact been lost in the chops of the Channel on the 25th of October. Lord Abinger told the jury that the fact of the "Fruiter" having seen the "King George" off Oporto was not material to be communicated, and they found for the plaintiff. The Court, however, granted a new trial, holding that the question of the materiality of these facts ought to go to the jury (*b*).

Elkin v. Jansen.

When the master abroad draws a bill on his owners at home for the disbursements of the ship, that is a fact from which the completion of the ship's loading, and consequently the probable time of her sailing, may be inferred. Consequently such a bill drawn at Seville on the 11th of January, which was sent thence on the 17th, and arrived at London on the 31st, was held to be material as to those dates, considering the average duration of the voyage from Seville to London, where the policy on the ship was effected on the 21st of February (*c*).

Kirby v. Smith.

The ship "Ocean" sailed from Elsinore for Hull in rough weather on the 26th of July; six hours after, her owner sailed from Elsinore for Hull in another ship. This was a voyage sometimes of four or five days, but of the average duration of eight to ten. Owing to tempestuous weather the owner of the "Ocean" did not arrive at Hull till the 9th of August, or fourteen days after leaving Elsinore, when, finding that the "Ocean" had not arrived, he immediately caused his broker to effect an insurance on her "at and from Elsinore to Hull, from the 26th July inclusive;" the broker at the time of effecting this policy did not communicate any more of these facts than that the "Ocean" was "all well at Elsinore on the 26th of July." The Court held that this was a concealment fatal to the policy (*d*).

(*b*) Westbury *v.* Aberdein (1837), 2 M. & W. 267.
(*c*) Elkin *v.* Jansen (1845), 13 M. & W. 655.
(*d*) Kirby *v.* Smith (1818), 1 B. & Ald. 672.

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Mackintosh v. Marshall.

A Liverpool merchant, on whose account a quantity of train oil was to be shipped at St. John's, Newfoundland, on board the "Elizabeth," wrote on the 27th of January to his brokers in London to effect an insurance, telling them "that he had advices from St. John's, of the 27th of December, of the train oil being shipped for him on board the 'Elizabeth,' to sail the end of the month." The real facts were: 1st. That he had received no advices of that date from St. John's, but had been merely told that intelligence from St. John's down to the 27th had come to hand, which made no mention of the sailing of the "Elizabeth"; and 2nd. That before giving the order to insure, he had received two letters from St. John's, both dated the 24th of December, but the second not sent till the 30th, in the first of which his correspondents stated that the "Elizabeth" was to sail on the 25th, that she was a new vessel, that he could endeavour to save the insurance by giving three or four days, according to the state of the weather in England; and in the second they said, "You can allow her from sixteen to twenty days; you can run a reasonable risk to save the insurance, but all will depend on the state of the weather." The insurance having been effected on the 27th January solely on the letter of instructions sent to the broker, the Court were clearly of opinion that these facts showed both a positive mis-statement and a material concealment, either of them sufficient to avoid the policy (*e*).

Non-disclosure of the fact that the assured wishes to save the insurance.

596. In this case, Maule, J., who tried the case, told the jury that the direction not to insure till a reasonable risk had been run, was not, in his opinion, a circumstance which the broker was bound to communicate. The Court, on making

(*e*) Mackintosh *v.* Marshall (1843), 11 M. & W. 116. The jury at the trial had found for the plaintiff, partly on the ground that the underwriter must be presumed to have consulted Lloyd's Lists, from which he might have inferred the true time of the "Elizabeth's" sailing; and one main ground on which the Court granted the new trial was that this presumption did not arise, as the underwriter must be taken to have relied on the misrepresentation. This part of the case is noticed *post*, § 615.

the rule absolute for a new trial, did not particularly deal with this point. **Sect. 596.**

On the question, therefore, whether circumstances which show that the assured was endeavouring to save the insurance by delaying to insure, ought to be communicated to the underwriter, no general rule can be laid down, but that the necessity of communicating this circumstance, like any other, must depend on the influence it might have in leading the underwriter to infer that the ship was out of time when he was asked to insure upon her.

There can be no doubt that, in all cases where it might reasonably be supposed likely to have this effect, the direction to delay the insurance ought to be communicated. Wherever, in fact, it appears that the intention of the assured was not to effect the policy till there was reason to suspect that the ship was a missing ship, the facts tending to show this ought to be communicated (*f*).

Concealment of the national character of the subject insured, and of other facts that aggravate the risk.

597. In time of war, any circumstance within the knowledge of the assured and not equally within the knowledge of the underwriter, which affects the national character of the subject insured, and exposes it to capture or detention, must be disclosed to the underwriters (*g*).

Yet if the materiality of the fact be due to circumstances not within the knowledge of the assured or his means of information, he will not be bound to communicate it.

Mayne *v.* Walter.

Thus a ship, warranted Portuguese, was taken by a French privateer, and condemned because she had an English supercargo on board, on the ground of a recent French ordinance declaring all neutral ships liable to capture where the supercargo was the subject of a state at war with France; Lord Mansfield held that as neither the assured nor the under-

(*f*) See the *dictum* of Lord Kenyon in M'Andrew *v. Bell* (1795), 1 Esp. 373; see, however, Bell *v.* Bell (1810), 2 Camp. 475, 479, *post*, § 623, that facts only, and not apprehensions, need to be disclosed.

(*g*) For a possible exception (in somewhat peculiar circumstances) to this rule, see Associated Oil Carriers *v.* Union Society of Canton, [1917] 2 K. B. 184; *ante*, § 588b.

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writers appeared to have known anything of this ordinance, the former was not guilty of a material concealment in not disclosing the fact of the supercargo being English (*h*).

His Lordship, however, was of opinion that, though this ordinance was contrary to the law of nations, yet if the assured knew it there would have been a material concealment, in not disclosing the fact of his not having complied with it; and if, on the other hand, the underwriters had known of it, they ought to have inquired who was to be supercargo (*i*).

Regulations not enforced.

It was held by Bigham, J., that an assured was not obliged to disclose to the underwriter an edict of the Persian Government prohibiting the importation of arms into Persia, when the trade had, in spite of the nominal prohibition, been openly carried on for years, the Persian Government exacting duties on the arms imported (*k*).

Matters which the insurer is presumed to know.

598. In the absence of inquiry, it is not necessary to disclose any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know (*l*). Thus an insurer is presumed to know that it is impossible to make a floating dry-dock as seaworthy as an ordinary ocean-going craft, and is put on inquiry, if he admits seaworthiness, as to the means adopted to strengthen it (*m*).

Private information of new regulations.

A knowledge of the political state of the world, of the allegiance of particular countries, of their standing mercantile regulations, of the risk and embarrassment affecting the course

(*h*) Mayne *v.* Walter (1782), 1 Park, Ins. 431; 1 Marshall, Ins. 402, 471. Cf. Associated Oil Carriers *v.* Union Society of Canton, *supra*.

(*i*) 1 Marshall, Ins. 402, 471; see also Barzillay *v.* Lewis (1782), 1 Marshall, Ins. 402, 404; and Marshall *v.* Union Ins. Co. (1809), 2 Wash. C. C. R. 357; 1 Phillips, s. 624.

(*k*) Fracis *v.* Sea Ins. Co. (1898), 3 Com. Cas. 229.

(*l*) Mar. Ins. Act, 1906, s. 18, sub-s. 3 (b), *ante*, § 575. See *post*, § 609.

(*m*) Cantiere Meccanico Brindisino, [1912] 2 K. B. 112; 3 K. B. 452 (C. A.).

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of trade contemplated by the insurance, must all necessarily be imputed to the underwriter, and therefore need not be disclosed by the assured; but it has been held in the United States, and apparently on very good grounds, that the new or shifting regulations of foreign states, by which the property is exposed to seizure, if privately known to the assured, ought to be disclosed by him, for they cannot be presumed to have been necessarily within the knowledge of the underwriter (*n*).

Facts which may expose the property to capture.

All facts lying peculiarly within the knowledge of the assured, which may expose the property to risk of capture, ought to be disclosed to the underwriters (*o*).

Thus, it has been held in the United States, that not disclosing that the property insured belongs to a house established and doing business in a belligerent state, will be a material concealment, and defeat a policy made in a neutral country "for whom it may concern" (*p*); so the omission to disclose that enemy's property embarked in a neutral ship was covered as the property of a neutral, was there also held to be a material concealment vitiating the policy (*q*). As by the Declaration of Paris, enemy's goods on board a neutral ship (except contraband) are not liable to capture, there seems to be no reason now why, during a war in which the belligerents are strictly observing this rule of the Declaration, the national character of goods carried under a neutral flag should be declared; for the risk is no greater when the

(*n*) Hoyt *v.* Gilman (1811), 8 Mass. R. 336; Blagge *v.* New York Ins. Co. (1804), 1 Caines, 549; 1 Phillips, ss. 595, 596, 597; see also 2 Duer, 516, 561.

(*o*) When an insurance is effected in a belligerent country, has the underwriter any right to assume that the property insured does not belong to a subject of his own sovereign? If he wish only to insure neutral property, should he not protect himself by having a warranty of neutrality inserted in the policy?

(*p*) Bauduy *v.* Union Ins. Co. (1809), 2 Wash. C. C. R. 391, cited 1 Phillips, s. 624. See, however, Buck *v.* Chesapeake Ins. Co. (1828), 1 Peters, S. C. R. 151; 1 Phillips, s. 625.

(*q*) Stocker *v.* Merrimack Fire & Marine Ins. Co. (1810), 6 Mass. R. 220, cited 1 Phillips, s. 629.

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goods belong to a belligerent than when they belong to a neutral (*r*).

Bates *v.* Hewitt.

The "Georgia" had been in the service of the Confederate States of America as a cruiser during 1863-4, and was afterwards laid up and dismantled in Liverpool, and there purchased at public auction by the plaintiff, who converted her into a merchant vessel. When, in July, 1864, he proposed her to the defendant for insurance, it was as "The 'Georgia,' ss., chartered on a voyage from Liverpool to Lisbon and the Portuguese Settlements on the West Coast of Africa and back." She was captured on her voyage by a war steamer of the United States. It was held that the plaintiff ought to have communicated the fact that she had been the Confederate cruiser, and consequently that by reason of this suppression the policy was void (*s*).

Republic of Bolivia *v.* Indemnity, &c. Ass. Co.

Goods, the property of the Bolivian Government, were insured against capture for a voyage up the Amazon to Bolivian territory. It was a matter of common knowledge that the frontier region was in a disturbed state, but the agents of the Government, who gave orders for the insurance, had also private information that an expedition was being fitted out by insurgents to intercept the goods. Pickford, J., held that the non-disclosure of this information was fatal to the policy (*t*).

Campbell *v.* Innes.

A ship and goods, the property of an American subject, were insured "from London to certain ports in America against all risks, American capture and seizure included";

(*r*) This rule was certainly departed from in the late European war. Thus, by the British Reprisals Order of the 11th March, 1915, neutral vessels carrying enemy goods or goods of enemy origin might be required to discharge them in a British or allied port, and the goods, if not requisitioned, were liable to be detained or sold under the direction of the Prize Court. The validity of this Order and of the supplementary Order of the 16th February, 1917, was affirmed by the Privy Council in The Stigstad, [1919] A. C. 279, and The Leonora, [1919] A. C. 974.

(*s*) Bates *v.* Hewitt (1867), L. R. 2 Q. B. 595. See further, as to this case, *post*, § 609.

(*t*) Republic of Bolivia *v.* Indemnity Mutual Mar. Ass. Co. (1908), 14 Com. Cas. 156, 166.

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on arrival, the ship was seized by the American government (for a breach of their Non-importation Act), on account of a war with Britain, which had broken out before, but was not known till after, the policy was effected. The fact that the assured was an American subject was not stated on the face of the policy, nor disclosed by the broker to the underwriter. Lord Tenterden and the Court of King's Bench held that the suppression vitiated the policy, because the fact, if disclosed, might have made a material difference to the risk; for, if the property had been British owned, they said, the owner would have done all in his power to prevent the risk from occurring, but if American owned, he might lend himself to the purposes of his own government, and assist them in obtaining possession of the property insured (*u*).

Sailing without convoy. Sawtell *v.* Loudon.

599. Unless a ship was within the exception of the Convoy Acts, her sailing without convoy, during the operation of those Acts, was held a material circumstance to be disclosed to the underwriters. A broker having proposed an insurance on the "Sophia," from Bristol to Port Mahon, &c., with liberty to seek, join and exchange convoy in the English and Irish Channels, the underwriter stated that a ship called the "Sophia," of Bristol, was reported at Lloyd's as being then at sea without convoy; the broker was afterwards informed by his employer that this was the same ship. The letter containing this statement was not communicated, and the Court held that, as the ship in question was not within any of the exceptions of the Convoy Act, the concealment was fatal to the policy (*x*).

Long *v.* Duff.

If the ship was foreign built, and therefore not within the scope of the Convoy Act, the fact of her having sailed

(*u*) Campbell *v.* Innes (1821), 4 B. & Ald. 423. Although the war did not break out until July, 1812, differences had arisen some time previously between the British and United States Governments, and, as Maclachlan points out (Arnould, 6th ed. p. 573), the fact that American seizure was included as one of the risks in the policy shows that the war was feared and anticipated when it was effected. The point that the insurance was void as being on enemy's property was not taken.

(*x*) Sawtell *v.* Loudon (1814), 1 Marshall, R. 99; 5 Taunt. 359.

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without convoy need not have been communicated, nor yet the fact that she was foreign built, or otherwise excepted from the operation of the Act; for it is the duty of the underwriter to obtain such information for himself (*y*).

Reid *v.* Harvey.

Where an insurance was effected on goods, to return five per cent. for convoy and arrival, the non-communication of the fact that the vessel was to be a running ship (*i.e.*, that she was sailing without convoy) was held fatal to the policy (*z*).

Information received by the assured.

600. The "circumstances" which must be disclosed to the underwriter include, as is stated in sect. 18 (5) of the Marine Insurance Act, 1906 (*a*), "any communication made to, or information received by, the assured."

The state of the ship on the voyage, and dangers to which she is exposed.

Thus, all material information communicated to the assured with regard to the state of the ship, or dangers to which she is exposed, in the course of the voyage, ought to be disclosed to the underwriter, and not only certain intelligence, but even doubtful rumours, if not too remote. If information concern matters preceding the commencement of the voyage, which would be covered by the warranty of seaworthiness, Lord Mansfield and Lord Ellenborough were of opinion that it is unnecessary to disclose it (*b*); under a time policy it may be otherwise (*c*).

Da Costa *v.* Scandaret.

One who had a doubtful account of a ship like his own being captured caused his ship to be insured, without communicating to the underwriter what he had heard, and the insurance was held to be void (*d*). So also where the owner of a ship hears a doubtful report of a shipwreck which he has reason to think may relate to his own ship, he must disclose it on effecting an insurance (*e*).

(*y*) Long *v.* Duff, and Long *v.* Bolton (1800), 2 B. & P. 209.
(*z*) Reid *v.* Harvey (1816), 4 Dow, 97. (*a*) *Ante*, § 575.
(*b*) Shoolbred *v.* Nutt (1782), 1 Park, Ins. 493; 1 Marshall, Ins. 474; Haywood *v.* Rodgers (1804), 4 East, 590. See *post*, § 619.
(*c*) Russell *v.* Thornton (1859), 4 H. & N. 788; 29 L. J. Ex. 9; in error, 30 L. J. Ex. 69.
(*d*) Da Costa *v.* Scandaret (1723), 2 P. Wms. 179.
(*e*) Nicholson *v.* Power (1869), 20 L. T. N. S. 580.

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Durrell *v.* Bederley.

A policy was effected on the 24th of March on a privateer, which had sailed from Jersey on the 6th, and reports in Jersey that some French frigates were about the coast, and had made a capture on the 7th of March, continued to prevail until the plaintiff sent the orders on which the insurance was effected, yet he had not said a word about them in his letter: this was held to be a material concealment which vitiated the policy (*f*). So where the plaintiff concealed from the underwriters the fact that he had received a letter from the Cape of Good Hope, stating that there were then two or three French privateers in those seas, he was nonsuited on the ground of that concealment (*g*).

Beckwaite *v.* Nalgrove.

Information which the assured does not believe.

601. Though the assured be satisfied that a report or rumour is incorrect, and therefore, acting in good faith, do not disclose his intelligence, the concealment is none the less fatal, if the mere report be such as would influence an underwriter. It is not for the assured to judge whether the news be true or false.

Morrison *v.* Universal Mar. Ins. Co.

The plaintiff in Liverpool, on the 8th October, wrote to his broker in London to insure 5,000*l.* on the ship "Cambria," and a similar sum on her freight. On the evening of that day his eye met a paragraph in the *Liverpool Mercury*, which caused him to telegraph to his broker on the 10th thus: "Since writing on Saturday, paragraph in *Mercury*: 'Cambria qy., Cameo, from New Orleans, aground on North Breaker.' To-day's *Mercury* says: 'The vessel on the North Breaker reported yesterday as the Cambria is stated to be the Cameo from New Orleans?' Can you find out at Lloyd's? Let me know before acting." The "Cameo" had also gone to New Orleans, and the broker made inquiries that satisfied him that the ship aground was the "Cameo"; and on the 12th he effected a policy on freight with the defendants, without mentioning what had appeared in the public newspapers or

(*f*) Durrell *v.* Bederley (1816), Holt, N. P. 283. The privateer, it appeared, had actually been captured by the French on the 7th of March, about thirty miles from Jersey.
(*g*) Beckwaite *v.* Nalgrove, cited 3 Taunt. 41.

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in Lloyd's list, in which the above announcement had first appeared on the 8th. It turned out to be, in fact, the "Cambria," and the concealment was held fatal to the policy (*h*).

Information which proves eventually to be false.

602. Even though the report eventually prove to be totally false and unfounded, its communication, as we have already seen (*i*), is not on that account less indispensable, if it would materially have influenced the judgment of an underwriter in assuming the risk (*k*).

Loose rumours and news of doubtful application.

"Loose rumours, indeed, which have gathered together, no one knows how, need not be communicated" (*l*); and intelligence may be so general, and its application to the subject insured so doubtful and remote, that the assured need not communicate it, though it may possibly turn out to have related to the subject insured (*m*). For the sake, however, of caution, a full disclosure of rumours is advisable.

The weather subsequent to the ship's sailing.

603. Whether the assured in a retrospective policy is bound to disclose the state of weather subsequently to the ship's sailing may be regarded as very doubtful; at all events, it may be laid down that he can only be obliged to do so in cases where the ship has sailed from a foreign port, and he has private information of some violent storm at or near that port within so short a period after her sailing that she has probably been exposed to it. If the ship has sailed from a home port, the underwriter is as well informed as the assured of the state of the weather; and unless the storm was of considerable violence, it would not be likely to affect his estimate of the risk (*n*).

(*h*) Morrison *v.* Universal Marine Ins. Co. (1872), L. R. 8 Ex. 40, 197.

(*i*) *Ante*, § 590.

(*k*) Seaman *v.* Fonnereau (1741), 2 Str. 1183; Lynch *v.* Hamilton (1810), 3 Taunt. 37; *S. C.*, in error, Lynch *v.* Dunsford (1811), 14 East, 494.

(*l*) Per Gibbs, C. J., in Durrell *v.* Bederley (1816), Holt, N. P. 283, 285. Yet see Leigh *v.* Adams (1871), 25 L. T. N. S. 566.

(*m*) 1 Phillips, Ins. s. 610; Ruggles *v.* General Int. Ins. Co. (1825), 4 Mass. R. 74; *S. C.*, in error (1827), 12 Wheaton, 408.

(*n*) See the two American cases, Ely *v.* Hallett (1804), 2 Caine, R 57; and Fiske *v.* New England Ins. Co. (1834), 15 Pick. R. 310, cited 1 Phillips, s. 577. The ground of decision in Ely *v.* Hallett was, that the assured's knowledge was precise and specific, his communication vague and general: he knew there had been a violent storm at the port; he only communicated that there had been "blowing weather and severe storms on the coast." Even thus the case is *inter apices juris*. See the comments of Duer, vol. ii. pp. 399—401. The editors submit that the distinction between home and foreign ports has lost most of its cogency, now that there is telegraphic communication with all parts of the world, and that the assured need only disclose his private information, when it is such as an underwriter's ordinary means of information will not enable him to acquire. They fail to see why such information need not be disclosed, when the ship has sailed from a home port.

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Nature of the cargo.

604. Generally speaking, there is no duty in effecting an insurance on ship to disclose the nature of the cargo shipped or intended to be shipped, although with regard to the safety of the vessel one kind of cargo may be much less desirable than another. In the absence of inquiry, the underwriter will be deemed to have waived any such disclosure. There may, however, be a duty to make the disclosure in the case of goods of an unusual and particularly dangerous kind (*o*).

The true port of loading.

605. The port of loading may be material. Goods were insured "at and from Genoa to Dublin, the adventure to begin from the loading to equip for the voyage," but the goods were loaded actually at Leghorn and not at Genoa, which was an intermediate port into which the ship was obliged to put and wait five months for convoy, and the non-communication of this fact was held to be a material concealment (*p*).

(*o*) This, it is submitted, is the effect of the judgments in Mann, MacNeal & Steeves *v.* Capital & Counties Ins. Co. (C. A.), Lloyd's List, 22nd Dec. 1920, reversing Greer, J. (1920), 4 Lloyd's List L. R. 57. For the effect, as regards non-disclosure, of a clause providing that the assured should be held covered at an extra premium in case of any incorrect description of the goods, see Hewitt *v.* Wilson, [1914] 3 K. B. 1131; [1915] 2 K. B. 739.

(*p*) Hodgson *v.* Richardson (1764), 1 W. Bl. 463. Arnould states, on the authority of this case, the unqualified rule that the true port of loading must be disclosed. Goods shipped before arrival at the *terminus a quo* are not generally covered by a policy in the ordinary form. (*Ante*, § 448.) The question of disclosure of the true port of loading does not therefore arise. Where the policy is framed to cover goods loaded before the commencement of the risk, the editors submit that generally speaking the actual port of loading is immaterial. The fact, however, of such a delay as took place at Genoa may well be material,

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Harrower v. Hutchinson.

When it was known that the ship was to load at a place called Laguna de los Padres, a mere anchorage in an open roadstead, which was unknown to underwriters as a port of loading for Europe, and the risk when express mention of that place was made had been already refused, a policy on the same risk, without further description of it than "at and from the port of Buenos Ayres and port or ports of loading in the province of Buenos Ayres," was held by the Exchequer Chamber to be void on the ground of concealment (*q*). So also where, under a licence to call at any places, it had been arranged to take cargo at an unknown and dangerous port, Mathew, J., held that this fact should have been disclosed (*r*).

Laing v. Union Mar. Ins. Co.

Intention to depart from usage.

Middlewood v. Blakes.

606. If it be intended that the ship shall take a course, which, though within the limits of the policy, may not be the best under the circumstances of the voyage insured, this intention should be disclosed to the underwriter: hence, as the customary course of the voyage for a ship insured from London to Jamaica was to leave the captain at liberty to take which of three tracks he pleased in sailing past St. Domingo; where he was limited by his instructions to take only one of those three tracks, it was held that the failure to communicate this fact to the underwriters vitiated the policy (*s*).

Any service of danger.

If a ship is to be employed on a service of peculiar danger, and this cannot be inferred from the terms of the policy, it ought to be communicated to the underwriter; as where the intention is to employ her in the foreign smuggling trade (*t*).

on the ground stated by the Court, viz., that damage might have happened during the ship's stay at Genoa. In the report, it may be pointed out, the insurance is stated to be on the ship, but there can be little doubt that this is a mistake.

(*q*) Harrower *v.* Hutchinson (1870), L. R. 5 Q. B. 584; reversing the judgment below, L. R. 4 Q. B. 523.

(*r*) Laing *v.* Union Marine Ins. Co. (1895), 1 Com. Cas. 11.

(*s*) Middlewood *v.* Blakes (1797), 7 T. R. 162; *ante*, § 389. See the observations of Duer on this case, vol. ii. pp. 494, 495.

(*t*) 1 Emerigon, 172. And see his opinion in 2 Valin, Tit. des Ass. l. 3, t. 6, art. 49.

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Accident to ship.

Neglect by the captain of a ship, aware of her having sustained an accident which might be the cause of serious damage, to inform his owners of it before they effect the policy, will at least prevent them from recovering for a loss resulting from the accident, the knowledge of which he has thus been the means of concealing from the underwriters (*u*).

Name of ship under a floating policy.

607. It has never been decided that when goods are insured by a floating policy and the assured knows by what ship they will be carried, he must disclose its name; and on principle it would seem that the insurer, by underwriting such a policy, waives this information as to the ship, and is willing to take a risk by any seaworthy ship (*x*). When, however, the assured knows that the goods will or may be shipped by a vessel concerning which there is intelligence material to the risk, he must when insuring disclose the name of the ship instead of waiting to declare the shipment at the usual time (*y*).

An anonymous letter was received at Lloyd's stating that the owners of the "Candida" intended to lose her on her next voyage. A., accustomed to open floating policies, on which he declared shipments from abroad as he heard of them, received intelligence of a shipment for him to be made by the "Candida." He was aware of the contents of the letter, but considered them unworthy of credit. Under these circumstances he opened a fresh policy believing that he should be able to declare the shipment on the policy already

(*u*) Gladstone *v.* King (1813), 1 M. & S. 35; Stribley *v.* Imperial Marine Ins. Co. (1876), 1 Q. B. D. 507. See, however, *ante*, § 584.

(*x*) See per Mansfield, C. J., Lynch *v.* Hamilton (1810), 3 Taunt. 37, 39; Knight *v.* Cotesworth (1883), 1 Cab. & E. 48, in which case a usage at Lloyd's to disclose the name of a ship by which the goods are expected to come was set up, but negatived by the jury. As to non-disclosure of the captain's past record, see Thames & Mersey Co. *v.* "Gunford" Ship Co., [1911] A. C. 529.

(*y*) Lynch *v.* Hamilton (1810), 3 Taunt. 37; Lynch *v.* Dunsford, in error (1811), 14 East, 494; Leigh *v.* Adams (1871), 25 L. T. N. S. 566. See, as to disclosure on opening a cover, Republic of Bolivia *v.* Indemnity Mut. Mar. Ins. Co. (1908), Pickford, J., 14 Com. Cas. 156.

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open. He was disappointed of this expectation by advices of other vessels coming to hand before advice as to the "Candida," and when such advice did come forward he was obliged to declare her on the fresh policy. The Court of Queen's Bench held that the concealment was material, and that he was not entitled to recover (*z*). The Court did not in terms hold the policy to be void. The question of the validity of subsequent declarations in respect of goods coming forward by other vessels was not raised; but it seems to follow logically that the policy was vitiated *in toto*, and not only so far as the declaration on the "Candida" was concerned.

Name of assured.

A broker is not bound to disclose the name of the person on whose behalf he effects the insurance (*a*).

Contract which may aggravate the risk.

608. When the assured has entered into a contract which makes the risk of ultimate loss to the underwriter greater than the usual one, this fact ought to be disclosed (*b*).

Lighterage on the "no recourse terms."

The Thames lightermen, finding that the law of common carriers bore hard upon them when it gave insurers recourse against them for losses not the consequence of negligence, formed an association for the purpose of doing the lighterage on the terms of being subject for loss only in case of negligence, called "no recourse terms." Underwriters thereupon refused to subscribe policies containing craft risks, except on a higher scale of premium, wherever the "no recourse terms" had been adopted by the assured. Policies on goods containing the craft risk were effected for the plaintiffs with the defendant, after they had agreed with a particular lighterman that he should lighter all their goods

(*z*) Leigh *v.* Adams (1871), 25 L. T. N. S. 566.

(*a*) Glasgow Ass. Corpn. *v.* Symondson (1911), 16 Com. Cas. 109.

(*b*) Tate *v.* Hyslop (1885), 15 Q. B. D. 368; see also Asfar *v.* Blundell, [1896] 1 Q. B. 123. In Property Insurance Co. *v.* National Protector Insurance Co. (1913), 18 Com. Cas. 119, Scrutton, J., considered that this principle was applicable to a reinsurance, "subject to the same clauses and conditions as the original policy," where the original contract of insurance contained an unusual clause enlarging the liability of the original underwriter.

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on the "no recourse terms." This was not made known to the defendant, and therefore the policies were underwritten for a lower premium than would have been demanded for craft risk coupled with "no recourse terms." A loss having occurred under these policies in the course of the lighterage, this action was brought. The Court of Appeal considered that it had not been proved that the practice to employ lightermen on the less onerous terms was general, and held that there had been concealment of a material fact which a fair and reasonable underwriter would have taken into account in fixing the terms on which he would accept the risk, and that such concealment vitiated the policies (*c*).

Cancellation clause.

Lord Coleridge held, in The Mercantile Steamship Company *v.* Tyser (*d*), that where a charter-party contained a clause giving the charterer an option to cancel the contract if the ship did not arrive on a certain date, the assured on freight was bound to disclose the existence of the clause. The reason given by the learned Chief Justice was, that there was no general usage (the policy was made in 1875) to insert this cancelling clause in charter-parties, and that it enormously increases the risk. It is submitted, however, that the insertion of a power to cancel cannot increase the risk, and that for this reason the fact that the contract contains this term is not material. Lord Coleridge's own decision and that of the House of Lords in a later case (*e*) show that where, in consequence of perils insured against, a ship does not arrive at the stipulated date and the power to cancel is exercised, the underwriter is not liable. The freight has been lost, not by any of the perils insured against, but by the exercise of the option.

(*c*) Tate *v.* Hyslop (1885), 15 Q. B. D. 368.

(*d*) (1880), 7 Q. B. D. 73.

(*e*) Inman Steamship Co. *v.* Bischoff (1882), 7 App. Cas. 670. See, however, Lord Selborne's *dictum*, *ibid.* p. 676; and see *post*, §§ 785—788. It may be that Lord Coleridge meant that if he was wrong in holding that the exercise of the option did not cause a loss by a peril insured against, the policy would be void for concealment; but this is certainly not what he is reported to have said.

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If, however, a charter-party contained a stipulation that if the ship did not arrive in port on a given day the contract should be at an end, without the exercise of any power to cancel, it would seem that this fact is material to the risk in a policy on freight. For if, in consequence of a peril insured against, the ship did not arrive on that day, there would be a loss of freight caused directly by such a peril (*f*).

It must, however, be remembered that when the insertion of a particular term in a mercantile contract has become very general, the underwriter will be deemed to have knowledge of it, and thenceforth there will be no obligation on the part of the assured to give information of its insertion (*g*). Therefore it may cease after some time to be the duty of the assured to give information as to the terms of a contract, the non-disclosure of which would at an earlier time have been fatal to the insurance.

Matters that need not be disclosed.

609. By sect. 18 (3) of the Marine Insurance Act, 1906,—

> In the absence of inquiry the following circumstances need not be disclosed, namely:—
>
> (a) Any circumstance which diminishes the risk;
>
> (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
>
> (c) Any circumstance as to which information is waived by the insurer;
>
> (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

"The assured," said Lord Mansfield, "need not mention what the underwriter knows, what way soever he came by

(*f*) The Alps, [1893] P. 109; The Bedouin, [1894] P. 1; see also Inman Steamship Co. *v.* Bischoff (1882), 7 App. Cas. 670, 682, 690; Scottish Shire Line, Ltd. *v.* London & Prov. Mar. Ins. Co., Ltd., [1912] 3 K. B. 51.

(*g*) See *post*, § 611; Mar. Ins. Act, 1906, s. 18, sub-s. 3 (b), *infra*.

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that knowledge; or what he ought to know; or takes upon himself the knowledge of; or waives being informed of; or what lessens the risk agreed and understood to be run; or general topics of speculation; or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, probability of hurricanes, earthquakes, &c.; or every cause which may occasion political perils, from the rupture of states, from war, and the various operations of it, upon the probability of safety from the continuance and return of peace, or from the imbecility of the enemy" (*h*).

Material facts not present to the underwriter's mind.

The assured cannot, however, excuse his omission to communicate a material fact on the ground that the fact had previously come to the knowledge of the underwriter, unless at the time when the contract was made the fact was present to the underwriter's mind.

Bates *v.* Hewitt.

In the case of the "Georgia," the policy was effected in 1864 on a vessel which had been a Confederate cruiser in the years 1863 and 1864, and which afterwards was dismantled and sold to the plaintiff. The "Georgia" had been notorious to the British public at the time she was cruising, and after she had been laid up in Liverpool had been the subject of comment in the London newspapers and in the House of Commons. The defendant, one of Lloyd's underwriters, had been cognizant of all this; but at the time that the risk was proposed to him nothing revived his recollection of these things, and it did not occur to him that this might be the Confederate cruiser. Under these circumstances the jury found that the defendant was not aware that the "Georgia" he was underwriting was the Confederate cruiser, but that at that time he had abundant means from the particulars to be found in the slip of identifying the ship. The Court held that the previous knowledge possessed by the defendant did not release the plaintiff from the duty of disclosure (*i*).

Facts of which the

It has also been held in the Supreme Court of the United

(*h*) Carter *v.* Boehm (1766), 3 Burr. 1909.

(*i*) Bates *v.* Hewitt (1867), L. R. 2 Q. B. 595; 36 L. J. Q. B. 282.

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underwriter's knowledge is not so complete as the assured's.

States that the assured cannot excuse his omission to disclose material facts by showing that they were actually known to the underwriter, unless the knowledge of the latter was as full and particular as his own (*k*).

Usages of trade.

610. On the principle that the assured need not disclose what the underwriter ought to know, it has been decided in several cases that facts comprised in the general usages of trade need not be communicated to the underwriter; *e.g.*, the usage of the Newfoundland trade for ships arriving on the coast either to be employed for some time in fishing on the Banks (called banking), or to make intermediate voyages in the American seas, before beginning to take in their homeward cargo (*l*); or the established custom during the great French war for a ship insured "at and from London or Ramsgate to Nantes, with liberty to touch at Ostend," to sail direct to Nantes, with false clearances for Ostend, and false bills of lading purporting to be made at Ostend and expressing that the goods were shipped there (*m*). But to dispense with communication of anything done according to usage, such usage must be general and universally known to all engaged in the trade (*n*).

Usual clauses in mercantile contracts.

611. Where it is the general and well-known practice to put a certain clause in a particular kind of mercantile contract, the underwriter is presumed to know that the contract contains the clause, and therefore the assured is not

(*k*) Sun Mutual Ins. Co. *v.* Ocean Ins. Co. (1882), 107 U. S. 485, citing 2 Duer, 399.

(*l*) Vallance *v.* Dewar (1809), 1 Camp. 503; Ougier *v.* Jennings (1800), *ibid.* 505, n.; Kingston *v.* Knibbs (1808), 1 Camp. 508, n. For further illustrations of the same principle, see Moxon *v.* Atkins (1812), 3 Camp. 200; Da Costa *v.* Edmunds (1815), 4 Camp. 142; Stewart *v.* Bell (1821), 5 B. & Ald. 238; and the cases decided on the East India trade, as Salvador *v.* Hopkins (1765), 3 Burr. 1707; Gregory *v.* Christie (1784), 3 Dougl. 419; Grant *v.* Paxton (1809), 1 Taunt. 463; 1 Marshall, Ins. 259; 2 Chitty, 319.

(*m*) Planché *v.* Fletcher (1779), 1 Dougl. 251. See Barnewall *v.* Church (1803), 1 Caines, 217; 1 Phillips, s. 598.

(*n*) Tennant *v.* Henderson (1813), 1 Dow, 324.

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bound to give information about its insertion, though the clause may tend to increase the risk.

Twenty-four hours clause.

In time charters it is now the universal practice to insert the so-called "twenty-four hours" clause, which provides that payment of hire shall cease when the ship has, from certain causes, become inefficient for twenty-four hours, until she is able to resume the voyage. And when the "twenty-four hours" clause is put into immediate operation by a peril insured against, the underwriter on freight is liable for the loss. An underwriter of a policy on chartered freight knew, from the form of the slip, that it was intended to insure a time freight. The Court of Appeal held that, considering that the "twenty-four hours" clause is practically universal in time charters, the assured was not bound to disclose the fact that the charter-party contained this clause (*o*).

Lump freight clause.

In a subsequent case, where a policy was effected by charterers on "profit on charter," and it was a material fact that the freight payable by the charterers was a lump freight, the Court of Appeal held that the assured was not bound specifically to disclose this fact. A clause for payment of a lump sum for freight, they said, is a usual clause in charter-parties, and the obligation specifically to disclose the contents of a charter-party extends only to unusual clauses, the insertion of which the underwriters could not reasonably have anticipated (*p*). So also it has been held in the United States that underwriters are now presumed to have knowledge of cancellation clauses in charter-parties (*q*).

Cancellation clause.

Continuation clause.

Similarly, it was held by Bigham, J., that an underwriter who re-insures a time risk need not disclose the fact that the original policy contains a continuation clause (*r*).

(*o*) The Bedouin, [1894] P. 1; see also Salvador *v.* Hopkins (1765), 3 Burr. 1707, where it was held that the underwriter need not be told that a charter-party of the East India Company contained a clause entitling the company to keep the ship out in India for a year, there being a general usage of the East India trade to this effect.

(*p*) Asfar *v.* Blundell, [1896] 1 Q. B. 123.

(*q*) Ruger *v.* Firemen's Fund Ins. Co. (1898), 90 Fed. R. 310.

(*r*) Charlesworth *v.* Faber (1900), 5 Com. Cas. 408.

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General trade and revenue laws.

612. Every underwriter is presumed to be as well acquainted as the assured with the general and established restrictions on commercial freedom imposed by different states for the sake of revenue or fancied protection to their interests (*s*); but if a prohibition be of recent date, or only occasional in its nature, the assured, supposing him to have private means of information, ought to communicate the fact to the underwriter: if he be himself ignorant of it, of course the rule will not apply (*t*).

Where part of the cargo is contraband or enemy's property.

613. It has been held in the United States that, under an insurance on "all lawful goods," it is not necessary to disclose that they are contraband of war, or that such constitute a part of the cargo (*u*). So, in this country, where an American neutral, who had effected an insurance on goods on board an American ship, did not inform the British underwriters that enemy's property, not included in the goods insured, was also on board the same ship, no objection was made to his right of recovery (*x*).

Contents of Lloyd's Lists.

614. As to the contents of Lloyd's Lists (which are now incorporated in the *Shipping Gazette*), whether the under-

(*s*) Lever *v.* Fletcher (1780), 1 Park, Ins. 507.

(*t*) See Mayne *v.* Walter (1782), 1 Park, Ins. 431; 1 Marshall, Ins. 478; and the American cases, 1 Phillips, ss. 595 *et seq.*

(*u*) Juhel *v.* Rhinelander (1800—1802), 2 Johnson's Cases, 120, 487; and Seton *v.* Low (1799), 1 Johnson's Cases, 1, cited 1 Phillips, s. 628. Generally speaking, as contraband goods, and other goods on board, the property of the same owner, are liable to condemnation, and the ship to be carried into port for inquiry, the nature of the goods ought, it would seem, to be declared. This is the opinion of Phillips (vol. i. s. 624). The owner of part of the cargo cannot, however, necessarily be expected to know that there are contraband goods on board belonging to other persons.

(*x*) Barker *v.* Blakes (1808), 9 East, 283. The editors venture to point out that the question of concealment was not raised in this case. Indeed, the assured may not have known that enemy's goods would also be carried. Before the Declaration of Paris the fact of enemy's goods being on board would have subjected the ship and cargo to delay and detention, as the ship might have been carried into port for the condemnation of the goods. It may, however, be said that the underwriter had no right to assume that a neutral shipowner would not, in the ordinary way of trade, carry belligerent-owned goods.

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writer, being a member of Lloyd's or a subscriber, and as such receiving or having access to these Lists daily, is to be affected with knowledge thereof, irrespective of its being actual knowledge, so as to be bound thereby in law, is a question concerning which the cases are conflicting. In the earlier cases the juries were directed that the assured need not disclose matters of fact which had been published in Lloyd's Lists. For instance, upon an insurance on the "Lusitania" from Brazil to Lisbon being proposed, it was stated that the ship was out fifty-seven days; but the fact that another vessel which had sailed at the same time had arrived at Lisbon ten days before the date of the orders to insure might have been learned from Lloyd's List, and was not stated. Burroughs, J., there held that the policy was not vitiated, on the ground that "what the underwriter by fair inquiry and due diligence may learn from the ordinary sources of information need not be disclosed" (*y*). A similar opinion is attributed to Erle, C. J., at Nisi Prius, in the following terms: "Actual knowledge is not essential; if the insurer knew he had the means of knowing the fact, then it was within his knowledge. If, for example, he knew that he could learn the exact cargo at Lloyd's, and chose not to ascertain it, knowing or believing it would include iron, it was within his knowledge" (*z*). To the same effect seems to be an opinion expressed by Lord Abinger, *in banc* (*a*).

In the last-mentioned case objection was taken before the Court to the admission in evidence, on the trial, by Maule, J., of Lloyd's Lists, and the learned judge was sustained in thinking them evidence. So far there seems to be no ground for doubt, the same point having been frequently ruled as to the admissibility in evidence of a newspaper which the party

(*y*) Friere *v.* Woodhouse (1817), 1 Holt, N. P. 572. So, upon the first trial of Elton *v.* Larkins (1831), 5 C. & P. 86; *S. C.* (1832), *ibid.* 385; 8 Bing. 198.

(*z*) Foley *v.* Tabor (1861), 2 F. & F. 662. And cf. Gandy *v.* Adelaide Ins. Co. (1871), L. R. 6 Q. B. 746.

(*a*) Mackintosh *v.* Marshall (1843), 11 M. & W. 116.

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against whom it is adduced is proved to take in regularly. It is upon the next point that the difference of opinion exists, namely, the use to be made of it when admitted in evidence, unless the particular entry in it can by evidence be traced to his knowledge.

In Nicholson *v.* Power it was not necessary to consider the point, because, although the same entry had first appeared in Lloyd's Lists which afterwards appeared in the *Shipping Gazette*, and of which no mention was made to the underwriter, the assured had peculiar information from his captain that enabled him to fix the entry as applying to his own ship, and to none other (*b*).

Morrison *v.* Universal Mar. Ins. Co.

In Morrison *v.* Universal Marine Insurance Co. (*c*), the defendants were subscribers to Lloyd's, and the entry found in the *Liverpool Mercury* newspaper had first appeared in Lloyd's Lists, where, however, their underwriter did not discover it until after he had initialed the slip; and as the broker, admitting his own knowledge of the entry, had taken upon himself to suppress all mention of it, this concealment defeated the policy. Upon the point here under consideration, Bramwell, B., said: "It is impossible to say that there is any rule of law or any principle or authority which affects the underwriter with knowledge of what is contained in Lloyd's Lists. No doubt some knowledge may be assumed in the underwriter—what, I will not attempt to define or describe; though I agree with what was thrown out by my brother Cleasby in the course of the argument, that the matters he must take knowledge of are matters of general knowledge, not matters relating to any particular ship. But to hold that the underwriter is bound to carry in his head all that is contained in Lloyd's Lists relating to a ship in which he has no interest, rather than to hold the owner of the ship bound to disclose it, would be to put a difficult and useless

(*b*) Nicholson *v.* Power (1869), 20 L. T. N. S. 580. See, however, the remarks of Cockburn, C. J., *ibid.* See *post*, § 616.

(*c*) Morrison *v.* Universal Mar. Ins. Co. (1872), L. R. 8 Ex. 40; on appeal (1873), *ibid.* 197; *ante*, § 601.

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burden on the underwriter, while the opposite view puts no difficulty at all in the way of the owner."

This view of the law thus expressed by Bramwell, B., was concurred in by the other members of the Court of Exchequer; and Blackburn, J., presiding in the Court of Exchequer Chamber upon the same case, expressed his concurrence in this with the Court below (*d*).

Summary.

It may be gathered from this last case and the case of Bates *v.* Hewitt (*e*) that there is no presumption of knowledge of particular facts concerning particular ships on the part of the underwriter merely on the ground that such facts have appeared in Lloyd's Lists or a newspaper.

Underwriter relying on representation and not consulting Lloyd's Lists.

615. The sole ground upon which Lloyd's Lists are admissible in evidence against the underwriter upon a question of concealment is that he is presumed to have consulted them with reference to the risk proposed before assuming it; if, therefore, there has been any false representation made to the underwriter as to the nature of the risk, and the underwriter acted solely in reliance on that representation without in fact consulting the lists, the presumption that he knows their contents of course falls to the ground. If in such case there have also been the concealment of a material fact, this will avoid the policy, although the fact concealed might have been learnt from the lists (*f*).

Private information connected with intelligence in Lloyd's Lists.

616. If the intelligence conveyed in Lloyd's Lists can only be connected with the risk proposed by means of information which the assured is privately possessed of, he will be bound to disclose such information if he is aware of its connection with such intelligence and the latter makes it material, and his failure to do so will vitiate the policy; for, although in such case the mere fact as it stands in Lloyd's Lists is presumed to be known to the underwriter, yet its connection

(*d*) Morrison *v.* Universal Mar. Ins. Co. (1873), L. R. 8 Ex. 197.

(*e*) (1867), L. R. 2 Q. B. 595.

(*f*) Mackintosh *v.* Marshall (1843), 11 M. & W. 116.

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with the risk could only be known to him through the information which the assured has privately received and withholds (*g*).

General maritime intelligence. Decisions in the United States.

617. It has been a question a good deal canvassed in the United States how far maritime intelligence inserted in the public papers, and open to all the world, need be stated. The conclusion upon the whole appears to be that such articles of intelligence need not be stated, unless they apply peculiarly to the case of the assured, or unless he is privately in possession of information which enables him to infer, with more certainty than the rest of the public, that the intelligence in the journals is in fact material to the risk (*h*). Mere items of ordinary shipping intelligence in the public papers, equally open to both parties and too general to lead to any particular application to the risk insured, need not be communicated (*i*).

Where the facts in question are comprised under the head of marine intelligence in papers actually and habitually taken in and filed at the office where the insurance is effected, it seems a fair general presumption that the insurers "have examined with some care the items of marine intelligence which are expressly designed speedily to diffuse information on a subject so immediately interesting to them, especially in relation to vessels belonging to their own port" (*k*). This is, however, at the highest only a *primâ facie* presumption; no case in the United States has carried it beyond this; and in New York and Massachusetts the law, we are told by Judge

(*g*) Lynch *v.* Dunsford (1811), 14 East, 494; Nicholson *v.* Power (1869), 20 L. T. N. S. 580; see also Bates *v.* Hewitt (1867), L. R. 2 Q. B. 595.

(*h*) See the cases cited in the last note. See also Republic of Bolivia *v.* Indemnity Mutual Mar. Ass. Co., *ante*, § 598.

(*i*) 3 Kent, Com. 285; 1 Phillips, s. 606; 2 Duer, 480, 481; and see the case of Ruggles *v.* General Int. Ins. Co. (1825), 4 Mason, 74; cited 1 Phillips, s. 610; and Alsop *v.* Com. Ins. Co. (1833), 1 Sumner, R. 451; 1 Phillips, *ibid.*

(*k*) Per Shaw, C. J., in Greene *v.* Merchants' Ins. Co. (1830), 10 Pick. Mass. R. 402; 1 Phillips, s. 606; 2 Duer, 481.

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Duer, may be regarded as settled, that in such cases the defence of a concealment is only to be met by direct or circumstantial proof of actual knowledge on the part of the underwriter (*l*).

In one of the cases cited in illustration of this position, the defence set up was that a letter of the plaintiff's alleged to contain material information had been withheld; the answer was, that the same information had appeared in substance in a New York *Gazette* that had been received at the office of the defendants, and was on the file there when the application for the insurance was made. The judge told the jury that if they thought the newspaper contained all the information the letter did, and was actually seen by the president of the Insurance Company before he subscribed the policy, and that part of it which contained the information read by him, then the omission to communicate the letter was immaterial. The jury found for the plaintiff. On application for a new trial the Court upheld the direction of the judge (*m*).

Inference from rate of premium.

Where, from the rate of premium or other circumstances, the fair probability appears to be that the insurer, though subscribing to and regularly taking in the *Gazette*, could not, before completing the insurance, have read the paragraph conveying the information complained of as withheld, the *primâ facie* presumption is repelled, and the defence of concealment unanswered. Thus, an insurance was effected at New York on a sloop from Washington, North Carolina, to Charleston, South Carolina. The premium was at the ordinary rate. The sloop had been in fact lost on Ocracocke Bar, North Carolina, nine days before the policy was effected. The day before effecting the insurance the plaintiff had read a paragraph in a New York mercantile gazette, stating that information had been received "that a New York sloop, bound from Washington, North Carolina, to Charleston, South Carolina, had been stranded, Thursday week, on Ocracocke Bar." He did not disclose this fact.

(*l*) 2 Duer, 481, 482.

(*m*) Greene *v.* Merchants' Ins. Co. (1830), 10 Pick. Mass. R. 402, cited 2 Duer, 481, and 1 Phillips, s. 606.

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The Insurance Company subscribed to and regularly received the *Gazette* in question. It was contended that they must, therefore, be held to be as well acquainted with its contents as the plaintiff. The judge, however, held that the plaintiff ought to have disclosed the fact, and that the concealment was material and avoided the policy. Judge Duer adds: "The rate of premium was doubtless considered by the judge as such conclusive proof of the ignorance of the underwriter that it superseded the necessity of submitting the question to the jury. The verdict was in conformity with the charge of the judge and no attempt was made to disturb it. In New York the propriety of the decision has never been questioned" (*n*).

Nothing need be disclosed which the underwriter impliedly waives being informed of.

618. Another principle laid down by Lord Mansfield in the celebrated judgment already cited and embodied in sect. 18 (3) (c) of the Marine Insurance Act, 1906, is that nothing need be disclosed to the underwriter which he himself waives being informed of. Thus, to take the illustration given by his Lordship in the same case:—"If the insurance be on a private ship of war, from port to port, the underwriter needs not to be told of the secret enterprise it is destined upon, for from the nature of the contract he waives this information" (*o*).

In case of privateer.

Need of repairs.

Upon the same principle, an insurance on a ship for a homeward voyage, "at and from" a foreign port, implies

(*n*) Dickenson *v.* The Comm. Ins. Co. of New York, Anthon's N. P. R. 92; 2 Duer, 480, n. (*a*). Phillips, in his statement of the case, adds a fact that makes the decision still stronger, viz., that on account of the intelligence another office had in the earlier part of the same day refused the risk. 1 Phillips, s. 606. For the inference from the payment of an unusually heavy premium, see Court *v.* Martineau (1782), 3 Dougl. 161; *post*, § 622.

(*o*) Carter *v.* Boehm (1766), 3 Burr. 1909. The underwriter on ship in general waives disclosure of the nature of the cargo: see Mann, MacNeal & Steeves, Ltd. *v.* Capital & Counties Ins. Co., *ante*, § 604. In Property Insurance Co. *v.* National Protector Insurance Co. (1913), 18 Com. Cas. 119, Scrutton, J., held that the words "without notice" in a reinsurance policy containing the following clause: "subject without notice to the same clauses and conditions, &c.," relieved the reassured from disclosing the existence of an unusual clause in the original policy.

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that in all probability repairs will be required before she can sail on her homeward voyage; the fact, therefore, that she requires to be detained there for repairs beyond the time of her loading need not be communicated to the underwriter, who, if he wishes for particular information on the point, ought to ask for it (*p*).

Date of sailing in retrospective policy.

So, where a ship is insured "at and from" a particular place, "lost or not lost," it is not necessary to disclose that she has in fact sailed before the policy is effected; for if the underwriters want to be satisfied as to this point, they ought to inquire into it (*q*).

Delay before ship reaches *terminus a quo*.

An insurance "at and from" a port by no means implies that the ship is already at the port in question, and consequently information that she is not then there is not required. But as it is implied in such a policy that the vessel will be there within a reasonable time, the assured ought to communicate any information possessed by him that this reasonable time is likely to be exceeded, otherwise the insurer may avoid the policy (*r*). Yet if such delay in excess be excused by a general usage, such usage is one of those things that the underwriter is bound to know, and therefore need not be mentioned in the particular case (*s*).

Strengthening floating dock, where seaworthiness admitted.

Where the owners of a floating dock insured it against loss on a voyage by sea by a policy containing the words, "seaworthiness admitted," it was held by the Court of Appeal that it was not necessary for the owners to disclose that it required special strengthening for the voyage, on the ground that the underwriters were under the circumstances

(*p*) Beckwith *v.* Sydebotham (1807), 1 Camp. 116. As a justifiable delay after the risk has attached, however prolonged, does not put an end to the insurance, it is submitted that the assured must, when the policy is retrospective, disclose any extraordinary delay which has taken place since the beginning of the risk. See Hodgson *v.* Richardson (1764), 1 W. Bl. 463.

(*q*) Fort *v.* Lee (1811), 3 Taunt. 381.

(*r*) Mar. Ins. Act, 1906, s. 42. See *ante*, §§ 479, 480.

(*s*) Per Tindal, C. J., in Mount *v.* Larkins (1831), 8 Bing. 108, 121.

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put on inquiry as to its construction, and should have asked for further information if they required it (*t*).

Unseaworthiness.

619. On the same principle it is that, as there is in every voyage policy an implied warranty of seaworthiness, the assured need not proffer any disclosure as to the ship's unseaworthiness when she sailed. The underwriter waives his right to a spontaneous disclosure of facts, which, whether disclosed or not, will exempt him from his liability, as being a breach of this implied warranty. Hence, in an action on a policy "at and from Madeira to Charleston," it was held that the captain's letters from Madeira to the owner, stating that the ship had been very leaky on her voyage thither, need not be communicated (*u*).

Shoolbred *v.* Nutt.

Haywood *v.* Rodgers.

So where the owners of a ship insured "at and from Trinidad to London," &c., without communicating the captain's letter, stating that he had been obliged to have a survey on the ship at Trinidad "on account of her bad character," or the survey which accompanied the letter and gave the ship a good character: it was held, that the non-disclosure of this letter and survey to the underwriters did not vacate the policy; though it appeared in evidence, that such circumstance, if known, would have enhanced the premium (*x*).

In a time policy there is no warranty of seaworthiness; and, therefore, material facts relating to the condition of the ship when the policy attaches must be disclosed (*y*).

A time policy on a ship to run from the 21st of January was effected on the 19th. The assured then knew that the ship had been ashore on the 2nd of January, and had sprung

(*t*) Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452, affirming Scrutton, J., [1912] 2 K. B. 112.

(*u*) Shoolbred *v.* Nutt (1782), 1 Marshall, Ins. 474; 1 Park, Ins. 493.

(*x*) Haywood *v.* Rodgers (1804), 4 East, 590; see also Beckwith *v.* Sydebotham (1807), 1 Camp. 116.

(*y*) Russell *v.* Thornton (1859), 29 L. J. Ex. 9. See Gandy *v.* Adelaide Ins. Co., *post*, § 625. The rule is, of course, the same where seaworthiness is admitted in a voyage policy. See Cantiere Meccanico Brindisino *v.* Janson, *ubi supra*.

a leak and been forced to go into port for repairs. The Court of Exchequer held that the non-communication of these facts avoided the policy (*z*). Sect. 619.

The general rule is that no circumstance need be disclosed which it is superfluous to disclose by reason of any express or implied warranty (*a*).

Where the underwriter calls for information.

620. If, indeed, the underwriter, even though the policy be on a voyage, particularly calls for information on the subject, then the assured must disclose truly all that he knows in the respect required (*b*).

The principles upon which this doctrine rests are thus clearly and admirably stated in Lord Ellenborough's judgment in the case of Haywood *v.* Rodgers:—"It certainly," said his Lordship, "would have some weight in guiding the judgment of an underwriter, to know how old the ship was; where she was built, whether originally British or foreign; what was the form of her construction, whether clinker built or not, whether copper bottomed or not; what repairs she had received, and when, and in what docks those repairs were done to her, and how lately before the voyage insured; and if the voyage were, as this was, a voyage home, what accidents the ship had met with in her outward voyage. All this may be very proper and convenient for an underwriter to be informed of, before he takes upon him the risk, and all this may be asked of the assured; and if he should withhold, on being asked for it, any material part of such required information, his policy could not be sustained for a moment;

(*z*) Russell *v.* Thornton, *supra*. In delivering the judgment of the Court, Bramwell, B., said (p. 13) that even if there had been a warranty of seaworthiness the facts ought to have been disclosed, as the ship, though made seaworthy, might never be as good a ship as before the calamity. This *dictum* does not agree with the authorities already cited. The logical consequence, if it were good law, would be that in all insurances all bygone calamities to the ship ought to be disclosed. See, as to this, *post*, § 621.

(*a*) Mar. Ins. Act, 1906, s. 18, sub-s. 3 (d), *ante*, § 609.

(*b*) So, according to the Mar. Ins. Act, 1906, s. 18, sub-s. 3, *ante*, § 609, it is only "in the absence of inquiry" that the circumstances there enumerated need not be disclosed.

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for such a suppression would be a fraudulent concealment of material facts, which has always been considered as avoiding the policy. But the question is, Is it the duty of the assured, in the first instance, and as a condition precedent on his part, to inform the underwriter of all these circumstances to the extent of his, the assured's, own actual knowledge on the subject?" His Lordship answers this question in the negative, upon the grounds:—1st. That the underwriter is exempted from the effects of these circumstances, as far as they render the ship not a proper object of insurance; for if the ship be not seaworthy at the commencement of the risk, he never incurred any responsibility. 2nd. From the almost absolute impossibility for the assured to state (without any specific inquiry) everything which the underwriter might have deemed material to the question, whether he should underwrite at all, and, if so, at what premium (*e*).

Condition of perishable goods.

621. On the same principle, the assured on perishable goods is not bound to make any disclosure as to whether they were in a damaged condition; because, if they be put on board in such a state as to produce spontaneous combustion and are thereby consumed, the assured can make no claim in respect of the loss which he has himself occasioned (*d*).

Bygone casualties to the ship.

Upon the same principle it has been decided that the assured need not, unasked, disclose all the bygone calamities that have befallen the ship, or produce his whole portfolio of letters; it is enough, in the first instance, if he communicates fully and truly all material facts relative to the state the ship was in at the time the last intelligence left her; and it is for the underwriters to require further information if they wish it, especially where the letter laid before them expressly

(*e*) Haywood *v.* Rodgers (1804), 4 East, 590, 597, 598. The decisions in the United States follow the law as thus laid down. See Walden *v.* New York Firemen's Ins. Co. (1815), 12 Johns. R. 128; De Wolf *v.* New York Firemen's Ins. Co. (1822), 20 Johns. R. 214; 3 Kent, Com. 281; 2 Duer, 523; 2 Parsons, 178.

(*d*) Boyd *v.* Dubois (1811), 3 Camp. 133.

refers to a prior communication as to the state of the ship in the earlier part of the same voyage (*e*). Sect. 621.

Inference from high rate of premium.

622. The payment of a very high premium may be evidence that the underwriter accepted the risk as an unusually hazardous one and waived the disclosure of a particular matter.

Court *v.* Martineau.

A Liverpool merchant directed his London broker to effect insurance on a prize ship, informing him by letter that should the ship arrive, he (the merchant) would send up an express to communicate the fact. The broker delayed insuring to give time for the arrival of the express, and, none having arrived, effected an insurance at 50 guineas per cent. without saying anything about the non-arrival of the express. It was held that, under the circumstances of the case, and especially the enormous amount of premium, this was not a fatal concealment; the underwriter ought to have inquired (*f*).

Apprehensions.

623. Although it be fatal to represent untruthfully that previous underwriters have taken the proposed risk at the same or a lower premium than that offered (*g*), yet the assured is not bound to disclose the estimate formed by other underwriters of the risk, that they have declined it, or what their apprehensions or opinions were respecting it (*h*). Nor need he communicate the fears and apprehensions of foreign correspondents, or even the state of his own mind as to

(*e*) Freeland *v.* Glover (1806), 7 East, 457.

(*f*) Court *v.* Martineau (1782), 3 Dougl. 161; Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. at p. 466. See Duer, vol. ii. pp. 568, 569.

(*g*) Sibbald *v.* Hill (1814), 2 Dow, 263.

(*h*) Lebon *v.* Straits Ins. Co. (1894) (C. A.), 10 Times L. R. 517; Glasgow Ass. Corpn. *v.* Symondson (1911), 16 Com. Cas. 109. The same has been held in the United States. Ruggles *v.* General Int. Ins. Co. (1825), 4 Mason, 74; Clason *v.* Smith (1812), 3 Wash. Circ. R. 156; 1 Phillips, s. 578. In Yager *v.* Guardian Ass. Co., Ltd. (1912), 108 L. T. 38, a Divisional Court appears to have held that a fire policy was vitiated by the failure to disclose the refusal of another office to continue the insurance.

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matters of mere opinion (*i*): it is enough to state the facts on which such apprehensions are founded (*k*).

Bell *v.* Bell.

The assured on a policy on a ship "at and from Riga," &c., at the time of effecting the policy were in possession of a letter from their correspondents in that place, stating that a great sensation had been produced there by an order of the Russian Government to send the papers of all vessels arriving at Riga to St. Petersburg, and that the ship on which the policy was effected must share the same fate with the rest; this letter was not shown to the underwriters, but the broker stated, as a fact, that the ship's papers had been sent to St. Petersburg for examination. Lord Ellenborough held that it was enough that the broker had communicated the fact of the ship's papers being sent to St. Petersburg for examination (*l*).

What lessens the risk.

624. "The assured," says Lord Mansfield, "need not disclose what lessens the risk agreed and understood to be run" (*m*).

Thus, to take the instances furnished by his Lordship: "If the underwriter insures for three years, he needs not to be told any circumstances to show it may be over in two; so if he insures a voyage, with liberty of deviation, he needs not to be told what tends to show there will be no deviation" (*n*).

Matters of inference.

625. Where a fact is a matter of inference, and the materials for informing the judgment of the underwriter are common to both parties, the assured is not bound to make any communication on the subject (*o*).

By the rules of Lloyd's Register, a ship classed in it A 1 for seven years is required, in order to retain that class,

(*i*) Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452; see the judgment of Buckley, L. J., at p. 471.

(*k*) Bell *v.* Bell (1810), 2 Camp. 479.

(*l*) Bell *v.* Bell (1810), 2 Camp. 475.

(*m*) See Mar. Ins. Act, 1906, s. 18, sub-s. 3 (a), *ante*, § 609.

(*n*) Carter *v.* Boehm (1766), 3 Burr. 1909.

(*o*) Per Cockburn, C. J., Bates *v.* Hewitt (1867), L. R. 2 Q. B. 595, 605; Gandy *v.* Adelaide Ins. Co. (1871), L. R. 6 Q. B. 746.

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to undergo a half-time survey in the fourth year. If the survey is satisfactory she retains her class, and the letters "H. T.," with the date of the survey, are placed opposite the entry of her name in the register. The plaintiff, the owner of a vessel classed A 1, informed Lloyd's surveyor, when her half-time survey was due, that he would not continue her in Lloyd's Register. Shortly afterwards he effected an insurance on her for a year with the defendant, who at the time referred to the register and, finding her classed A 1, took the risk at the rate for a ship so classed. Nineteen days afterwards, the ship was struck off the register, and subsequently she was lost. The Court of Queen's Bench held, Cockburn, C. J., dissenting, that the plaintiff was not bound to disclose the fact that he had resolved not to let the ship undergo the survey; for the underwriter ought to have seen from the entry in the register that the time for the survey had passed, and that no survey had been held. The Chief Justice refused to apply the rule which he had laid down in Bates *v.* Hewitt, on the ground that the fact which was not disclosed was a matter of positive knowledge to the plaintiff, and only of possible inference from imperfect materials to the underwriter. (It was in evidence that the period for the half-time survey was not always strictly observed.)

The jury found that the fact that the plaintiff had resolved not to continue the ship on the list was not material. The majority of the Court declined to say that this finding was wrong. Cockburn, C. J., however, thought that this fact was material. The refusal to submit to the survey, he said, led fairly to the inference that the owner was conscious that the condition of the vessel had so far deteriorated, that the result of the survey would be unfavourable. Applied to a time policy, as this was, the opinion of the Chief Justice, it is submitted, has great force (*p*).

Materiality a question of fact.

626. "Whether any particular circumstance, which is not

(*p*) Gandy *v.* Adelaide Ins. Co. (1871), L. R. 6 Q. B. 746.

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disclosed, be material or not is, in each case, a question of fact" (*q*).

Materiality of concealment, how proved.

Therefore the materiality of the facts concealed is a question mainly for the jury, whose finding thereon is not lightly disturbed, unless, indeed, it is clearly against the weight of evidence, or the result of erroneous direction by the judge presiding at the trial (*r*).

Evidence of skilled witnesses.

Whether the jury, in forming their judgment upon the materiality of the fact concealed, may be assisted by the evidence of skilled witnesses, such as brokers, underwriters, &c., called to give their opinion whether the fact, in their judgment, was one which, if communicated to a prudent underwriter, would be likely materially to influence him in his estimate of the risk, is a question that has been very much canvassed in this country, and on which the authorities are indecisive.

Authorities against its admissibility. Authorities in its favour.

Lord Mansfield (*s*), Sir Vicary Gibbs (*t*), and Lord Denman (*u*) have maintained that the evidence is inadmissible; on the other hand, Lord Kenyon (*x*), Holroyd, J. (*y*), Lord Tenterden (*z*), and Tindal, C. J. (*a*), have all held this evi-

(*q*) Mar. Ins. Act, 1906, s. 18 (4).

(*r*) See Willes *v.* Glover (1804), 1 B. & P. N. R. 14; Littledale *v.* Dixon (1805), *ibid.* 151; Bridges *v.* Hunter (1813), 1 M. & S. 15; Elton *v.* Larkins (1831), 8 Bing. 198; Westbury *v.* Aberdein (1837), 2 M. & W. 267; Mackintosh *v.* Marshall (1843), 11 M. & W. 116; Gandy *v.* Adelaide Ins. Co. (1871), L. R. 6 Q. B. 746.

(*s*) In Carter *v.* Boehm (1766), 3 Burr. 1909. Judge Duer points out that this was a case of a very unusual insurance, not against any marine risk, but against the capture by enemies of a fort in the East Indies. The previous experience of a broker could furnish him with no light or data to guide his judgment on the question proposed to be asked. 2 Duer, 783.

(*t*) At N. P., in Durrell *v.* Bederley (1816), 1 Holt, 283.

(*u*) In Campbell *v.* Rickards (1833), 5 B. & Ad. 840.

(*x*) Chaurand *v.* Angerstein (1791), Peake, N. P. 43.

(*y*) Berthon *v.* Loughman (1817), 2 Stark. 229.

(*z*) Rickards *v.* Murdock (1830), 10 B. & Cr. 527.

(*a*) Chapman *v.* Walton (1833), 10 Bing. 57. In this case the opinion of brokers was given in evidence, not on a question of materiality, but on the question what alterations a skilful broker would have made in the policy. The principle involved is, however, the same. See also Elton *v.* Larkins (1832), 5 C. & P. 392, tried the year before the decision of Chapman *v.* Walton and Campbell *v.* Rickards.

dence admissible; and it was also admitted without objection in two reported cases which came respectively before Sir James Mansfield (*b*) and Lord Ellenborough (*c*), in the former of which it had a material influence on the judgment, both of the Court and jury. Sect. 626.

Law in the United States on this point.

In the United States the leading authorities, including Chancellor Kent (*d*), Story, J. (*e*), and Judge Duer (*f*), are all in favour of the admissibility of this evidence.

Conclusion.

The arguments in favour of the admission of this evidence far outweighed, in Arnould's opinion, those which have been urged against it.

Since the learned author wrote, the evidence of underwriters and brokers on such questions has been frequently resorted to without objection (*g*); and it is now settled practice to admit their evidence.

Onus et modus probandi.

627. The burthen of proof of concealment lies on him who pleads it. In the days when parties to the cause could not be examined as witnesses, it was held that, whenever it was proved to the satisfaction of the jury that the assured, before the policy was effected, was in possession of facts which would probably have induced the underwriter to decline the risk or ask a higher premium than that at which the policy was actually effected, there was a fair presumption that the facts were not communicated (*h*). In the present state of the

(*b*) Littledale *v.* Dixon (1805), 1 B. & P. N. R. 151.

(*c*) Haywood *v.* Rodgers (1804), 4 East, 590.

(*d*) 3 Kent, Com. 284, n. (*b*).

(*e*) Per Story, J., in M'Lanahan *v.* Universal Ins. Co. (1828), 1 Peters, S. C. R. 188, cited 2 Duer, 786.

(*f*) 2 Duer, Ins. 783—789. The matter is fully discussed, and the authorities reviewed in the notes to Carter *v.* Boehm, in Smith's Leading Cases, vol. i. See, also, *ante*, §§ 158—160.

(*g*) See, *e.g.*, Ionides *v.* Pender (1874), L. R. 9 Q. B. 531; Herring *v.* Janson (1895), 1 Com. Cas. 177; Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. 529; Scottish Shire Line, Ltd. *v.* London & Prov. Co., [1912] 3 K. B. at p. 70.

(*h*) See Robertson *v.* Marjoribanks (1819), 2 Stark. 575; and Elkin *v.* Janson (1845), 13 M. & W. 655. Duer considers that the good sense of the matter is not to require further proof from the underwriter. 2 Duer, 685, 686.

Sect. 627. law it would not be safe for the underwriter defending, if the policy was effected with him personally, to rely on evidence to this effect and refrain from giving evidence in person under this plea. It must, moreover, be proved on his behalf—1, that the facts were known to the plaintiff before the conclusion of the contract (*i*), and, 2, that the communication of these facts would have influenced a prudent underwriter in fixing the premium or determining whether he would take the risk (*k*).

(*i*) Mar. Ins. Act, 1906, ss. 18, 21. (*k*) *Ibid.* s. 18.

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ON

MARINE INSURANCE.

TENTH EDITION.

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ARNOULD

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MARINE INSURANCE

AND AVERAGE.

TENTH EDITION

BY

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AND

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OF CERTAIN MATTERS THAT RENDER THE CONTRACT OF INSURANCE VOID OR UNAVAILABLE.

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628. THE subject of warranties is dealt with in sects. 33 to 41, inclusive, of the Marine Insurance Act, 1906. This

Express warranties generally.

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Definition of an express warranty, and provisions of the Mar. Ins. Act.

work devotes one chapter to Express Warranties, another to Implied Warranties, and a third to the subject of Illegality of the Risk, which the Act treats as a part of the subject of warranties, by laying down that there is an implied warranty as to the legality of the adventure.

As to warranties, generally, the thirty-third section of the Act provides as follows:—

> (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
>
> (2) A warranty may be express or implied.
>
> (3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

The thirty-fourth section also applies to warranties generally, and deals with excuses, whether valid or invalid, for non-compliance.

It is in the following terms:—

> (1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law (*a*).
>
> (2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss (*b*).
>
> (3) A breach of warranty may be waived by the insurer (*c*).

(*a*) See *infra*, § 636. (*b*) *Infra*, § 688. (*c*) *Infra*, § 690.

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The thirty-fifth section takes up the subject of express warranties in particular, and provides as follows:—

> (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.
>
> (2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.
>
> (3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

As provided by sect. 33, sub-sect. 1, of the Act, a warranty may either allege the existence of some fact or state of things at the time, or previous to the time, of making the policy: as, that the thing insured is neutral property, that the ship is of such a force, that she sailed on such a day, or was all well at such a time; or it may undertake for the happening of future events, or the performing of future acts: as, that the ship shall sail on or before a given day, that she shall depart with convoy, that she shall be manned with such a complement of men, &c. (*d*).

Express warranties must be written on the face of the policy.

629. It is a fixed and long-established rule that nothing can amount to an express warranty—*i.e.*, to an explicit condition, on the literal truth of which the validity of the contract depends—unless it be inserted in writing on the face of the policy, or in some document incorporated therewith by reference.

For instance, a written paper stating that the ship "mounts twelve guns and twenty men" was held not to be an express warranty to that effect, though it was wrapped up

(*d*) 1 Marshall, Ins. 353. In the former case Marshall terms the stipulation an affirmative, and in the latter a promissory warranty; but the distinction between the two classes is one rather of form than substance, many warranties that are in form affirmative being in fact also promissory, as, *e.g.*, the warranty that the ship is neutral not only affirms that she is so at the date of the policy, but also engages that, as far as depends on the assured, she shall continue neutral throughout the duration of the risk: see sect. 36 of the Mar. Ins. Act, 1906. The Act ignores Marshall's distinction by applying the term "promissory warranty" to both classes: see sect. 33, *supra*.

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with, and enclosed in, the policy when brought to the underwriters for subscription (*e*); and the decision was the same with regard to a similar paper, even though wafered to the policy at the time of subscribing (*f*). It is, however, now the regular practice of those engaged in the business of insurance to have clauses containing warranties printed on slips of paper, which are fastened with gum to the policy, and it is submitted that, in view of this practice, the ruling in Bize *v.* Fletcher would not now be followed (*g*).

No matter whereabouts.

But although it is absolutely essential that an express warranty should be written somewhere or other on the face of the policy, or in some document incorporated therewith, yet it need not be written in the body or printed part of the policy; it may be in the margin or at the foot, and written either in the usual way or transversely (*h*). As is recognized in sect. 35 (2) of the Marine Insurance Act, 1906, there are cases in which, by distinct reference in the policy, a document which is extrinsic to it will be considered as incorporated with the contract, and its literal fulfilment be as strictly enforced as though it were actually inserted in writing on the face of the instrument (*i*).

Or referred to in the policy.

Whether a rule of a mutual insurance association, incorporated into the policy, amounts to a warranty depends on the nature of the rule. A rule that ships were not to sail

(*e*) Pawson *v.* Barnevelt (1779), 1 Dougl. 12, n.; accord. Higginson *v.* Dall (1816), 13 Mass. 96.

(*f*) Bize *v.* Fletcher (1779), 1 Dougl. 12, n.: followed in Goddard *v.* East Texas Fire Ins. Co. (1886), 67 Texas, 69; 60 American R. 1.

(*g*) See Lord Halsbury's judgment in Bensaude *v.* Thames and Mersey Mar. Ins. Co., [1897] A. C. 612. In Goddard *v.* East Texas Fire Ins. Co., *supra*, the Supreme Court of Texas held that a slip fastened with gum to a fire policy did not form part of the policy.

(*h*) Kenyon *v.* Berthon (1778), 1 Dougl. 12, n.; Blackhurst *v.* Cockell (1789), 3 T. R. 360.

(*i*) Pittegrew *v.* Pringle (1832), 3 B. & Ad. 514; Graham *v.* Barras (1834), 5 B. & Ad. 1011. The rule was established in the older cases of Routledge *v.* Burrell (1789), 1 H. Bl. 255, and Wood *v.* Worsley (1795), 2 H. Bl. 574; in error (1796), 6 T. R. 710, which were cases on fire policies. *Quære*, whether a clause of warranty indorsed on the back of the policy, unless signed by the initials of the parties, or referred to in the body of the instrument, would be operative. 1 Duer, 176.

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from certain ports within certain dates was held to be a warranty; while in the same case the Court said that another rule, providing that a vessel beaching before or after a specified time was not entitled to recover for any subsequent loss until surveyed and reported sufficient, was an exception (*k*).

"Warranted" sometimes denotes an exception.

630. The fact that the word "warranted" is used in a policy does not always prove that the term to which it refers amounts to a warranty. Thus, the clause "warranted free from particular average" is not a warranty; if it were, the result of a trifling particular average loss would be to avoid the insurance. It is an exception from the risk undertaken by the underwriter.

No peculiar form of words requisite for a warranty.

No particular form of words is requisite to constitute an express warranty: it may be in any form of words from which an intention to warrant can be inferred (*l*). The word "warranty" or "warranted," for instance, is in no case necessary. The words "to sail on such a day," or "in port," or "all well" on such a day, or "carrying so many guns and so many men," &c., if written in the body, at the foot, or on the margin of the policy, would amount to an express warranty as much as any formal clause (*m*). Similarly a clause in a floating policy, "declarations of interest to be made . . . . as soon as possible after sailing of vessel to which interest attaches" has been held by the Privy Council to be a warranty, not merely a collateral stipulation the breach of which would only found a claim for damages (*n*).

Nor special clauses.

In some cases, indeed, it is not even requisite that there should be any explicit clause of warranty at all; for instance, the mere description in the policy of the thing insured as being of a certain nation, as "a Danish brig," "the Swedish

(*k*) Colledge *v.* Harty (1851), 6 Ex. 205; 20 L. J. Ex. 146. See also Harrison *v.* Douglas (1835), 3 A. & E. 396.

(*l*) Union Ins. Soc. of Canton, Ltd. *v.* Wills, [1916] 1 A. C. 281, at p. 287. See also Yorkshire Ins. Co., Ltd. *v.* Campbell, [1917] A. C. 218, at pp. 224, 225.

(*m*) Kenyon *v.* Berthon (1778), 1 Dougl. 12, n.; Mar. Ins. Act, 1906, s. 35, sub-s. 1.

(*n*) Union Ins. Soc. of Canton, Ltd. *v.* Wills, *supra*.

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ship 'Sophia,'" &c., will amount to an express warranty that the thing insured has the national character thus ascribed to it in the policy. Thus, where a policy was effected on goods "on board the 'Mount Vernon,' an American ship," it was held that this description of the ship contained a warranty that she was an American ship, and therefore induced a necessity of her being documented as American ships were bound to be by the treaties then subsisting between the United States and France (*o*).

Attempt to carry this to extremes.

An attempt was made to push this doctrine to extremes by contending that the mere fact of describing the ship in the policy by an English name, as the "Three Sisters" instead of the "Tres Hermanas," or the "Mark Antony" instead of the "Marco Antonio," was a warranty that the ship was English; but Lord Ellenborough held decisively that no warranty of nationality could be inferred from the language in which the ship's name was expressed in the policy (*p*).

That a strained construction must not be put on a statement in a policy, so as to make it a warranty, also appears from another decision of Lord Ellenborough's, where the insurance was expressed to be "on the cargo being 1,031 hogsheads of wine," that this was not a warranty that the whole cargo was wine, and that no other goods would be taken on board (*q*). So, also, calling a vessel "the good ship A.," in a time policy, is not a warranty of seaworthiness (*r*).

Decision in the United States as to

631. It appears to have been decided in the United States that the mere allegation of a fact in the policy is not a

(*o*) Baring *v.* Claggett (1802), 3 B. & P. 201; *S. C.*, Baring *v.* Christie (1804), 5 East, 398; Lothian *v.* Henderson (1803), 3 B. & P. 499. And see the cases in the United States, 1 Phillips, Ins. s. 757, *in notis*.

(*p*) Clapham *v.* Cologan (1813), 3 Camp. 382. See also Dent *v.* Smith (1869), L. R. 4 Q. B. 414. The Mar. Ins. Act, 1906, declares in terms that "there is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk": sect. 37.

(*q*) Muller *v.* Thompson (1811), 2 Camp. 610.

(*r*) Small *v.* Gibson (1850), 16 Q. B. 141, 157.

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warranty, where it is clear, from the terms of the policy itself, that the fact alleged can, in the particular case, have no relation to the risk. In a policy "on the good British brig called the 'John'" against sea risks only, this mere description of the ship as British was held not to be a warranty that she was such, because the fact of her being British could not, on such a policy, have affected the underwriter's judgment of the risk (*s*).

statement of national character.

Phillips considers this distinction well taken, if rigorously confined to cases where it plainly appears that the fact alleged could not possibly, in the opinion of any man, have any relation to the risks insured against in the particular policy (*t*).

These cases must, however, be of exceedingly rare occurrence, and, on the whole, it appears better to avoid entering in any case into the question of the materiality of the fact alleged, both because it is a departure from what has hitherto been regarded as a fixed principle of decision with regard to Warranties as distinct from Representations; and, secondly, because it calls upon the Court and jury to decide upon a point most difficult to be ascertained, viz., the impossibility of the underwriter's having been influenced by the fact thus impliedly alleged. Who, for instance, in the very case cited, would take upon himself to say that the underwriter might not have been more inclined to insure a British ship against sea-risks than one of any other national character? It therefore seems better to discard this distinction, and to lay it down generally, that every allegation contained in the policy, whether direct or indirect, of the national character of the thing insured amounts to a warranty, and as such must be literally fulfilled (*u*).

An express warranty requires

632. The first great distinction, then, between an express warranty and a representation is, that the former is always,

(*s*) Mackie *v.* Pleasants (1810), 2 Binn. 363, cited 1 Phillips, s. 758.

(*t*) 1 Phillips, Ins. s. 758.

(*u*) Or, in other words, adopting the language of sect. 35, sub-sect. 1, of the Mar. Ins. Act, 1906, that an "intention to warrant is to be inferred" from any such allegation.

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an exact and literal fulfilment.

and the latter seldom, if ever (*x*), written on the face of the policy; the second main distinction between them is, that while a representation may be satisfied with a substantial and equitable compliance, a warranty requires a strict and literal fulfilment, *i.e.*, what it avers must be literally true; what it promises must be exactly performed.

Every policy, in fact, in which an express warranty is inserted is a conditional contract, to be binding if the warranty be literally complied with, but not otherwise. Arnould's opinion, founded on the view expressed by some learned judges, was that any failure in such literal compliance avoids the policy *ab initio* (*y*). In the language of Lord Mansfield, "The contract depends on the event taking place. There is no latitude, no equity; the only question is, has that event happened?" (*z*). "The warranty in a contract of insurance," says his Lordship in another place, "is a condition or a contingency, and unless that be performed there is no contract" (*a*).

And no inquiry can be made into its materiality or immateriality.

Hence all inquiry into the materiality or immateriality to the risk of the thing warranted is entirely precluded; and so are all questions as to a substantial compliance with the warranty. "It is perfectly immaterial," says Lord Mansfield, "for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with." "The very meaning," says Ashurst, J., "of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so" (*a*). "It is a clear and first principle of insurance law," says Lord Eldon, "that when a thing is warranted to be of a particular nature or description, it must be exactly what it is stated to be. It is no matter whether material or not; the only question is, is this the thing *de facto* I have signed?" (*b*). Thus where a horse insured by a marine

(*x*) Arnould said "never"; but see *ante*, § 532.
(*y*) 2nd ed. p. 629. See further on this point, *post*, § 634.
(*z*) In Hibbert *v.* Pigou (1783), 1 Marshall, Ins. 375.
(*a*) In De Hahn *v.* Hartley (1786), 1 T. R. 345, 346.
(*b*) Per Lord Eldon, in Newcastle Fire Ins. Co. *v.* Macmorran (1815), 3 Dow, 255.

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policy was described as "by Soult X St. Paul (mare)" and it was found that the pedigree was incorrectly stated, the Privy Council held that these words of description amounted to a warranty, and that the assured could not recover for the loss of the horse (*c*).

Breach and loss need not be connected.

633. Hence, although the loss may not have been in the remotest degree connected with the breach of the warranty, the underwriter is none the less discharged on that account from all liability for the loss if the warranty have been in fact broken.

Thus, where a ship warranted to sail with convoy had in fact sailed without it and went down in a storm, the underwriter was held not liable for this loss (*d*).

Even where the warranty relates to a period antecedent to the commencement of the risk under the policy, and the breach of warranty is remedied before the ship sails on the voyage insured, it will be equally fatal.

De Hahn *v.* Hartley.

A ship was insured, on a slaving voyage, "at and from Africa to her port or ports of discharge in the British West Indies," and a memorandum was inserted in the margin of the policy that the ship had "sailed from Liverpool with fourteen six-pounders, swivels, small arms, and fifty hands or upwards, copper sheathed": it appeared that the ship had actually sailed from Liverpool with only forty-six men instead of fifty, but that within twelve hours of leaving Liverpool she had taken on board at Beaumaris six additional hands; and express evidence was also given that the ship, between Liverpool and Beaumaris, was quite as safe with forty-six men as she could have been with fifty. The Court unanimously held that it was an express warranty; that it had been broken by the ship sailing from Liverpool

(*c*) Yorkshire Ins. Co., Ltd. *v.* Campbell, [1917] A. C. 218.
(*d*) Hibbert *v.* Pigou (1783), 1 Marshall, Ins. 375; 2 Park, Ins. 694. See also Yorkshire Ins. Co., Ltd. *v.* Campbell, *supra*.

Sect. 633. with only forty-six men, and therefore that the policy was void *in toto* (*e*).

Accordingly, it is now expressly provided by the Marine Insurance Act, 1906, that "where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss" (*f*).

But "a breach of warranty may be waived by the insurer" (*g*).

Breach of warranty is no defence to a claim for a loss before breach.

634. A breach of warranty, however, whether express or implied, only discharges the insurer from liability as from the date of the breach, without prejudice to any liability incurred by him before that date (*h*). This appears to have always been the law as regards implied warranties. Thus, if a ship, insured "at and from" a port, sails in an unseaworthy state, this breach of the implied warranty of seaworthiness does not avoid the policy as regards her stay in port (*i*). And the Act now makes no distinction on this point between warranties express and implied.

General rule is that nothing excuses non-compliance.

635. No cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse non-compliance with an express warranty. Even the direct and irresistible operation of a peril expressly insured against in the policy is no excuse for non-compliance; thus, where a ship warranted to sail on a given day was prevented from doing so by an embargo laid on by a British governor, this

(*e*) De Hahn *v.* Hartley (1786), 1 T. R. 343; affirmed in the Exch. Ch. (1787), 2 T. R. 186, n.

(*f*) Sect. 34 (2).

(*g*) Sect. 34 (3).

(*h*) Mar. Ins. Act, 1906, s. 33, sub-s. 3. This provision determines a point which, before the Act, was an open one, and as to which there were conflicting opinions. Phillips and the American authorities were in favour of the law as now declared (see 1 Phillips, ss. 764, 771), a view which the present editors considered the more reasonable one (see Arnould, 7th ed. § 634). Arnould took the view that every breach of an express warranty avoided the policy *ab initio*, and herein he appears to have had the support of Lord Mansfield: see Arnould, 2nd ed. p. 629.

(*i*) Annen *v.* Woodman (1810), 3 Taunt. 299.

breach of the express warranty was held to avoid the policy, Sect. 635. although such embargo came expressly within the words "restraints and detainment of kings, princes, and people," &c., which were perils expressly insured against in the policy (*k*).

Exceptions to this rule.

636. There are, however, two cases in which it was suggested, before the Act, that compliance with an express warranty might be excused—1. If the state of things contemplated by the warranty were to cease; or, 2. If a subsequent law should render compliance with a warranty illegal. These exceptions to the general rule have been expressly recognized by the Marine Insurance Act, 1906 (*l*), which provides that "Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law."

Thus, if during war a warranty to sail with convoy at a future time from some foreign station were inserted, the intervention of peace before the period at which the ship was so to sail would excuse the necessity of compliance; for it would be only fair to presume that the parties, when they inserted such a condition into the policy, contemplated the continuance of that state of things which alone led to its

(*k*) Hore *v.* Whitmore (1778), 2 Cowp. 784; 2 Park, 669. The case of Havelock *v.* Hancill (1789), 3 T. R. 277, which is cited by Phillips (vol. i. s. 770) in support of the contrary view, is not in reality inconsistent with the statement in the text. It only decides that when there is a warranty that the ship shall be employed in a lawful trade, this means employed in a lawful trade by her owners. See *post*, § 637; and see Mr. Arthur Cohen's note in the Law Quarterly Review, April, 1895, vol. xi. p. 119. According to the declaration in Hore *v.* Whitmore, as reported by Cowper, the ship was "warranted to sail on or before the 26th of July, 1776, free from capture and from all restraints and detainments of kings, &c." It would seem, therefore, that capture, restraints of kings, &c., were not perils insured against, but perils excepted, as is said by Phillips (vol. i. s. 772). As, however, the loss for which the assured was suing was a loss by capture, it seems clear that the report is inaccurate, and that the insurance was *against* and not *free from* capture, &c.

(*l*) Sect. 34 (1).

Sect. 636. insertion. The principle here is *cessante ratione, cessat lex* (*m*).

It is an old principle of law, that if a man covenants to do a thing which is lawful at the time, but an Act of Parliament comes in and hinders him from doing it, the covenant is repealed (*n*). "The same rule," said Arnould (*o*), "extends to warranties; and it may be stated generally, that compliance with a warranty will be dispensed with if it be rendered unlawful by a law enacted since the time of making the policy. If, however, a compliance with the warranty was unlawful at the time of making the policy, the contract was then void on the ground of the illegality."

Phillips (*p*) also states, on the authority of Brewster *v.* Kitchin, that compliance with a warranty is dispensed with, if made unlawful by subsequent legislation. Mr. Arthur Cohen, however, pointed out, before the Marine Insurance Act was passed (*q*), that Brewster *v.* Kitchin by no means decides the point; it merely shows that the performance of a stipulation or promise is dispensed with, if it be rendered unlawful by subsequent legislation; and it has no application to a condition. "Indeed, it is clear on principle and authority," he said, "that where a contract is made subject to a condition, and compliance with a condition is rendered unlawful by subsequent legislation, the result is to make the contract itself voidable" (*r*). Performance of a warranty in a marine policy is not a stipulation for the breach of which an action lies, but a condition precedent to the liability of the underwriter. But notwithstanding this weighty criticism, the rule appears now to be established by the statute.

(*m*) See Duer on Representations, 89, 90; 1 Phillips, s. 424; 1 Parsons, 341.

(*n*) Brewster *v.* Kitchin (1698), 1 Ld. Raym. 321; *S. C.*, reported as Brewster *v.* Kitchell, 1 Salk. 198.

(*o*) 2nd ed. p. 633.

(*p*) 1 Phillips, s. 769.

(*q*) Law Quarterly Review, April, 1895, vol. xi. p. 118.

(*r*) Mr. Cohen cited, in support of this statement, Comyns' Digest, Condition D. (3); Davis *v.* Cary (1850), 15 Q. B. 418; Brown *v.* Mayor of London (1861), 30 L. J. C. P. 230; Pollock on Contracts, 6th ed. pp. 415—419.

Sect. 637. Construction of a warranty by mercantile usage.

637. A warranty, like every other part of the contract, is to be construed according to the understanding of merchants. It must be construed, said Lord Esher, "according to its ordinary acceptance among the class between whom the documents passed, unless by usage it has acquired a wider or narrower interpretation among men of that class." "The same broad rules of construction," said Bowen, L. J., "apply to the interpretation of a warranty as apply to all commercial documents" (*s*). Thus, a warranty does not bind the assured beyond the commercial import of the words, but it binds him to their full extent. This principle is illustrated by the following cases:—

Hart *v.* Standard Mar. Ins. Co. "Iron" includes steel.

Where a policy on ship contained a clause "warranted no iron . . . exceeding the net registered tonnage," the Court of Appeal held that "iron" included steel, the intention being to exclude a class of cargo having certain physical qualities. The Court therefore decided that the policy was rendered void by the shipping of a quantity of steel in excess of such tonnage (*t*).

Meaning of "no mining timber."

A warranty "no mining timber carried" was held not to be broken by the carriage of a cargo of "sleepers," viz., sawn timber, which, according to the length of the pieces, could be used in the construction of small tramways, such as were laid in collieries, or to support the roof in mines, but was not specially put on the market for use in mining (*u*).

Meaning of "seaman." Bean *v.* Stupart.

Again, a warranty that the ship insured should carry "thirty seamen, besides passengers," was held to be satisfied although only twenty-six mariners had signed the ship's register, and, to make up the number thirty, the plaintiff reckoned the steward, cook, surgeon, some boys, &c.; evidence being given that boys are included under the term seamen by mercantile usage, and the jury being of opinion that the word seamen in this policy meant persons employed in navigation as distinct from passengers (*x*).

(*s*) Hart *v.* Standard Marine Ins. Co. (1889), 22 Q. B. D. 499—501.

(*t*) *Ibid.*

(*u*) Aktieselskabet Grenland *v.* Janson (1918), 35 T. L. R. 135.

(*x*) Bean *v.* Stupart (1778), 1 Dougl. 11.

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Meaning of "uninsured." General Ins. Co. of Trieste v. Cory.

Where a policy contained a warranty that the vessel should not be insured beyond a certain amount, Mathew, J., held that such a warranty was not broken by the owner taking out a new policy to cover the probable deficiency upon a policy effected with an underwriter who had become insolvent, although thereby the total nominal insurance exceeded the amount limited in the warranty (*y*).

Roddick v. Indemnity Mut. Ins. Co.

A policy on "hull and machinery" contained the proviso, "5,000*l.* warranted uninsured," and the question was whether the assured had broken this warranty by effecting "p.p.i." or "honour" policies on disbursements. Kennedy, J., held that such policies, although void at law, were an infringement of the warranty (*z*). "The main, if not the whole, object of the warranty," said the learned judge, "is to give the insurer a pledge of the good faith of the assured, and of his diligence in preserving the thing assured by reason of his remaining his own underwriter to the extent specified in the warranty. . . . . Looking alike at the obvious aim of such a warranty as this and the fair meaning of the word 'uninsured' in a commercial document of this kind, as it must be taken to have been understood both by assurer and assured by the light of their common knowledge of the universal treatment of an 'honour' policy in the insurance world, I am of opinion that the clause ought to be construed as a warranty by the plaintiff that as to 5,000*l.* he was not covered by any such insurance as is treated in practice and according to the usage of commercial men as an effectual insurance." The learned judge, however, held that the policies on disbursements did not cover the subject-matter of the policy on "hull and machinery," and therefore did not

(*y*) General Ins. Co. of Trieste *v.* Cory, [1897] 1 Q. B. 335. A time policy on a tug was expressed to be void if she was insured for more than 350,000 dollars. The policy did not cover navigation outside of certain limits. The tug went on a voyage outside these limits, and a policy was taken out to supplement her insurances, which were for the full amount. It was held that the warranty was not broken. St. Paul Fire & Marine Ins. Co. *v.* Knickerbocker (1899), 93 Fed. R. 931.

(*z*) Roddick *v.* Indemnity Mutual Mar. Ins. Co., [1895] 1 Q. B. 836.

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infringe the warranty. On this ground his decision was affirmed in the Court of Appeal (*a*), where both Lord Esher, M. R., and Smith, L. J., expressly reserved their opinion on the point whether the warranty could be infringed by an insurance which is a nullity at law (*b*).

"Lawful trade." Havelock v. Hancill.

In the case of a ship insured "in any lawful trade," it has been held that the words "lawful trade" must be confined to the trade on which the ship was sent by her owners, and therefore that the assured, who had sent her on a lawful voyage, was not precluded from recovering for a loss occasioned by her being barratrously employed by the master in a smuggling trade (*c*).

A warranty does not extend to anything not necessarily inferred from its terms. Hyde v. Bruce.

638. Although, on the one hand, the literal fulfilment of a warranty is strictly required, yet, on the other, it is no less certain that nothing beyond a bare and literal fulfilment can be required. A warranty will not be extended by construction to include anything not necessarily implied in its terms. Thus, where there was a warranty "that the ship should have twenty guns," and it appeared that, although in fact the ship had twenty guns, yet she had only twenty-five men, a number quite short of the necessary complement for twenty guns, Lord Mansfield held that this warranty did not imply that she should carry a competent number of men to work the guns; and therefore, as there was no ground to impute fraud, that the warranty had been sufficiently complied with (*d*).

(*a*) [1895] 2 Q. B. 380.

(*b*) In Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. at p. 538, Lord Alverstone, C. J., expressed his agreement with the view of Kennedy, J., on this point.

(*c*) Havelock *v.* Hancill (1789), 3 T. R. 277. Barratry was a peril expressly insured against by the policy; but that would have been of no avail in case the Court had held that there had been a breach of the warranty. Hore *v.* Whitmore (1778), 2 Cowp. 784; *ante*, § 635.

(*d*) Hyde *v.* Bruce (1782), 3 Dougl. 213; 1 Marshall, Ins. 354. It may be questioned whether such a warranty would now be construed in a manner which might make it useless. The tendency in the later cases cited above is to consider, in construing a warranty, the object which the parties had in view.

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Enumeration of different kinds of warranties impossible.

639. It would be idle to attempt an enumeration of all the different kinds of stipulation, which the varying exigencies of commerce may induce parties to introduce into contracts of insurance. We will therefore only discuss some of the most important ones. In the United States, from the great number of their ports and the great variety of their tribunals, the decisions upon the effect of such occasional clauses and peculiar stipulations have been proportionately numerous, and may be found collected by the indefatigable industry of Phillips (*e*).

Warranties prohibiting navigation within certain limits.

Warranties which restrict the navigation of a ship to certain geographical limits, or exclude certain voyages or localities, either entirely or at certain periods, are frequently inserted in time policies (*f*).

Such warranties are often contained in rules of the mutual insurance associations, expressly incorporated in the policies of the associations. Thus, one of the rules of such an association was as follows: "Ships not to sail from any port to any port in the Belts between the 20th of December and 15th of February." The Court held, first, that this was a warranty, not an exception; secondly, that the word "to" meant "towards," according to its general construction in sea policies, bills of lading, &c., and that therefore, as the vessel had left Newcastle-on-Tyne on the 8th of February for a port in the Belts, the warranty was infringed, though she never arrived there (*g*).

The two following cases may also be cited with reference

(*e*) 1 Phillips, Ins. c. ix. s. 9.

(*f*) The Institute Warranties, usually inserted in time policies, will be found in Appendix B. A warranty not to use a certain river was held in the United States to be broken when the ship insured came to a buoy near the entrance of the river with the intention of entering it, was driven about, and anchored a mile from the river, where she was lost. Thames and Mersey Marine Ins. Co. *v.* O'Connell (1898), 86 Fed. R. 150.

(*g*) Colledge *v.* Harty (1851), 6 Exch. 205; 20 L. J. Ex. 146; cf. Simpson SS. Co. *v.* Premier Underwriting Association, Ltd. (1905), 10 Com. Cas. 198, "Warranted not to proceed East of Singapore."

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to the construction of warranties excluding certain geographical limits:—

A policy contained the following warranty: "Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th day of April, nor to be in the said Gulf after the 15th day of November; nor to proceed to Newfoundland after the 1st day of December or before the 15th day of March without payment of additional premium and leave first obtained." The ship left Montreal for Newfoundland on the 16th of November, and on the 1st of December she was lost in the Gulf of St. Lawrence. It was contended for the assured that the first part of the warranty had no application to a voyage to Newfoundland, and that as the ship had sailed before the 1st of December he could recover. The Privy Council, however, held that the true construction of the warranty was, that the vessel was neither to be in the Gulf of St. Lawrence after the 15th of November nor to proceed to Newfoundland from any port after the 1st of December. This is obviously the ordinary meaning of the words of the warranty (*h*).

A time policy contained the clause: "Warranted no St. Lawrence between the 1st October and the 1st April." The Court of Session in Scotland held that the warranty applied only to the river of that name, and not also to the gulf, on the grounds (1) that the warranty was ambiguous; (2) that no usage had been proved by which to construe it; (3) that a penal clause was to be construed *contra proferentes*. The House of Lords, however, held, reversing this decision, that there was no ambiguity, and that the whole St. Lawrence navigation, both gulf and river, was prohibited during the period in question (*i*).

The limit of the Port of London for ships clearing outwards is at Gravesend; if, therefore, goods should be warranted as having been, or to be, exported from London on or

(*h*) Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224.

(*i*) Birrell *v.* Dryer (1884), 9 App. Cas. 345.

Sect. 639. before a given day, such warranty would not be satisfied unless the ship had cleared out at Gravesend on or before the day (*k*).

Warranty of safety at a particular time and place.

640. In order to protect himself from liability for any loss before a given day, the underwriter frequently causes a warranty to be inserted in the policy that the ship was "all safe," or "well," on the day. It is provided by the Marine Insurance Act, 1906 (*l*), that "where the subject-matter insured is warranted 'well' or 'in good safety' on a particular day, it is sufficient if it be safe at any time during that day." And the construction of the warranty is the same where it is the ship that is so warranted, but the subject-matter insured is not the ship, but the cargo.

Goods were insured "lost or not lost," and at the foot of the policy was written "warranted well December 9th, 1784;" the policy was subscribed by the defendant between one and three o'clock in the afternoon of the day named in the warranty, and the ship had been lost at eight o'clock the same morning. "We are all of opinion," said Lord Kenyon, delivering the judgment of the Court, "that if the ship were well at any time on that day it is sufficient, and that the defendant is consequently liable" (*m*).

"In port" on a given day. Kenyon *v.* Berthon.

A warranty that the ship was "in port" on a given day is construed in the same way. Where the following words were written transversely on the margin of a policy, "in port 20th July, 1776," Lord Mansfield held, that this was a warranty that the ship should be in port on that day; and therefore, as it was proved that the ship had sailed on the 18th of July, he held the policy void (*n*).

Where a policy was effected on a ship against fire for one

(*k*) So decided on a license to export: Williams *v.* Marshall (1815), 6 Taunt. 390; 2 Marsh. R. 292; see also 2 Park, Ins. 692, 693.

(*l*) Sect. 38.

(*m*) Blackhurst *v.* Cockell (1789), 3 T. R. 360.

(*n*) Kenyon *v.* Berthon (1778), 1 Dougl. 12, n. On the question when a ship is "in port," see Hunter *v.* Northern Marine Ins. Co. (1888), 13 App. Cas. 717.

month, on the terms that she should be "safe moored in Portsmouth Harbour" during the time, Lord Ellenborough held, that this policy was not avoided by the ship's being moved from one part of the harbour to another for the more convenient purpose of repairs and taking in her cargo, she having been safely moored at every part of the harbour she was so moved to (*o*). Sect. 640.

Distinction between time and voyage policies. Colby *v.* Hunter.

In a time policy, where the *terminus a quo* is not mentioned, but the insurance is intended to cover the ship on any voyage during the time, the warranty that the ship is "in port" will be satisfied by the ship's being in any port on the day specified. But in policies "at and from" a given terminus, the general words "in port" must be construed as referring to the port where, under the policy, the voyage is made to commence, and the warranty will not be satisfied unless the ship was in that port on the specified day. Thus, where a ship was insured "at and from Hamburg to Vigo," with a warranty that she was "in port on the 19th October, 1825," and it appeared that the ship on that day was in the port of Cuxhaven, ninety miles below Hamburg, and also on the river Elbe, but without the limits of the port of Hamburg, Lord Tenterden held that this was not a compliance with the warranty: his Lordship remarked, that "if the assured had merely meant to stipulate that the ship was in port somewhere or other, as distinct from being at sea, on the day specified, he should, under such a form of policy, have warranted that the ship was 'all safe,' or 'well,' on the 19th of October" (*p*).

Warranty as to time of sailing.

641. One of the most important and most general of all express warranties is that which either alleges that the ship has sailed, or stipulates that she shall sail on, before, or after a given day.

Summer and winter risks.

In many voyages the year for the purposes of insurance is divided into two periods of time, all risks commencing

(*o*) Clarke *v.* Westmore (1807), cited in Selw. N. P. 939, 13th ed.

(*p*) Colby *v.* Hunter (1827), 1 Mood. & Malk. 81.

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within one portion of the year being called *winter risks*, and those commencing within the other being called *summer risks*. The amount of danger incurred in one of these periods is found by experience to be greater than in the other, and the amount of premium asked for insuring a winter risk is proportionately higher than for a summer risk.

When an insurance is effected "at and from" a port, the ship is protected during her stay at the port; in such policies it becomes additionally desirable for the underwriter to limit his responsibility by fixing some definite day after which he will not be liable unless the ship have actually sailed on her voyage (*q*). For these reasons, as well as upon the general principles already laid down, the Courts have been exceedingly rigorous in requiring the most exact and literal fulfilment of the warranty to sail on, before, or after a given day. Thus, as we have already seen, even an irresistible force, though one of the perils insured against, will not excuse a non-compliance with this warranty, so as to enable the assured to recover for a loss happening after the day limited for sailing (*r*).

To sail "after" a given day.

It may obviously be as important that the voyage should not be commenced till after the winter risk ends as that it should not be deferred until the winter risk commences. A stipulation, therefore, that the ship shall sail after a given day and before another day, must be complied with quite as strictly as a stipulation to sail on or before a given day. A ship insured "at and from Martinique to Havre de Grace, with liberty to touch at Guadaloupe," was "warranted to sail after the 12th of January, 1778, and on or before the 1st of August, 1778:" the ship sailed from Martinique to Guadaloupe long before the 12th January, 1778, intending to return to Martinique; finding, however, a full cargo at Guadaloupe, she never did so, but sailed direct from that island for Havre. The policy was held void because the ship

Vezian *v.* Grant.

(*q*) Beckwith *v.* Sydebotham (1807), 1 Camp. 116.
(*r*) Hore *v.* Whitmore (1778), 2 Cowp. 784. See, as to this case, *ante*, § 635.

had sailed from Martinique before the 12th of January, contrary to the warranty (*s*). Sect. 641.

642. Where a ship is insured "at and from" an island the whole island is considered as one *terminus a quo*, the ship under the word "at" is protected in coasting round the island from port to port, and is not considered as having sailed on her voyage till she has entirely cleared away from the island with the purpose of proceeding directly for the *terminus ad quem*. Hence where a ship, insured "at and from Jamaica to London," was warranted to sail "after the 12th of January, and on or before the 1st of August," and it appeared that the ship, directly she had finished her loading at Port Maria, in Jamaica, and before the 12th of January, sailed for Port Antonio, an accustomed rendezvous in the same island, intending to wait there for convoy, and was lost in going thither: it was held, that this sailing from port to port was not a sailing on the voyage within the meaning of the warranty, and therefore that, although before the 12th of January, it was no breach thereof (*t*).

Sailing from an island.

Cruickshank *v.* Janson.

643. Considerable nicety has been shown in determining, under the varying circumstances of different cases, whether a warranty to sail has been complied with; and the Courts have put a different interpretation on a general warranty "to sail" (without more), and on a warranty "to sail from," or "to depart from," a named terminus.

Distinction between a warranty "to sail" and "to sail from" or "to depart from" a terminus.

First, with regard to the general warranty "to sail" on or before a given day, the general principle established by the cases is this: if a ship, so warranted "to sail," quits her moorings on or before the day limited in the warranty, and, being then perfectly ready to proceed on her sea voyage, removes, though only to a short distance, with a *bonâ fide* intention of at once prosecuting such voyage, that is a sailing within the meaning of the warranty, although she may

Construction of a general warranty "to sail."

(*s*) Vezian *v.* Grant (1779), 1 Marshall, Ins. 359; 2 Park, 670, 671.
(*t*) Cruickshank *v.* Janson (1810), 2 Taunt. 301.

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subsequently be detained till after the limited day by some unforeseen delay; if, on the other hand, the ship, at the time she quits her moorings and sets sail, is not in a state of complete preparation for her sea voyage, and is not *bonâ fide* intended to proceed directly and immediately upon it, this is not a compliance with the warranty. In short, in order to satisfy a general warranty to sail, there must be a *bonâ fide* commencement of the voyage insured on or before the given day.

Warranty "to sail" in a policy "at and from" a district.

644. If a ship insured "at and from" an island or other district containing several ports quits her moorings and sails from any one of such ports on or before the given day, in a state of complete readiness for her sea voyage, and with a real intention of proceeding directly upon it, her subsequent detention at another of such ports or on the coast of the island until after the given day will not amount to a breach of the warranty to sail, if such delay were accidental and unforeseen.

Unforeseen embargo. Bond *v.* Nutt.

The ship "Capel" was insured "lost or not lost at and from Jamaica to London, warranted to have sailed on or before the 1st of August." The ship, being completely laden and in every respect prepared for her voyage to London, sailed from St. Anne's Bay, on the north coast of the island of Jamaica, on the 26th of July, for Bluefields (an open roadstead on the south coast of the same island, and therefore out of the ship's direct course to England) in order to join convoy there; Bluefields being the general rendezvous appointed for convoy for all ships on the Jamaica station. She arrived at Bluefields on the 29th July, expecting to find the convoy then ready there; the convoy, however, not being there, the ship was detained by an embargo, under order of the government, until the 6th of August, when she finally sailed with the convoy for England.

The Court of King's Bench were of opinion that the voyage homewards had begun from St. Anne's, and, consequently, that the ship had sailed within the meaning of the

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warranty when she left St. Anne's Bay on the 26th of July (*u*). "The great distinction," Lord Mansfield said, "is this: that she sailed from St. Anne's for England by the way of Bluefields, and that it was not a voyage from St. Anne's to Bluefields with any object or view distinct from the voyage to England. If she had gone first to Bluefields for any purpose independent of her voyage to England, to have taken in water, or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from St. Anne's to Bluefields and another from Bluefields to England" (*x*).

Warranty may be satisfied though ship has orders to call at another port for despatches.

645. The true question, however, seems to be whether, at the time of sailing from the port of clearance, any delay was contemplated or intended at any other port or place in the island, which would be inconsistent with a direct voyage from the port of clearance to the *terminus ad quem:* if no such delay were contemplated or anticipated, an unexpected detention at such other port or place, beyond the day limited in the warranty, will not amount to a breach thereof, even though the captain, at the time of sailing from his port of clearance, had positive directions to pass by such port or place for the purpose of taking in letters or despatches.

Thellusson *v.* Fergusson.

A French ship, insured "at and from Guadaloupe to Havre," and "warranted to sail on or before the 31st of December," sailed from Point à Pitre (her port of loading in Guadaloupe) on the 24th of October, being then completely loaded and provisioned, and duly cleared out for her voyage to France. The captain had by the greatest exertions sailed on the 24th in order to join a convoy which was advertised to sail on the 25th from Basseterre (a fort and open roadstead in Guadaloupe lying directly in the course of his voyage to France). A condition had been inserted in his clearance from Point à Pitre, that he should pass by

(*u*) Bond *v.* Nutt (1777), 2 Cowp. 601.

(*x*) See 2 Cowp. 608, 609. See also Cruickshank *v.* Janson (1810), 2 Taunt. 301.

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Upon this state of facts Lord Mansfield and the Court of King's Bench unanimously held, that, as the voyage had been *bonâ fide* commenced when the ship sailed from Point à Pitre on the 24th of October, and was afterwards stopped by unforeseen accident at Basseterre, the warranty had been complied with by such sailing (*y*).

Earle v. Harris. Even where, at the time of sailing from his port of clearance, the captain knew of the embargo and sailed into it, but swore that he thought the embargo was only meant to prevent ships from departing without convoy, that he expected to meet with convoy on arriving at the place of rendezvous, and that the embargo would thereupon immediately cease and leave him to pursue his voyage the same day without interruption; the jury, believing this evidence, and that his departure from the port of clearance was not merely colourable in order to answer the letter of the insurance, gave a verdict for the plaintiff, which the Court, on motion for a new trial, refused to disturb; though they admitted that, if the captain on sailing from his port of clearance had expected and meant to wait for convoy, it would not have been a sailing on the voyage (*z*).

(*y*) Thellusson *v.* Fergusson (1780), 1 Dougl. 361. See also Thellusson *v.* Staples, and Same *v.* Pigou (1780), 1 Dougl. 366, *in notis*.

(*z*) Earle *v.* Harris (1780), 1 Dougl. 357; Willes, J., however, dissented.

Sect. 646. Sailing to join convoy.

646. When a vessel is insured "at and from" several or all of the West Indian Islands, with a warranty to sail on or before a given day, this warranty will be satisfied by her having sailed on her voyage from her last loading port in the islands on or before such day, and will not be broken by her proceeding to another of the islands to join convoy, and sailing with it thence after the day.

Wright v. Shiffner. Under a policy "at and from Surinam and all or any of the West Indian Islands (except Jamaica) to London," with a warranty "to sail on or before the 1st of August," the ship sailed from Surinam, where she had cleared out, completely loaded and provisioned for the homeward voyage, before the day, and proceeded to Tortola (which was not out of her usual course to England, and the general rendezvous for convoy) in order to join convoy, with which she finally sailed thence after the day. The Court held, that the ship had satisfied her warranty by sailing from Surinam before the day. Lord Ellenborough intimated that, as Surinam was proved to have been the ship's final port of loading, the case was the same as though that place only had been mentioned in the policy as the *terminus a quo*, and one of the special jury stated that such was the construction universally put upon these policies in the City of London (*a*).

State of the ship which satisfies the warranty "to sail."

647. In all cases a warranty "to sail" means "to sail on the voyage insured," and nothing can amount to a compliance with this warranty, unless on or before the day the ship has broken ground in a state of perfect fitness and preparation for completing her sea voyage without requiring anything further to be done, and with the intention of at once prosecuting such voyage.

"It is clear," says Lord Tenterden, "that a warranty to sail, without the word 'from,' is not complied with by the vessel's raising her anchors, getting under sail, and moving onwards, unless at the time of the performance of these acts she has everything ready for the performance of the voyage,

(*a*) Wright *v.* Shiffner (1809), 2 Camp. 247; *S. C.*, 11 East, 515.

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and such acts are done at the commencement of it, nothing remaining to be done afterwards" (*b*).

The following cases illustrate this rule:—

Ridsdale *v.* Newnham.

A policy "at and from Portneuf" (a place on the St. Lawrence about thirty miles above Quebec) "to London" contained a warranty "to sail on or before the 28th of October": on the 26th of October the ship dropped down the river from Portneuf, where she had completed her loading, to Quebec (the first place at which she could obtain her clearances), with a crew which, though sufficient for the river navigation, was not so for her sea voyage across the Atlantic. This was the usual mode of performing voyages from the upper parts of the St. Lawrence (*c*). She arrived at Quebec on the evening of the 28th, but did not complete her crew nor obtain her clearances at the Quebec custom-house till the 29th, and did not actually leave the port of Quebec till the 30th: this was held not to be a compliance with the warranty (*d*).

Pittegrew *v.* Pringle.

A time policy was effected, subject to certain rules, one of which provided "that vessels should not sail to certain ports of British North America from ports in Ireland after the 1st of September"; and another (No. 9), "that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship were then ready for sea." The plaintiff's ship, then lying in the Ballyshannon river under charter to sail to Miramichi, in New Brunswick (a port within the terms of the rule), was cleared at the Sligo custom-house on the 29th of August: at that time she had on board

(*b*) In Lang *v.* Anderdon (1824), 3 B. & Cr. 499. See also Thompson *v.* Gillespie (1855), 5 E. & B. 209.

(*c*) See Ridsdale *v.* Shedden (1814), 4 Camp. 108.

(*d*) Ridsdale *v.* Newnham (1815), 4 Camp. 111; *S. C.*, 3 M. & S. 456. See, as to this case, the remarks of Willes, J., in Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37, 43, where it is stated that the *ratio decidendi* of the case was that the voyage did not commence till the vessel left Quebec. But it is clear that the voyage covered by the policy included the passage down the river from Portneuf. It is not easy to reconcile the decision with the principle laid down in Bouillon *v.* Lupton. See *post*, § 648.

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the whole of her stores and provisions, but only fifteen tons of ballast instead of fifty. The reason for this was to enable her to cross the bar of the river, which she could not have done with a greater weight of ballast; boats, however, were on the morning of the 1st of September waiting outside the bar of the river to complete the ballasting there, and this they might have accomplished before dark on the 1st. On that morning, however, the ship struck twice before she succeeded in crossing the bar; and the master, on getting outside, instead of then taking in his ballast, put across to Killybegs, on the other side of Donegal Bay, in order to see what damage the ship had sustained: she was not injured, and the ballasting was completed at Killybegs, but not till the 4th of September, and the ship did not finally sail till the 8th. The Court on these facts held, first, that the warranty not to sail after the 1st of September had not been complied with; and, secondly, that the ship, at the time she cleared out at Sligo, was not ready for sea (*e*).

Graham *v.* Barras.

In the next case on this subject the policy was also on time, and the ship was "warranted not to sail foreign" after the time limited in certain club rules. She was bound for the Bay of Fundy, from Dublin, and the last day for sailing, by the club rules, was the 1st of September; by another rule (No. 9) it was declared that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship was then ready for sea. On the 31st of August the ship, then lying in St. George's Dock, Dublin, was cleared out at the Dublin custom-house: at that time, although all her crew were engaged, she had not on board a sufficient complement of men for the sea voyage. Early in the morning of the 1st of September the ship, with the same incompetent crew on board, dropped down the river Liffey to the Pigeon Hole, a place within the Port of Dublin, where she lay at anchor the rest of that day. In the course of that day

(*e*) Pittegrew *v.* Pringle (1832), 3 B. & Ad. 514. It is doubtful whether this case is not open to the criticism which the editors have ventured to apply to Ridsdale *v.* Newnham, *supra*.

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the whole crew came on board; but, the wind being unfavourable, the ship did not sail from the Pigeon Hole and quit the Port of Dublin till the morning of the 2nd of September.

Upon this state of facts the Court held, first, that the warranty not to sail after the 1st of September was not satisfied, because on that day, after arriving at the Pigeon Hole, the ship remained stationary and did not proceed to sea; secondly, supposing the 9th rule to be incorporated by reference into the policy, that the ship was not ready for sea on the 31st of August, when she cleared at the custom-house, as she had not then a full crew on board (*f*).

Warranty "to sail" on a voyage in stages.

648. When, however, a voyage consists of different parts, such as a river and a sea voyage, and the usual course of navigation is to perform them with different crews or equipments, the warranty only requires the vessel to sail on the earlier stage in the condition in which that part of the voyage is usually performed.

A ship, warranted to sail on a voyage from Lyons to Galatz on or before the 15th of August, left Lyons on the 24th of July fully equipped for her river voyage, but with only a river captain and crew, and without her masts, anchors, and other parts of her tackle necessary for the sea voyage; this being the usual course of navigation. She took on board her sea captain and some of her sea crew at Arles, and completed her crew and equipment at Marseilles, whence she sailed on the 23rd of August. The Court of Common Pleas held that she had complied with the warranty (*g*).

Involuntary detention after the sea voyage has begun is of no effect.

649. If the ship had broken ground on her sea voyage, and once got fairly under sail for her place of destination, on or before the day limited in the warranty, though she may

(*f*) Graham *v.* Barras (1834), 5 B. & Ad. 1011. With regard to the construction of the 9th rule, "The time of clearing at the custom-house to be deemed the time of sailing, provided the ship is then ready for sea," the whole Court, with the exception of Littledale, J., held, that the word "then" must be referred to the time of clearing.

(*g*) Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37.

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have gone ever so little a way, and she afterwards put back from stress of weather, or apprehension of an enemy in sight, or be stopped by an embargo, or be in any way afterwards detained, yet, as there was a beginning to sail on the voyage insured, on or before the day, the warranty will be held to have been complied with (*h*).

The ship must have broken ground.

650. The ship need not proceed to any distance on her sea voyage in order to comply with a general warranty to sail; yet she must have actually quitted her moorings and broken ground so as to have *bonâ fide* commenced such voyage on or before the specified day.

Nelson *v.* Salvador.

In a policy on sugars "at and from Tobago to London," there was a warranty that the ship should sail on or before the 10th of August: the ship took out her clearances for London, on the voyage insured, on the 9th of August; and on the 10th had finally completed her loading and got her passengers on board. The ship was at that time moored in Tobago Bay with a bower anchor and a stream anchor, and there was no impediment to her sailing but the wind. The stream anchor was, in fact, raised that day; some of the sails were set, and the vessel moved forward about thirty fathoms by heaving in that quantity of the cable of the bower anchor: when, however, they were about to heave the bower anchor the captain observed so heavy a swell setting into the bay that he desisted, being fearful, if he departed that day, that he should be lost in getting out. Next morning, the 11th, she got under weigh, and finally left the port, having had no communication with the shore after the morning of the 10th. Lord Tenterden held that this was not a compliance with the warranty (*i*).

There must be a *bonâ fide* commence-

651. Not only must the ship be actually moved from her moorings on the day named, but this must be done with the

(*h*) Per Lord Mansfield in Bond *v.* Nutt (1777), 2 Cowp. 607. And see Thellusson *v.* Fergusson (1780), 1 Dougl. 364, cited *ibid.* 601; Earle *v.* Harris (1780), 1 Dougl. 357.

(*i*) Nelson *v.* Salvador (1829), Mood. & Malk. 309; *S. C.*, Dans. & Ll. 219.

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ment of the voyage.

bonâ fide intention of forthwith prosecuting the voyage, and not merely and solely for the sake of complying with the warranty.

Cockrane *v.* Fisher.

A time policy contained a warranty that the ship should not sail for British North America after the 15th of August. On that day the ship was lying in a dock in Dublin Harbour, bound for Quebec, and it was impossible from the state of the wind to go to sea; but the vessel was hauled out of dock and warped down the river about half a mile towards the mouth of the harbour. At the time when the vessel was thus moved the master and crew knew that it was impossible to get to sea on that day. It was held, that if the master's intention in moving the vessel was solely to comply with the warranty, his proceeding was not a compliance therewith; but that if his intention was to put his vessel in a more favourable situation for the prosecution of the voyage, the warranty was satisfied, even though the intention to comply therewith was part of his motive for moving the vessel. As the jury had not found what the captain's intention in fact was, the Court ordered a new trial on this point (*k*).

On the new trial the jury found that the master and crew intended to put themselves in a better position for the prosecution of the voyage and not merely to fulfil the warranty; at the same time they found, that at the time when the ship quitted the dock they knew it was impossible to go to sea that day. On this verdict the Court of Exchequer gave judgment for the plaintiff; and the Court of Error confirmed their judgment, on the ground that the ship was in the prosecution of her voyage on the 15th of August, having on that day made a movement for the purpose of proceeding to sea, and over the sea to North America (*l*).

Sea Ins. Co. *v.* Blogg.

Similarly when the warranty is that the ship shall not sail before a certain day, and she quits her moorings before that day in a state of readiness for the voyage, the question

(*k*) Cockrane *v.* Fisher (1834), 2 Cr. & M. 581; *S. C.*, 4 Tyr. 424.
(*l*) Cockrane *v.* Fisher, in error (1835), 1 Cr. M. & R. 809; *S. C.*, 5 Tyr. 496.

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whether the warranty has been broken depends on the purpose for which she was moved. Thus, where a policy was on goods in ship "sailing on or after the 1st of March," and the ship, being cleared and ready for sea, was moved 500 yards away from her loading berth at a late hour on the 29th of February, the master's only object being to keep his crew on board for an early start on the 1st, the Court of Appeal held that the ship had not sailed before the 1st of March (*m*).

Warranty "to depart."

652. We proceed now to notice those cases which have been decided on warranties "to depart" and "to sail from."

Moir *v.* Royal Exch. Ass. Co.

Under a policy "lost or not lost, at and from Memel to her port of discharge in England, warranted to depart on or before the 15th of September," the "Neptunus," having completed her loading and cleared at the custom-house of Memel on the 9th of September, in a state of perfect readiness for her voyage, hove up her anchor and dropped down the river with the intention of at once proceeding to sea; a change of wind, however, obliged her to lie at a place in the river, still within the limits of the port, until the 21st, when she finally got to sea. Lord Ellenborough, at the trial, although he admitted that the ship had sailed within the meaning of a general warranty "to sail," when she first broke ground on the homeward voyage, yet held that a warranty "to depart" required a different construction. "The intention of the insurers must have been," said his Lordship, "that the ship should be out of the port of Memel, and at sea by the given day; but she was still in the port, and therefore the warranty was not complied with" (*n*). The Court of King's Bench supported this ruling (*o*); and in another action on the same policy, the unanimous judgment of the Court of Common Pleas was given the same way (*p*).

(*m*) Sea Ins. Co. *v.* Blogg, [1898] 2 Q. B. 398, C. A.
(*n*) Moir *v.* Royal Exch. Ass. Co. (1814), 4 Camp. 84.
(*o*) *S. C.* (1815), 3 M. & S. 461.
(*p*) *S. C.* (1815), 6 Taunt. 241, and 1 Marsh. R. 570.

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Warranty "to sail from."

653. It would seem that a warranty "to sail from" a named place must have precisely the same meaning as a warranty "to depart." In the following case this was admitted, the only question being as to what in mercantile usage were the limits of the port of departure with reference to ships of the burden of that insured.

Lang v. Anderdon.

A policy was effected on goods "by ship or ships" at and from Demerara to London, warranted to sail from Demerara on or before the 1st of August. Goods under this policy were shipped on board a vessel of small burden, then lying in the river of Demerara, opposite the town, such being the proper usual place of loading and clearing out for ships of her tonnage. On the 1st of August the ship had loaded, cleared, unmoored and dropped down the river to a place beyond its mouth. It appeared that although ships of small burden always load and clear out as and where this ship had done so, yet large vessels only take in part of their cargo there, and do not complete their loading or obtain their clearances until they get on the outside of a shoal which commences about three miles beyond the river mouth. The ship in question did not get to the outside of this shoal till the 3rd of August, soon after which she was lost. Abbott, C. J., and the Court of King's Bench held, upon this evidence, that as the ship on which the goods were actually loaded had dropped down the river beyond its mouth on the 1st of August, nothing further being then required to be done by a ship of her size before proceeding on her sea voyage, she must be considered as having "sailed from Demerara" on that day, within the meaning of the warranty (*q*).

If, indeed, this had been the case of a large vessel, which would have been obliged, after dropping down the river on the 1st of August, to take in a further part of her cargo and obtain her clearances outside the shoal, his Lordship held that she would not only not have "sailed from Demerara" within the meaning of this warranty, but she would not even

(*q*) Lang *v.* Anderdon (1824), 3 B. & Cr. 495.

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"have sailed" within the meaning of a general warranty "to sail" on or before the 1st of August.

Baines v. Holland.

On an insurance on ship "at and from New York to Quebec, during her stay there, and thence to the United Kingdom, the said ship being warranted to sail from Quebec on or before the 1st of November," the Court held, that the underwriters were liable for the loss of the ship while on the voyage between New York and Quebec, after the 1st of November: they held, in fact, that the warranty only applied to the part of the voyage between Quebec and England, not to the part between New York and Quebec (*r*).

Warranty to sail with convoy.

654. In order to avoid running a dangerous risk in time of general war, it was very usual, while the state of war continued, to insert an express warranty in the policy, that the ship should sail or depart with convoy. This, like every other express warranty, was held to require a strict and literal compliance.

It does not appear necessary to state in detail the cases decided on the extinct Convoy Acts (*s*): the following is an enumeration of the five requisites established, by the authority of these cases, as being essential to a sailing with convoy:—(1) It must be with the regular convoy appointed by government (*t*); (2) from the place of rendezvous appointed by government (*u*); (3) it must be convoy for the voyage (*x*); (4) the ship insured must have sailing

(*r*) Baines *v.* Holland (1855), 10 Exch. 802; 24 L. J. Exch. 204.

(*s*) For the statutory provisions relating to convoy in force during the late European war, see British India Steam Nav. Co. *v.* Green, [1919] 2 K. B. 670, 689, 699.

(*t*) Hibbert *v.* Pigou (1783), 2 Park, 694, 700. "'Sailing with convoy' is the sailing of merchantmen under protection of the King's ships": per Duke, L. J., in British India Steam Nav. Co. *v.* Green, [1919] 2 K. B. 670, at p. 689.

(*u*) Gordon *v.* Morley (1780), 2 Str. 1265; Warwick *v.* Scott (1814), 4 Camp. 62.

(*x*) It is, however, no breach of the warranty, when convoy is appointed for part only of the voyage, for the ship to pursue the remainder of the voyage alone: D'Eguino *v.* Bewicke (1795), 2 H. Bl. 551.

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instructions (*y*); (5) she must depart with convoy, and continue with it till the end of the voyage unless separated by necessity (*z*).

Warranty of neutrality.

655. During the maritime wars that grew out of the French Revolution, it became important for underwriters to ascertain whether the ship or goods insured were liable to hostile capture; and to avoid this risk it came to be customary, where the assured wished to insure his property as neutral, for the underwriters to require him to warrant his ship or goods to be neutral property. This was usually effected by inserting in the policy the words "warranted neutral," or "warranted neutral property"; or sometimes, without any formal clause of warranty, by describing the ship or goods as of a neutral nation, as, "an American ship," "a Dane," "a Swedish brig," &c., which, as we have already seen, was held to have the same effect as any formal warranty of neutrality (*a*).

Its form.

Meaning of a warranty of neutrality.

656. The warranty of neutrality is dealt with in sect. 36 of the Marine Insurance Act, 1906, as follows:—

> (1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.
>
> (2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract (*b*).

(*y*) If, however, she has put herself under convoy, and the master cannot obtain orders, the warranty is not broken: Vardon *v.* Wilmot (1744), 2 Park, 696, n.; Victoria *v.* Cleeve (1779), 2 Str. 1250; Webb *v.* Thompson (1797), 1 B. & P. 5; Anderson *v.* Pitcher (1800), 2 B. & P. 164.

(*z*) Lilly *v.* Ewer (1779), 1 Dougl. 72; Jefferey *v.* Legendra (1691), 3 Lev. 320; Carth. 216; 2 Park, 705.

(*a*) Baring *v.* Claggett (1802), 3 B. & P. 201; Lothian *v.* Henderson (1803), *ibid.* 499; Baring *v.* Christie (1804), 5 East, 398.

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Instances of breach.

If, therefore, when the policy was effected, the ship or goods were not owned by persons either, politically speaking, the subjects of a neutral country or having the commercial character of subjects of such country, or if the ship were not at that time properly documented as a neutral ship, this is a breach *ab initio* of the warranty of neutrality (*c*): so also if, in the course of the voyage, the ship violate the laws of blockade, or resist the right of search, or in any other way conduct herself illegally as a neutral ship so as to forfeit her character of neutrality, this is equally a breach of warranty which frees the underwriter from all liability on the policy.

Assured does not warrant anything beyond his control after beginning of risk.

The warranty of neutrality, however, only means "that things beyond the control of the assured stand so at the time, not that they shall continue so": if, for instance, at the time the risk commences the property warranted neutral be really owned by neutrals, it will be no breach of warranty if these parties become belligerents by the subsequent breaking out of hostilities between the state of which they are subjects and another state. The assured warrants that the ship and cargo are neutral when the risk commences; he does not warrant that they shall continue so at all events during the whole period of the risk. The risk of future war is undertaken by the underwriter on every policy (*d*). In fact, the assured only pledges himself that the neutrality of the ship during the risk shall not be forfeited by any acts or omissions of

(*b*) See 1 Marshall, Ins. 410; 1 Phillips, Ins. s. 783.

(*c*) Baring *v.* Claggett (1802), 3 B. & P. 201.

(*d*) Eden *v.* Parkinson (1781), 2 Dougl. 732 (*a*); the *S. P.* was ruled in Saloucci *v.* Johnson (1785), 1 Park, 169; 2 Park, 716, and confirmed in Tyson *v.* Gurney (1789), 3 T. R. 477. It would, however, be open to an underwriter, on the facts of Eden *v.* Parkinson, to resist the claim, not on the ground of any breach of the warranty of neutrality, but because the insurance was on enemy's property.

Sect. 656. himself and his agents (*e*); he does not and cannot stipulate for the continuance of a state of neutrality over which he himself has no control.

Breaches of the warranty by want of neutral ownership.

657. All property warranted neutral must be at the commencement of the risk, and, as far as depends on the assured or his agents, must continue to be till the end of it, neutral-owned—that is, must belong to those who either by birth or domicil are for commercial purposes neutrals (*f*).

As we have elsewhere (*g*) discussed the question as to what constitutes neutrality for commercial purposes, it will be sufficient in this place shortly to recapitulate the principal points as to neutral ownership.

Domicil and trading in a neutral country constitute neutrality for commercial purposes.

The great principle is, that all men take their commercial character from the place of their domicil (*h*). "All persons who reside and carry on business in a country, reaping the advantages of its trade and contributing to its well-being, must, for the purposes of trade, be considered as belonging to that country" (*i*).

Tabbs *v.* Bendelack.

Thus, where a ship "warranted American" belonged at the time the policy was effected to a man who, though a native-born American, had married an Englishwoman, settled, and was carrying on business in England, where for the last year he had resided with his family without quitting it; the Court held that this ship, though documented as an American, was not in fact an American-owned ship within the true meaning of the warranty, or so as to be protected by the American flag (*k*).

(*e*) Cf. Trinder *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. 114, as to the acts of the shipowner and his servants, when there is no express warranty.

(*f*) Woolmer *v.* Muilman (1763), 1 W. Bl. 427; *S. C.*, 3 Burr. 1419.

(*g*) See Part I. Chap. V.

(*h*) See *ante*, Vol. I. § 90 *et seq.*

(*i*) Per Lord Kenyon in Tabbs *v.* Bendelack (1801), 4 Esp. 109. This rule is recognized in the Prize Law of the United States and of Japan. On the Continent the general doctrine is that the national character of property is determined by the nationality, not the commercial domicil, of the owner.

(*k*) Tabbs *v.* Bendelack (1801), 4 Esp. 207; *S. C.*, 3 B. & P. 207, n.

Sect. 657. On the other hand, property belonging to the born subject of a belligerent state will be considered as neutral-owned, within the meaning of a warranty of neutrality, if its owner be residing and carrying on his trade in the neutral state at the time the policy was effected (*l*).

Immigration *flagrante bello.*

It has been solemnly decided, however, in the United States, and no doubt would be so held in this country, that a man cannot acquire a neutral character for the purposes of commercial protection, or so as to make his property neutral property, by leaving a hostile and establishing himself in a neutral country, *flagrante bello* (*m*).

Property connected with establishment in a hostile country.

658. Wherever a man may reside and whatever political character he may have by birth, whether enemy, neutral or ally, yet if during war-time he keeps up a commercial establishment in a hostile country either alone or in partnership, all property connected with such commercial establishment is liable to hostile capture, and therefore not neutral within the meaning of a warranty of neutrality (*n*).

If, however, he who carries on business both in the belligerent and in the neutral country resides in the latter, then, whatever may be his national character by birth, his property connected with his trading establishment in the neutral country will be neutral for the purposes of protection against hostile capture, and therefore within the meaning of

A strong case, as it appeared that the plaintiff had an *animus revertendi* to America in that very ship on the termination of her then voyage. See also Wilson *v.* Marryatt (1798), 8 T. R. 31; M'Connell *v.* Hector (1802), 3 B. & P. 113; The Indian Chief (1801), 3 C. Rob. 12; The Anna Catherina (1802), 4 C. Rob. 107; The President (1804), 5 C. Rob. 277.

(*l*) The Postilion, Hay & Marriott, 245; M'Connell *v.* Hector (1802), 3 B. & P. 113; The Emanuel, 1 C. Rob. 296; The Abo (1854), Spinks' Prize Cases, 42, 44.

(*m*) The Dos Hermanos (1817), 2 Wheaton, 76.

(*n*) The Vigilantia (1798), 1 C. Rob. 1; The Susa (1799), 2 C. Rob. 251; The Portland (1800), 3 C. Rob. 41; The Manningtry, [1916] P. 329; The Anglo-Mexican, [1918] A. C. 422. The rule is the same in the United States: see The San Jose Indiano (1814), 2 Gallison's R. 268; The Antonia Johanna (1816), 1 Wheaton, 159.

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the warranty (*o*). But if a resident in a hostile country has a trading establishment in a neutral country even his property connected with such establishment is deemed to be enemy property (*p*).

Property not wholly neutral-owned.

It has been decided in the United States, and apparently on sound principles of law, that under a warranty of neutrality the property must be wholly owned by neutrals, and therefore, if a belligerent be interested in any part thereof, though merely as *cestui que trust*, this falsifies the warranty (*q*).

It is not, however, requisite that the whole cargo should be neutral-owned, unless it be all protected by the policy which contains the warranty of neutrality (*r*).

Property in transit to a belligerent country.

659. If the property which is the subject of the insurance be *in transitu* or in course of consignment from a vendor to a vendee, it is not enough, in order to satisfy a warranty of neutrality, that the property be neutral-owned at the commencement of the transit; for if it be consigned by neutral owners to a hostile destination in pursuance of a contract made during war, it is liable to hostile capture while in transit. The English rule is, that neutral property going to be delivered in the belligerent country, and under a contract to become the property of the belligerent immediately on arrival, is to be considered as belligerent property unless the contract was made in time of peace and without any contemplation of war (*s*).

(*o*) The Portland (1800), 3 C. Rob. 41; The Herman (1802), 4 C. Rob. 228; The Jonge Klassina (1804), 5 C. Rob. 297; The Lützow, [1918] A. C. 435. Cf. The Hypatia, [1917] P. 36.

(*p*) The Harmony (1800), 2 C. Rob. 322; The Clan Grant (1915), 1 Brit. & Col. Prize Cases, 272.

(*q*) Murray *v.* United Ins. Co. (1801), 2 Johnson's Cases, 168, cited 1 Phillips, s. 790; and see also Calbreath *v.* Gracy (1805), 1 Washington C. C. R. 219; 1 Phillips, s. 788.

(*r*) Barker *v.* Blakes (1808), 9 East, 283. See *S. P.* in Livingston *v.* Maryland Ins. Co. (1810), 6 Cranch, 274, and Bayard *v.* Massachusetts Fire and Mar. Ins. Co. (1826), 4 Mason, 256; 1 Phillips, s. 789.

(*s*) The Sally (1795), 3 C. Rob. 300, n.; The Vrow Margaretha (1799), 1 C. Rob. 336; The Jan Frederick (1804), 5 C. Rob. 128. See The Miramichi, [1915] P. 71, 75.

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It was held to make no difference that it was agreed between the neutral consignor and the belligerent consignee that the goods shall be at the risk of the former until delivered (*t*). Such agreements were held to be fraudulent, as, if they could operate, they would cover all belligerent property while at sea, since the risk of capture would be laid alternately on the consignor or consignee according as the one or other happened to be neutral (*u*).

Goods in transit from a belligerent country.

On the other hand, it has been also held, though in apparent inconsistency with the principle of the last rule, that goods which are hostile owned at the commencement of the transit do not acquire a neutral character by a neutral destination; the principle assumed in this case being that property which has a hostile character at the commencement of the risk cannot change that character while it is *in transitu* so as to protect it from capture (*x*).

The rule, in short, was, that if either neutral goods were shipped with a hostile destination, or hostile goods with a neutral destination, by virtue of any contract made during

(*t*) The Atlas (1801), 3 C. Rob. 299.

(*u*) See The Baltica (1857), 11 Moo. P. C. 141. The Courts in New York dissent from this rule altogether, and their judges have declared it to be rather "a rule of political expediency than of international law": De Wolff *v.* New York Firemen's Ins. Co. (1822), 20 Johnson, R. 214; *S. C.*, in error (1823), 2 Cowen's R. 56. It should be stated, however, that Phillips lays down the law as in the text, merely stating this case, by the way, as existing: 1 Phillips, ss. 260, 791.

(*x*) The Sally (1795), 3 C. Rob. 300, n.; The Atlas (1801), *ibid.* 299; The Anna Catherina (1802), 4 C. Rob. 107, 113; The United States, [1917] P. 30; The Kronprinsessan Margareta, [1917] P. 114; [1921] W. N. 22; The United States (No. 2) (1917), 2 Brit. & Col. Prize Cases, 525; The Bawean, [1918] P. 58; The Annie Johnson, [1918] P. 154. See, however, The Vesta, [1920] P. 385. The principle also applies in the case of a transfer of goods *in transitu* made before the outbreak of hostilities, but induced by apprehension of war between the vendor's country and that of the captors; but otherwise it has no application to *ante-bellum* shipments: see The Southfield (1915), [1917] A. C. 390, n.; The Daksa, [1917] A. C. 386; The Parchim, [1913] A. C. 157. In The Dirigo, [1919] P. 204, Lord Sterndale held that the principle does not apply in certain cases of f. o. b. contracts.

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war, both alike were, by the law of nations, as understood in this country before the Declaration of 1856, liable to hostile capture, and neither, therefore, were neutral within the meaning of a warranty of neutrality.

Want of neutral origin. Colonial produce.

660. It was also held, that if property warranted neutral consisted of colonial produce, it must be either of neutral origin, or last shipped for its destination from a neutral port. The produce of a belligerent colony, though owned by a neutral, was thus liable to hostile capture (*y*); and the same consequence followed when it was contracted for by a neutral before, but in contemplation of, war (*z*); but when the produce was delivered before war, not having been contracted for in contemplation thereof, it was held to be neutral (*a*).

Colonial produce shipped from a neutral port.

If, however, the produce was owned by neutrals, and exported from the hostile colony to a neutral country, it was deemed neutral during its subsequent transit upon re-exportation, even to the mother country.

The question in such cases always was, whether there had been a *bonâ fide* importation into the neutral country, or whether the whole transportation from the colony to the mother country was one entire voyage. If such produce had been brought into the ports of a neutral country and there transhipped immediately on arrival, without being landed; this, especially in the absence of any distinct proof as to the hostile origin of such produce, was held enough to satisfy a warranty of neutrality (*b*). So, also, landing the produce and paying the duties upon it at the neutral port previous to its transhipment to the mother country was held

(*y*) The Phœnix (1803), 5 C. Rob. 20; per Lord Stowell, *ibid.* 167. In The Asturian, [1916] P. 150, the rule was affirmed that the produce of land in the enemy country is liable to capture while in the ownership or possession of the person owning such land, even though he be a neutral subject residing in a neutral country.

(*z*) The Jan Frederick (1804), 5 C. Rob. 128. See also The Rendsborg (1802), 4 C. Rob. 121.

(*a*) The Vrow Anna Catherina (1804), 5 C. Rob. 161.

(*b*) See Berens *v.* Rucker (1761), 1 W. Bl. 313; The Polly (1800), 2 C. Rob. 361.

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sufficient to legalize the transaction (*c*); but merely touching with such produce at the neutral port, and there paying a nominal duty, was not enough (*d*).

Want of proper documents and proofs of neutrality.

661. Where a ship is expressly warranted 'neutral,' there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract" (*e*).

By this statutory provision two points are settled which on the authorities were not clearly established. The first is, that where the ship is warranted neutral, the obligation to be properly documented only exists so far as the assured can control the matter. For instance, in a policy on cargo, the carrying vessel may be warranted neutral; but the assured will not lose the benefit of the insurance owing to want of proper documents to establish the ship's neutrality if the want of them is due to no fault of his own. The second is, that the breach of this condition gives the insurer no right to avoid the contract except where the breach has caused a loss (*f*).

The principal documents and proofs of neutrality which

(*c*) The Polly (1800), 2 C. Rob. 361.

(*d*) The Essex, cited 5 C. Rob. 368; The Maria (1805), *ibid.* 365; The William (1806), *ibid.* 385.

(*e*) Mar. Ins. Act, 1906, s. 36, sub-s. 2.

(*f*) The concluding words of the sub-section, which overrule the decision in Rich *v.* Parker (1798), 7 T. R. 705, create a difficulty. Do they mean that the insurer can avoid the policy *ab initio* and altogether, so that he will not be liable for a previous partial loss, *e.g.*, damage which has been repaired, or for a subsequent loss which has nothing to do with the want of documents, or do they only mean that he can repudiate liability for any loss which is due to the breach of the condition? It is submitted that the latter is the proper construction: otherwise the extraordinary result would follow that liability for a partial loss might depend on the contingency whether a subsequent loss unconnected therewith had or had not occurred.

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the law of nations requires in every neutral ship are stated by Arnould to be the following (*g*):—

The flag.

1. The flag: this is the most obvious badge of the national character of the ship, and by the law of nations she is liable as against herself to be considered as belonging to the nation so indicated (*h*). A ship warranted neutral must bear no other than a flag that was neutral at the commencement of the risk; and a ship warranted of any given national character must bear the flag of that and of no other nation.

The passport or sea-letter.

2. The passport, sea-brief, sea-letter or pass: this is a certificate granted by authority of the neutral state, giving permission to the master of the ship to proceed on the voyage proposed, and declaring that while on such voyage the ship is under the protection of the neutral state (*i*). It is indispensable to the safety of a neutral ship (*k*); nor is any vessel permitted to disown the national character ascribed to her therein (*l*). Its form is frequently and variously given in the commercial treaties contracted between different states, and must therefore vary in each particular case. Usually it specifies the name and residence of the captain; the name, property, description, tonnage, and destination of the ship;

Its usual form.

(*g*) The papers carried on board vary to some extent according to the nationality of the ship. For a list of the documents which may be expected to be carried by ships of different states, see Professor Holland's official Manual of Naval Prize Law, 52—59.

(*h*) The Success (1812), 1 Dodson, 131; The Vrow Elizabeth (1803), 5 C. Rob. 2; The Industrie (1854), Spinks' Prize Cases, 54; The Leda (1914), 1 Brit. & Col. Prize Cases, 233 (Prize Court of Bermuda). The neutral flag is not conclusive in favour of the ship: The Proton, [1918] A. C. 578; The Hamborn, [1918] A. C. 993; The Kanakee, 4 Lloyd's List L. Rep. 67, 355. The goods do not take their national character from the flag or pass: The Vreede Scholtys (1804), 5 C. Rob. 5, n.; but goods on an enemy ship consigned to an enemy port are *primâ facie* enemy property: The Roland (1915), 84 L. J. P. 127.

(*i*) The Vigilantia (1798), 1 C. Rob. 13; The Vreede Scholtys (1804), 5 C. Rob. 5, n.

(*k*) 1 Marshall, Ins. 410, citing Hubner de la Saisie des Bâtiments neutres, Pt. ii. chap. 3, s. 10, vol. i. 242.

(*l*) The Vigilantia (1798), 1 C. Rob. 13. This does not apply to the goods: The Vrow Elizabeth (1803), 5 C. Rob. 2; The Vreede Scholtys (1804), *ibid.* 5, n.

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the nature and quantity of the cargo; the place whence it comes; its destination, &c.; but no general rule can be laid down on these points.

The register or certificate of registry.

3. The register or certificate of registry is also an important document under this warranty, as it shows to whom and to what port a vessel belongs, and, being certified by some officer of the customs, bears with it a certain stamp of public authority. This document, however, is not indispensable for compliance with the warranty, if the ship possesses others from which her neutral character may be decisively ascertained. So it was held in the United States, where the ship had a sea-letter but no register (*m*).

Bill of sale.

4. The bill of sale may also be of importance as a proof of nationality, especially where the ship appears to be hostile built, in order to show that, although she be so, yet she has been either purchased by the neutral before, or captured and legally condemned and sold to the neutral after, the declaration of war (*n*).

The muster-roll.

5. The muster-roll (*o*) may be of great use in ascertaining a ship's national character, as it contains the name, age, nationality, &c. of every person of the ship's company.

The charter-party.

6. The charter-party, as it serves to authenticate many of the facts on which the proof of neutrality must rest, ought always to be found on board chartered ships (*p*).

The log-book.

7. The log-book, if faithfully kept, is important with the same view (*q*), and so is—

The Bill of health.

8. The bill of health, which is a certificate, properly authenticated, that the ship comes from a place where no

(*m*) Barker *v.* Phœnix Ins. Co. (1811, 8 Johnson's R. 237, cited 1 Phillips, Ins. s. 806.

(*n*) Per Lord Stowell, The Sisters (1804), 5 C. Rob. 155; 1 Marshall, Ins. 411.

(*o*) Commonly known as the ship's articles, but in the Merchant Shipping Act, 1894, styled the Agreement with the Crew. For the contents of this document, see sect. 114 of the Act.

(*p*) 1 Marshall, Ins. 411.

(*q*) See the observations of the Privy Council in The Ophelia, [1916] 2 A. C. 206.

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infectious distemper prevails, and is thus incidentally evidence of ownership.

Proofs of the national character of cargo.

9. Proofs of the national character of the cargo, as invoices, bills of lading, certificates of origin, &c.: these are all of importance, as proofs of the neutral character of the goods warranted neutral (*r*). The certificate of origin was generally deemed necessary during the continuation of the French wars, in order to prove that the goods were the subject of legal transport. To this list the manifest and the clearances may be added.

The want of none of these documents singly is conclusive.

Upon the subject of these documents it may be observed generally that though the want of some of these papers may be taken as strong presumptive evidence, yet the want of none of them singly amounts to conclusive evidence against a ship's neutrality.

All, in fact, that the warranty of neutrality requires is that the property should be owned in compliance with the warranty and be furnished with the usual evidence of such neutrality as is warranted (*s*), that this proof shall accompany the property, and be forthcoming whenever its neutral character is called in question.

Documents required by commercial treaties.

662. The same principles which apply to the proofs of nationality required by the general law of nations are applicable to the regulations introduced by the commercial treaties of modern states (*t*).

Rich *v.* Parker.

By the treaty of 1778 between France and America, it was agreed that ships belonging to either state "must be furnished with sea-letters or passports" (to be made out in the form annexed to the treaty), "expressing the name, property

(*r*) The Mar. Ins. Act, 1906, does not impose any obligation with respect to documents in the case of a warranty of the neutrality of goods. Sect. 36, sub-sect. 2, refers only to ship. It applies, however, to a policy on goods where the ship is warranted neutral. See Baring *v.* Claggett (1802), 3 B. & P. 201.

(*s*) Siffken *v.* Lee (1807), 2 B. & P. N. R. 484. See 1 Marshall, Ins. 412; 1 Phillips, Ins. s. 802.

(*t*) Per Lawrence, J., in Pollard *v.* Bell (1800), 8 T. R. 440.

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and build of the ship, as also the name and place of habitation of the master or commander."

A ship insured "from London to Guernsey, and from thence to the coast of Africa," &c., "warranted American property," while this treaty was in force, had sailed from London to Guernsey without any passport, but from Guernsey, and until she was captured by a French privateer, she had such passport on board and exhibited it to the captain of the privateer at the time of her capture. The Court of King's Bench held that although the ship was not lawful prize, yet the warranty of neutrality was broken by her having sailed from London to Guernsey without a passport (*u*). "The ship," said Lord Kenyon, "was not only not to be liable to risks arising from her not being American property, but she was not to be liable to any inconvenience or impediment in her voyage from her not being in the condition required by the treaty with France" (*u*).

Baring *v.* Claggett.

The following case shows the strictness with which the Courts will exact a compliance with the letter of the treaty regulations. In this same treaty the sea-letter is required to express "the name and place of habitation of the master or commander." A ship "warranted American" had a sea-letter running as follows:—"Permission has been granted to George Dominic, master of the ship called the 'Mount Vernon,' of the town of Philadelphia, of the burden of," &c. The Court was of opinion that the name of the town in the sea-letter must necessarily, from its collocation, be referred to the ship and not to the master, and that the sea-letter was not in accordance with the treaty (*x*).

(*u*) Rich *v.* Parker (1798), 7 T. R. 705, 709. Inasmuch, however, as the loss here was not due to the want of the passport, this case, in view of the concluding words of sect. 36, sub-s. 2, of the Mar. Ins. Act, 1906, would now be decided differently.

(*x*) Baring *v.* Claggett (1802), 3 B. & P. 201 (before Lord Alvanley and the Court of C. P.), and *S. C.* in error (1804), 5 East, 398 (before Lord Ellenborough and the Court of K. B.). Inasmuch as the policy in this case was on cargo, and the condemnation was not due to the informality in the sea-letter, the decision would now, in view of sub-sect. 2 of sect. 36 of the Mar. Ins. Act, 1906, be otherwise.

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In the same case, as it appeared that the owner of the ship had not been naturalized in America, and his ship consequently had not acquired the privileges conferred upon registered ships of the United States by the American Navigation Act of 1792, the Court held that the ship on this ground also was not "American" within the meaning of the warranty (*y*).

Want of documents required by occasional regulations.

663. Although it is requisite, to comply with a warranty of neutrality, that a ship should be furnished with all documents required by treaties between her own and other states, the same rule does not apply to those marine regulations and ordinances which foreign states make in time of war contrary or in addition to the law of nations. Questions of neutrality are to be decided by the general law of nations, subject only to such alterations and modifications therein as may have been introduced by treaties between the state to which the ship belongs and other powers. The warranty imposes no obligation on the neutral shipowner to furnish himself with every document that the belligerent powers may require by their own private ordinances, unsanctioned by international treaty, as evidences of neutrality. In no case, therefore, will the want of such documents amount to a forfeiture of his neutrality (*z*).

Engaging in privileged colonial or coasting trade of the enemy.

664. A warranty of neutrality implies that the ship shall (so far as the assured can control the matter) (*a*) be conducted on the voyage with strict regard to the rules of neutrality. If she be guilty of any conduct which by the rules of war renders her liable to hostile capture, this is a breach of the warranty.

(*y*) Baring *v.* Claggett (1802), 3 B. & P. 201. Kent, C. J., supposes that Lord Alvanley did not know of the Act of Congress of 1802, giving vessels not entitled to a register, but American owned, all the advantages of national protection: 1 Phillips, Ins. s. 813, n. He certainly did not, for Baring *v.* Claggett was only decided in 1802, and the ship which was the subject of the warranty had been captured six years before, in 1796.

(*z*) Mayne *v.* Walter (1782), before Lord Mansfield, 1 Marshall, Ins. 402. See also the remarks on that case, and Barzillay *v.* Lewis, *ibid.* 404, 405. Pollard *v.* Bell (1800), 8 T. R. 434; Bird *v.* Appleton (1800), *ibid.* 562; Price *v.* Bell (1801), 1 East, 663. See further, *post*, § 684.

(*a*) Mar. Ins. Act, 1906, s. 36, sub-s. 1.

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Thus, engaging in the privileged colonial or coasting trade of the enemy—simulating or destroying papers—resisting the right of search—violating the laws of blockade—are all so many forfeitures of neutrality and breaches of the warranty. We will consider these in their order.

Rule of 1756.

By the law of nations, as interpreted in this country, the following rule (frequently called the Rule of 1756) has been firmly established as a principle of our laws of war. If during war neutral property be engaged in any branch of the colonial or coasting trade of the enemy, which is not open to foreigners in time of peace, such property loses its character of neutrality and becomes liable to hostile capture (*b*).

This rule stands on two grounds: 1. That the neutral, by thus acting, interposes to relieve the enemy from the condition to which the other belligerent had reduced him, and to that extent deprives that belligerent of the advantage he had gained. 2. That the neutral employed in a trade, reserved by the enemy to his own subjects, identifies himself with that enemy, and assumes his character: in the words of Lord Mansfield, "If a neutral ship trades to a French colony with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked on as a French ship, and is liable to be taken" (*c*). This rule was uniformly acted upon by Lord Stowell throughout the whole course of the great maritime wars of the French Revolution, from 1792 to 1815.

(*b*) The rule is firmly established: see The Immanuel (1799), 2 C. Rob. 186; and see especially 1 Kent, Com. 81—86, which contains an able exposition of the whole doctrine, together with a reference to the American authorities.

(*c*) In Berens *v.* Rucker (1761), 1 W. Bl. 313. France being then at war with this country, "French" in this paragraph is equivalent to "belligerent." See also The Montara (1906), 2 Russ. & Jap. Prize Cases, 403.

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Limitations of Rule of 1756.

665. The rule, however, is confined to trade directly between the enemy's colony and the mother country, and does not apply where the produce of a hostile colony is *bonâ fide* imported into a neutral country and thence re-exported into the mother country (*d*). But merely touching at the neutral port and paying nominal duties there is not enough (*e*).

The question, in fact, in all cases is one of intent. Did the *animus importandi* terminate at the intermediate port or look to an ulterior one? Was it, under the circumstances, a *bonâ fide* importation ending at the intermediate port, or a mere contrivance to cover the original scheme of the voyage to an ulterior port? This is the true principle of the cases (*f*).

This rule is not admitted by the United States.

This rule was uniformly repudiated by the United States throughout the whole of the war of 1812—1814, but Chancellor Kent intimates the possibility, that if the United States were ever themselves to be engaged in a maritime war with an enemy who threw the whole of his colonial or coasting trade into the hands of enterprising neutrals, they might be induced to feel more sensibly than they had hitherto done the weight of the arguments of foreign jurists in favour of the policy and equity of the rule (*g*).

Carrying simulated papers,

666. Carrying simulated papers is a ground of capture and condemnation, and, if without leave expressly given in the

(*d*) The Polly (1800), 2 C. Rob. 361.

(*e*) The Essex, cited 5 C. Rob. 368; The Maria (1805), *ibid.* 365.

(*f*) Per Sir Wm. Grant in The William (1806), 5 C. Rob. 385.

(*g*) 1 Kent, Com. 84, 85. Phillips (vol. i. s. 278), after stating that his countrymen had suffered much under this rule in the English Courts, lays it down that such trade, opened to all neutrals indiscriminately, ought not to be treated as contraband except after official notice. As regards notice, the rule was well known. Besides, it is a fallacy to say that the trade is *opened*. It continues to be a privileged trade, and the neutrals that embark in it become the privileged traders of the belligerent. Even if a final abolition of this privilege were proclaimed, this being done under stress of war and for belligerent purposes, may, according to a rule of the Courts, be disregarded by the enemy. See The Dos Hermanos (1817), 2 Wheaton, 76; and *ante*, § 95.

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policy, is a breach of the warranty of neutrality (*h*): this is so, even though it be impossible without such papers to carry on the proposed trade (*i*).

or suspicious papers.

So, carrying suspicious papers has been held in the United States to be a breach of this warranty. Under a policy on goods "warranted American property," certain papers relating to a former shipment were concealed in a cask on board and were referred to in a letter written in sympathetic ink, and they were such altogether as to throw a mystery over the shipment—this was held to amount to a breach of the warranty (*k*).

Attempting to disguise belligerent goods as neutral.

So it has been held in the United States, and apparently on sound principles, that an attempt to disguise belligerent goods as neutral and carrying them as such with neutral cargo, is a breach of the warranty of neutrality and will avoid the policy as to the neutral cargo, though if the same goods had been taken on board as enemy's goods and so documented, the only effect would have been to expose them to confiscation (*l*).

Concealing papers.

Concealing papers, material for the proof or preservation of neutral character, justifies a hostile detention and carrying into port for adjudication, and on this ground it has been laid down in the United States by Marshall, C.J., that the concealment of the ship's papers will generally amount to a breach of the warranty of neutrality (*m*).

Spoliation or destruction of papers.

The spoliation or destruction of papers is a still more aggravated circumstance of suspicion, and may justify an

(*h*) By sect. 36, sub-sect. 2, of the Mar. Ins. Act, 1906, as to which, however, see § 661, *ante*. See Horneyer *v.* Lushington (1812), 15 East, 46; Oswell *v.* Vigne (1812), *ibid.* 70; Bell *v.* Bromfield (1812), *ibid.* 364.

(*i*) See the cases in East last cited, which answer the doubt raised on this point by Sir J. Mansfield in Steel *v.* Lacy (1810), 3 Taunt. 285.

(*k*) Carrere *v.* Union Ins. Co. (1813), 3 Harris & Johnson, 324, cited 1 Phillips, Ins. s. 809.

(*l*) Phœnix Ins. Co. *v.* Pratt (1810), 2 Binn. 308; Schwartz *v.* Ins. Co. of North America (1811), 3 Washington C. C. R. 117.

(*m*) Livingston *v.* Maryland Ins. Co. (1813), 7 Cranch, 536, cited 1 Phillips, s. 809.

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Enemy's goods in neutral ships and neutral goods in enemy's ships no breach of neutrality.

667. Previous to the treaty of Paris of 1856 (*p*) it was an established rule of the law of nations, as acted upon in this country, that enemy's property carried on board neutral ships in time of war is liable to capture and confiscation. It was not, however, held to involve a forfeiture of neutrality, either in the ship in which it was carried or in the cargo together with which it was loaded on board, if such cargo belonged to other owners and was covered by separate insurances (*q*).

Neutral goods are not liable to seizure on board enemy's vessels; and this on the same principle as regulates the case last considered, viz., that war gives a right to capture the goods of an enemy, but not of a friend. It would, therefore, be no ground of avoiding the policy that goods "warranted neutral" had been put on board an enemy's vessel: this, however, must be understood as confined to the enemy's merchant vessels, for if placed on board an armed ship of the enemy they are regarded as enemy's property; for this shows an intention to resist the right of search (*r*).

And the same consequence has been held to follow, for the same reason, if the ship on which they are loaded, though neutral, sails under convoy, or in company of an armed belligerent force, or under the licence of a hostile government (*s*):

(*n*) The Hunter (1815), 1 Dods. Adm. R. 480; The Ophelia, [1915] P. 129; [1916] 2 A. C. 206.
(*o*) Bernardi *v.* Motteux (1781), 2 Dougl. 581. The American rule is the same: The Pizarro (1817), 2 Wheaton, 227.
(*p*) See *post*, § 672.
(*q*) See Barker *v.* Blakes (1808), 9 East, 283.
(*r*) The Fanny (1814), 1 Dodson's Adm. R. 443.
(*s*) *Ibid.* See also The Maria (1799), 1 C. Rob. 340, *infra*, §§ 673, 674.

the doing so would clearly amount to a breach of the warranty of neutrality. Sect. 667.

Violation of the laws of blockade.

668. It is an invariable principle of the Law of Nations, that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he is guilty of a high offence against the laws of war, and thereby subjects his ship and cargo to the penalty of confiscation (*t*); and this penalty may be enforced by seizure at any time during the continuance of the ship's voyage out and home, though long subsequent to the act of violation (*u*). We shall have occasion in a subsequent chapter to enter at some length into the question of what constitutes a violation of blockade (*x*); it will be sufficient here to lay it down as an undoubted rule, that any act which can be so construed will entail a forfeiture of neutral privileges, and be a breach of the warranty of neutrality.

Carrying hostile despatches.

669. Few modes of violating the rules of neutral conduct are of more aggravated description than carrying hostile despatches, *i.e.*, communications made by the home government, or the spies of one of the belligerents, to its forces at the theatre of war, or *vice versâ*. Such conduct exposes to confiscation the neutral ship so employed (*y*), and if there be any connection between the owner of the ship and cargo, then (but not, it seems, otherwise) the cargo also (*z*); it is needless to add that it would amount to a breach of the warranty of neutrality.

(*t*) Bynkershoek, Quæst. Juris Publici, lib. i. c. 4, s. 11; Grotius de Jure Belli ac Pacis, lib. iii. c. 1, s. 5; Vattel, Droit des Gens, lib. iii. c. 7, s. 117. For an exception to this rule made by Lord Stowell in the case of the cargo, where the owners thereof could not have been cognizant of the blockade at the time of shipment, see The Mercurius (1798), 1 C. Rob. 80, *post*, § 766.
(*u*) The Welvaart van Pillaw (1799), 2 C. Rob. 128; The Juffrow Maria Schrœder (1800), 3 C. Rob. 147.
(*x*) See *post*, §§ 766—770.
(*y*) See *infra*, § 760.
(*z*) The Atalanta (1808), 6 C. Rob. 440.

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Ambassadors' despatches not within the rule.

But this rule does not extend to the case of a neutral ship carrying the despatches of the ambassador of one of the belligerents from the neutral country to the sovereign of the belligerent state (*a*); nor, under the Hague Maritime Convention (No. XI.) of 1907, to the carriage of postal correspondence.

Carrying contraband of war.

670. As we shall have to consider the whole subject of contraband of war in treating hereafter of the illegality of the risks, we will here only observe that, as carrying contraband articles entails the confiscation of all property on board the neutral ship belonging to the same owner, it would clearly amount to a breach of the warranty of neutrality as to such property (*b*); with regard, however, to the ship and such portion of the cargo as belongs to different owners, it will only, it should seem, produce such a result when the circumstances of criminality are such as to involve both ship and cargo in one common penalty (*c*).

Carrying a belligerent's despatches or military persons in his service.

The carriage of a belligerent's despatches, or of military or naval persons in his service, under circumstances which render the ship liable to condemnation (*d*) is, no doubt, a breach of the warranty of neutrality. But the carriage of naval officers has been held by the Court of Appeal, affirming the decision of Bigham, J., not to be a breach of a warranty against "contraband of war," as both in legal and in commercial language the word "contraband" is not applied to persons, but only to goods (*e*).

Resisting the right of search.

671. In order to enforce the rights of belligerent nations, and with a view to ascertain the real character of all vessels

(*a*) The Caroline (1808), *ibid.* 461.

(*b*) See Seymour *v.* London and Provincial Marine Ins. Co. (1872), 41 L. J. C. P. 193. In that case there was a warranty in a policy on goods against contraband. Some of the goods covered by the policy being contraband, it was held that the policy was void *in toto*.

(*c*) See *infra*, § 763.

(*d*) See *infra*, § 760.

(*e*) Yangtze Ins. Ass. *v.* Indemnity Mutual Marine Ass. Co., [1908] 1 K. B. 911; 2 K. B. 504, C. A.

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on the high seas, the Law of Nations arms the belligerents with the power of visitation and search.

If, upon making the search, the vessel be found employed in contraband trade, or (according to the rule acted upon in this country previous to the Treaty of Paris of 1856) in carrying enemy's property, or in carrying hostile despatches or troops, she is liable to be brought in for inquiry by a Court of Prize as to her conduct, or the national character of the cargo (*f*).

If either the ship herself, or the vessel under whose convoy she is sailing, resist this right of search when lawfully exercised, or attempt a rescue while being conducted into port for adjudication, such conduct amounts to a forfeiture of her neutrality, and exposes both ship and cargo, without distinction, to the penalties of confiscation (*g*).

The Armed Neutrality of 1780.

Several attempts have been made in European history to put an end to the exercise of this right of search, as far as it relates to the carriage of enemy's goods on board neutral ships; the most memorable of these was the Armed Neutrality of 1780—a league formed under the auspices of the Empress Catherine for the purpose of defending and propagating the principle "that free ships make free goods," and that the neutral flag should be a substitute for all other proof of nationality, and protect all goods carried under it, to the exclusion of the right of search.

England, considering this an attempt to introduce by force a new code of maritime law, perseveringly resisted it, and

(*f*) For the effect of the Reprisals Orders of 1915 and 1917, see *post*, § 672a.

(*g*) See Vattel, lib. iii. c. 7, s. 114; The Maria (1799), 1 C. Rob. 340. The convention between Russia and England, 17th June, 1801. In the United States, The Nereide (1815), 9 Cranch, 388; The Marianna Flora (1826), 11 Wheaton, 42. Arts. 61 and 62 of the Declaration of London exempt neutral vessels under national convoy from search, unless the commander of the convoy, being satisfied that his confidence has been abused, withdraws his protection. By art. 63, forcible resistance to the right of search involves in all cases the condemnation of the vessel, and the cargo is liable to the same treatment as the cargo of an enemy vessel, *i.e.*, if belonging to an enemy it will be also condemned, if neutral owned it will be released.

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when, in the wars of the French Revolution, the Armed Neutrality re-appeared under the title of the Baltic Confederacy, she so vigorously and promptly opposed its pretensions, that the attempt was speedily abandoned, and the right of belligerent search was admitted even by Russia to the very fullest extent (*h*).

Declaration of Paris, 1856.

672. On the conclusion of the Crimean War, England concurred with France, Austria, Russia, Prussia, Sardinia and Turkey, in establishing the principle that free ships make free goods. The Declaration appended to the Treaty of Paris of 1856 is this:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war (*i*).
3. Neutral goods, except contraband of war, are not liable to capture under enemy's flag.
4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy.

Most of the maritime states have formally adhered to this Declaration. The only important exception now is the United States; but during the war between that Power and Spain (which only adhered to the Declaration several years later, viz., in 1908), both States agreed to the exemption of enemy's goods in neutral ships from capture (*k*).

(*h*) In the convention between England and Russia, 17th June, 1801, the latter admitted the right of search, even of merchant ships under convoy of a ship of war.

(*i*) This immunity does not extend to goods transhipped from an enemy vessel: The Bawean, [1918] P. 58, nor to goods seized in port after they have been discharged from a neutral ship: The Batavier II., [1918] P. 66, n.

(*k*) In 1908—1909, on the invitation of the British Government, a conference of the chief naval Powers was held in London for the purpose of reaching an agreement, if possible, on certain questions in respect of which the Prize Laws of different states enforce divergent rules. The conference came to an agreement upon most of the questions submitted, and formulated a series of rules which are embodied in the "Declaration concerning the Laws of Naval Warfare," known as the Declaration of London. These rules relate to blockade, contraband, unneutral service, destruction of neutral prizes, transfer to a neutral flag, enemy character, convoy, resistance to search, and compensation. "They have been extracted," it is stated in the Report of the drafting committee, "from the various views or practices which prevail, and represent what may be called the *media sententia*." (See Parl. Paper, Misc. No. 4, 1909, for the text and Report.) The Declaration has not been ratified. In the war of 1911—1912 between Italy and Turkey, both Powers declared that they would act upon the rules contained in the Declaration. Again, on the outbreak of the late European war the belligerent Powers on both sides declared that they would observe the provisions of the Declaration, and by Order in Council of the 20th August, 1914, it was "adopted and put in force" with a few modifications, the most important being the virtual abrogation of Art. 35, which exempts conditional contraband intended to be discharged at an intervening neutral port from capture. Further modifications were made by Orders in Council of the 29th October, 1914, the 20th October, 1915, and the 30th March, 1916. Finally, acting in concert with the allied Governments, the British Government withdrew all these Orders by an Order in Council of the 7th July, 1916, and thenceforth the Declaration ceased to have any force in the Prize Law of this country. Even as regards the period during which the Declaration was in force the Privy Council held that it had no validity as an international agreement, and that the Prize Court could not act on an Order putting it in force, except in so far as it either embodied international law or contained a waiver of the strict rights of the Crown. The principle is that "the Crown cannot by Order in Council prescribe or alter the law to be administered by a Court of Prize": see The Hakan, [1918] A. C. 148, 152; The Proton, [1918] A. C. 578, 580; The Zamora, [1916] 2 A. C. 77, 96, 97.

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The right of search is not affected by the Declaration of Paris. Even though enemy's property on neutral ships is exempt from confiscation, the right subsists as to the other points in respect to which it was formerly exercised—viz., the carriage of troops—hostile despatches—contraband of war.

The Reprisals Orders of 1915 and 1917.

672a. "The Prize Court," said Sir Samuel Evans, in one of the earliest prize cases in the late war, "will regard the Declaration of Paris as a recognized and acknowledged part of the law of nations (*l*). Nevertheless, the disregard of the ordinary rules of naval warfare by the German naval forces and the Reprisals Orders which the British Government found it necessary to issue in retaliation, led to a state of

(*l*) The Marie Glaeser, [1914] P. 218, 233.

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affairs in which the rule that enemy goods on neutral ships are immune from capture virtually ceased to be operative. On the 4th February, 1915, the German Government issued a decree by which the waters round Great Britain and Ireland were declared to be a war zone in which every enemy merchant ship would be destroyed without it always being possible to warn the people on board of the imminent dangers; and it was stated that neutral vessels would incur danger, as attacks intended for hostile ships might also affect them. This decree was the prelude of indiscriminate attacks by German submarines on British and neutral merchant and passenger ships which were constantly torpedoed and sunk without any steps being taken to ensure the safety of the persons on board and even without any warning (*m*). Consequently the Reprisals Order in Council of the 11th of March, 1915 (*n*), was issued, which declared that in retaliation the Crown had decided to adopt measures to prevent commodities of any kind from reaching or leaving Germany. With this object it provided (1) that no merchant vessel should be allowed to proceed to a German port and that the goods on board must (unless she received a pass enabling her to discharge elsewhere) be discharged in a British port; (2) that no merchant vessel which sailed from any German port should be allowed to proceed on her voyage with any goods laden at such ports, and that the goods must be discharged in a British or Allied port. It further provided (3) that every merchant vessel on her way to a port other than a German port carrying enemy goods or goods with an enemy destination, or (4) which sailed from a port other than a German port with enemy goods or goods of enemy origin might be required to discharge such goods at a British or

(*m*) For an account of the events which led to the issue of this Order and of Germany's subsequent methods of naval warfare, see the judgment of Sir Samuel Evans in The Leonora, [1918] P. 182.

(*n*) See Manual of Emergency Legislation Supplement, 3, p. 513. The full text of the Order is also set out in The Ogeechee, 5 Lloyd's Prize Cases, 413.

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allied port (*o*). Goods discharged under the Order in a British port were to be placed in the custody of the Prize Court. In cases (1) and (3) (unless they were contraband or were requisitioned) they were eventually to be restored to the person entitled thereto; and in cases (2) and (4), unless requisitioned, they were to be detained, or sold and the proceeds to be paid into Court to be dealt with as the Court might deem to be just."

The validity of this Order was upheld by the Privy Council, affirming a judgment of Sir Samuel Evans, on the ground that the breaches of international law committed by the German Government justified retaliatory measures on the part of this country, and that the Order did not subject neutrals to more inconvenience or prejudice than was reasonably necessary in the circumstances (*p*).

The sinking of British and neutral ships by German submarines, often without any warning, continued, and on the 1st February, 1917, the German Government issued a memorandum in which they announced that thenceforth all sea traffic would, without further notice, be opposed by all weapons in the waters adjacent to Great Britain, France and Italy (*q*). The British Government retaliated by issuing a supplementary Order in Council of the 16th February, 1917 (*r*), which declared (1) that vessels encountered on their way to or from neutral ports affording means of access to the enemy territory without calling at a British or allied port should, until the contrary was established, be deemed to be carrying goods with an enemy destination or of enemy origin and should be brought in for examination; and (2)

(*o*) A supplementary Order of the 10th January, 1910, was made for the purpose of dispelling doubts which had arisen whether "enemy" included hostile countries other than Germany.

(*p*) The Stigstad, [1916] P. 123; [1919] A. C. 279. When the cargo is sold, the shipowner may be allowed a reasonable sum as freight out of the proceeds: *Ibid.*, and The Heim, [1919] P. 237.

(*q*) See The Leonora, [1918] P. 198, for the text of the German Memorandum.

(*r*) See *Ibid.* at p. 183, for the text of this Order.

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that any vessel carrying goods with an enemy destination or of enemy origin should be liable to condemnation, unless she called at an appointed British or allied port for examination of her cargo. The validity of this Order also, as a measure of retaliation, was affirmed by the Prize Court and the Privy Council, in a case in which a neutral ship was condemned for carrying a cargo of coal, the produce of Belgian collieries under the control of the German Government, on a voyage from Rotterdam to Stockholm, without calling at a British or allied port (*s*).

Exposition of the doctrine of search in the "Maria."

673. The ablest and most eloquent exposition anywhere to be met with of the whole doctrine of the right of search is contained in the celebrated judgment of Lord Stowell, in the case of the "Maria" (*t*). The points established in it are thus expressed by that great master of law and language:—

1. The right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontrovertible right of the lawfully-commissioned cruisers of the belligerent nation.
2. The authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully-commissioned belligerent cruiser (*u*).
3. The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

Resistance by convoy.

674. Agreeably to these principles Lord Stowell, in that case, pronounced sentence of condemnation on a whole fleet of Swedish ships sailing under convoy of a Swedish man-of-war under instructions to resist by force the right of search claimed by lawfully-commissioned British cruisers. The

(*s*) The Leonora, [1918] P. 182; [1919] A. C. 974.
(*t*) (1799), 1 C. Rob. 340.
(*u*) For the rule of the Declaration of London, see *ante*, § 671, n. (*g*).

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resistance of the convoying ship was held to be the resistance of the whole convoy, subjecting all to confiscation (*x*).

Sailing with convoy for the purpose of resistance.

The very act of sailing under the protection of a belligerent or neutral convoy for the purpose of resisting search is a violation of neutrality (*y*).

What the right of search includes.

The right of search includes that of sending a vessel into port for the more satisfactory examination of the national character of the property, in cases where there is a reasonable ground of doubt (*z*). It is therefore a breach of the warranty if the captain and crew of a neutral vessel, thus sent into port, attempt to rescue the vessel (*a*).

Limitations upon right of search.

With regard to the limitations upon the exercise of the right of search, it must be observed that it can only be exercised—1st, by ships of war or lawfully-commissioned cruisers of the belligerents; 2ndly, upon private merchant ships of the neutrals, and not in any case upon public ships of war; 3rdly, during the existence of war (*b*).

With regard to the mode of its exercise, it may be laid down generally that it must be conducted with due care and regard to the rights and safety of the vessel (*c*).

(*x*) The Maria (1799), 1 C. Rob. 340.

(*y*) *Ibid.* See the authorities collected as to this point, 1 Kent, Com. 155, n. (*b*) and (*c*), and 1 Phillips, Ins. s. 818.

(*z*) The Maria (1799), 1 C. Rob. 340. In the late European war it was the usual British practice to send the vessel into port for search, and the American Government protested against the practice. Sir Edward Grey, however, defended the practice on the ground that the growth in the size of steamships made it necessary to go into calm waters, even to exercise the right of visit, and that a thorough search was the only protection against the risk of merchantmen being used to lay mines or carry supplies for submarines which could easily be concealed under other cargo. See Parl. Papers, 1915, Cd. 7816, nos. 1, 2 and 4.

(*a*) Garrels *v.* Kensington (1799), 8 T. R. 230; *S. P.* decided in the United States, Wilcocks *v.* Union Ins. Co. (1809), 2 Binn. 574, cited 1 Phillips, Ins. s. 822. See also The Dispatch (1801), 3 C. Rob. 278.

(*b*) See The Maria, *sup.*; Le Louis, 2 Dods. Ad. R. 210.

(*c*) Thurlow's State Papers, vol. ii. p. 503. Mr. Canning's letter to Mr. Monroe, August 3rd, 1807, cited 1 Kent, Com. 156, n. (*a*). As to the general duty of captors to take reasonable care of the captured property, see The Santa Catharina (1919), 88 L. J. P. 170 (P. C.).

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Effect of foreign judgments as proof of breach of warranty.

675. One of the means most frequently used for proving that the ship or goods warranted neutral had forfeited their neutrality was by producing the judgment or sentence of a competent Prize Court pronouncing their condemnation.

Copies of the sentence, properly authenticated and produced under the seal of the Court, were in such cases always deemed sufficient evidence of the fact of the condemnation, and of the ground on which it proceeded (*d*).

We will consider—First, what is to be deemed a Court of competent jurisdiction in questions of prize; secondly, when the sentence of such Court is to be deemed conclusive evidence of a breach of the warranty.

A competent Prize Court must be—

676. Whether a Court acting as a Prize Court has competent jurisdiction depends mainly upon the points—1, by whom it was held; 2, in whose dominions it was held; and 3, where the prize itself lay.

1. A Prize Court of the government of the captor.

1. The condemnation must be pronounced by a Prize Court of the government of the captor; the Prize Court even of a co-belligerent has no jurisdiction.

2. Sitting in the territory either of the captor or of an ally, but not of a neutral.

2. As to place, it is established that although the Prize Court of the captor may sit in the territory of an ally, yet it is not lawful for such a Court to act in the territory of a neutral (*e*), notwithstanding that the territory is in the military occupation of a belligerent, if the neutral government still exists (*f*).

It is established that a Prize Court of the government of the captors, whether sitting in its own territory or that of an ally, may lawfully pronounce sentence of condemnation on a captured ship brought into a port of the ally (*g*).

(*d*) See cases cited in Marshall, Ins. vol. i. p. 393, vol. ii. p. 723, and the *dicta* of Lord Ellenborough in Flindt *v.* Atkins (1811), 3 Camp. 215, n.

(*e*) The Flad Oyen (1799), 1 C. Rob. 135; Havelock *v.* Rockwood (1799), 8 T. R. 268. The *S. P.* held in the United States, L'Invincible (1816), 1 Wheaton, 238; The Estrella (1819), 4 Wheaton, 298.

(*f*) Donaldson *v.* Thompson (1808), 1 Camp. 429; Hagedorn *v.* Bell (1813), 1 M. & S. 450.

(*g*) The Christopher (1799), 2 C. Rob. 209; The Betsy (1800), *ibid.* 210, n.; Oddy *v.* Bovill (1802), 2 East, 473; The Victoria (1809), Edw. 97.

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3. A Prize Court has jurisdiction over prizes lying in neutral or allied ports.

677.—3. It was for some time supposed that a Prize Court, though sitting in the country of the captors, had no jurisdiction over prizes lying in a neutral port, and Lord Stowell, in one case, seems to have acted on this principle (*h*). Subsequently, though he still admitted the correctness of the principle, yet he felt himself bound by the contrary practice which had so long a period prevailed, and acted upon the rule that the condemnation by a Court of the captors, sitting in the country of the captors, upon prizes carried into a neutral port and remaining there, is valid by the general usage of nations (*i*). On appeal his judgment was affirmed (*k*).

During the Crimean War the question arose again in the case of some Russian ships which, being unfit to be brought here, were sold at Memel with the consent of the Prussian Government. Dr. Lushington condemned them under the circumstances, while maintaining in theory the correctness of the principle that a prize must be brought into a port of the captor's country (*l*). There can be no doubt, and, in fact, it has been so decided, that a belligerent Prize Court, sitting in its own country, has lawful jurisdiction to condemn as prize captured ships brought into the ports of an ally (*m*).

When the sentence of a foreign Prize

678. How far the sentences of foreign Prize Courts are to be conclusive evidence of a breach of the warranty of

(*h*) The Herstelder (1799), 1 C. Rob. 114, 119, n.

(*i*) The Henrick and Maria (1799), 4 C. Rob. 43; The Purissima Conception (1805), 6 C. Rob. 45, 47.

(*k*) The Henrick and Maria, on appeal (1807), 6 C. Rob. 138, n. This rule is adopted in the United States: Hudson *v.* Guestier (1808), 4 Cranch, 293; Williams *v.* Armroyd (1813), 7 Cranch, 423. Maclachlan (Merchant Shipping, 4th ed. p. 22; Arnould, 6th ed. 641, 763) took a different view on this point, with which the editors do not agree.

(*l*) The Polka (1854), Spinks' Prize Cases, 57. In view of this decision, it has become more difficult even than it was in Lord Stowell's time to question the sentence of a foreign Prize Court on the ground that the prize was lying in a neutral port.

(*m*) The Christopher (1799), 2 C. Rob. 209.

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Court is conclusive.

neutrality is a question upon which considerable difference of opinion among the judges existed at one time.

"Since the judgment of the House of Lords in Lothian *v.* Henderson (1803), it may now be assumed," said Lord Ellenborough, "as the settled doctrine of a Court of English law, that all sentences of foreign Courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence in actions on policies of insurance upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially" (*n*).

Same rule in the United States.

This rule of the English law has been adopted in the federal Courts of the United States (*o*), and though there has been some difference of opinion in the State Courts on the point, yet the weight of judicial authority on the other side the Atlantic seems clearly to be in favour of the binding force and universal application of this doctrine of English law (*p*).

But not in France.

The law in France is different, and the French Courts, though they will enforce a foreign judgment in France, after subjecting to examination the grounds on which it proceeds, will not permit a foreign judgment, though pronounced by a competent Court, to be conclusive evidence in the French Courts of the facts as to which it decides (*q*).

(*n*) Bolton *v.* Gladstone (1804), 5 East, 155, 160. See the learned opinions delivered by Blackburn, J., in Castrique *v.* Imrie (1869), L. R. 4 H. L. 414, 425; Godard *v.* Gray (1870), L. R. 6 Q. B. 139, 147; Schibsby *v.* Westenholz (1870), *ibid.* 155. In Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 463, the Court of Appeal said that the cases in which the judgments of Prize Courts were held to be conclusive evidence of the fact that the ships were not neutral are exceptional cases, and have no application to judgments *in rem* in general. The condemnation of a cargo of timber by a German Prize Court under a decree which declared "mining lumber" to be contraband was held by Rowlatt, J., in Aktieselskabet Grenland *v.* Janson (1918), 35 T. L. R. 135, not to be decisive of the question whether a warranty "no mining timber" in a marine policy had been broken.

(*o*) Croudson *v.* Leonard (1808), 4 Cranch, 434; Bradstreet *v.* The Neptune Ins. Co. (1839), 3 Sumner's R. 600.

(*p*) 2 Kent, Com. 121, n. (*a*).

(*q*) Such seems to be the result of the French authorities, which, however, are very conflicting. See the very elaborate and learned note of Chancellor Kent, 2 Com. 121, n. (*a*).

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The first English case in which this rule of international comity was established was that of Hughes *v.* Cornelius, in the year 1682 (*r*).

The rule was afterwards extended to the case of hostile tribunals, though many of the English judges, Lord Ellenborough in particular (*s*), have expressed their regret at this establishment and extension of the rule.

The doctrine, however, stands on too firm ground to be shaken, and it only remains to notice the somewhat perplexed decisions by which, under varying circumstances, the English Courts have sought to modify and apply it.

Limitations of the doctrine.

679. The proposition itself is: That the sentence of a foreign Prize Court is conclusive evidence in our Courts upon all points within its jurisdiction, and upon which the sentence, on the face of it, professes to decide, but upon none other.

Sentences only conclusive as to points upon which they profess to decide.

The chief point to be attended to is that these judgments are only conclusive as to the points upon which they profess to decide. It follows that, unless the sentence professes to be grounded on some fact or state of facts, which, by the law of nations, amounts to a forfeiture of neutrality; as, *e.g.*, that the ship was "enemy's property," or "was not properly documented according to treaties," the sentence is not conclusive evidence of a breach of the warranty of neutrality.

Grounds of condemnation may be inferred from whole of sentence.

680. Formerly our Courts would not give a conclusive effect to facts merely set out in the preamble or reciting part of these sentences as motives of the condemnation, but not expressly stated in the adjudicative clause as the ground of the sentence (*t*). Subsequently, however, a more liberal rule of interpretation prevailed, according to which, if it clearly appear by necessary inference from the whole of the sentence

(*r*) Carth. 32; T. Raym. 473; 2 Shower, 232.

(*s*) Donaldson *v.* Thompson (1808), 1 Camp. 429. See also his remarks in Fisher *v.* Ogle (1808), *ibid.* 418.

(*t*) Christie *v.* Secretan (1799), 8 T. R. 192.

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taken together what that ground was, and that it was incompatible with the neutrality of the condemned property, such sentence will be conclusive to falsify the warranty (*u*).

But that it may have this effect, the real ground upon which the sentence proceeded must be clearly deducible by plain inference from the whole taken together; and such ground must amount to a forfeiture of neutrality by the law of nations. If there be so much ambiguity as to make it impossible to ascertain the real ground on which the sentence proceeded, it is not conclusive (*x*).

The rule is thus laid down by Tindal, C. J.: "In order to conclude the parties from contesting the ground of condemnation in an English Court of Law, such ground must appear clearly on the face of the sentence; it must not be collected by inference only or left in uncertainty, whether the ship was condemned on one ground which would not be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country" (*y*).

Bernardi v. Motteux.

In an early case before Lord Mansfield, where a sentence of ambiguous construction stated on the face of it two facts as the basis of adjudication, one of which raised the inference that the condemnation did not proceed on the ground of enemy's property but on the ground of a non-compliance with the private ordinances of the condemning state, his Lordship permitted the plaintiff to show by collateral

(*u*) See Kindersley *v.* Chase (1801), 1 Marshall, Ins. 425; Bell *v.* Carstairs (1811), 14 East, 374, 392, 394; Bolton *v.* Gladstone (1804), 5 East, 155; *S. C.* (1809), 2 Taunt. 85; Baring *v.* Royal Exch. Ass. Co. (1804), 5 East, 99, overruling as to this point the N. Pr. decision of Lord Ellenborough in Fisher *v.* Ogle (1808), 1 Camp. 418, in which his Lordship decided that the sentence is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.

(*x*) Bernardi *v.* Motteux (1781), 2 Dougl. 575; Calvert *v.* Bovill (1798), 7 T. R. 523; Fisher *v.* Ogle (1808), 1 Camp. 418; Dalgleish *v.* Hodgson (1831), 7 Bing. 495.

(*y*) Dalgleish *v.* Hodgson (1831), 7 Bing. 504.

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evidence that the latter ground was that on which the foreign Court really proceeded (*z*).

Calvert v. Bovill.

So, in a case before Lord Kenyon and the Court of King's Bench, where the sentence of a French Prize Court condemned property, "warranted American," on three grounds, alleged in the preamble in such a way as to make it ambiguous on which the sentence really proceeded, and none of which was a just ground of condemnation by the law of nations; the Court held the sentence not conclusive to prove a forfeiture of neutrality (*a*).

Where the sentence merely condemned the ship as prize, without stating on the face of it any grounds of condemnation, Lord Mansfield in one case permitted the defendant to show, by collateral evidence, that it really proceeded on the ground of a violation of neutrality (*b*). In another case of the same kind, his Lordship held that the mere fact of condemnation by a competent Court, "as good and lawful prize," where no grounds were stated, was conclusive evidence of a breach of the warranty of neutrality (*c*). The authority of this case has, however, been doubted (*d*), and it does not seem to be reconcilable with the rule laid down as above by Tindal, C. J., in Dalgleish *v.* Hodgson.

Sentence conclusive though manifestly unjust.

681. If the sentence in the adjudicative part of it expressly condemns ship or goods on the ground of their being enemy's property, such sentence, though manifestly unjust, will be received as conclusive evidence to prove a breach of the warranty of neutrality.

Geyer v. Aguilar.

An insurance was effected on the freight of a ship "warranted American property": the ship, being captured by a

(*z*) Bernardi *v.* Motteux (1781), 2 Dougl. 575.

(*a*) Calvert *v.* Bovill (1798), 7 T. R. 523.

(*b*) Fernandez *v.* Da Costa (1764), Beawes, 314; 1 Marshall, Ins. 398.

(*c*) Saloucci *v.* Woodmass (1784), 2 Park, Ins. 727; 1 Marshall, Ins. 405.

(*d*) 2 Smith's L. C. 12th ed. 835. See also the remarks of Lawrence, J., on this case in Lothian *v.* Henderson (1803), 3 B. & P. 527, though it appears that the learned Judge approved of the decision.

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Express declaration in sentence that property was enemy's is not necessary.

682. Even though the foreign Court do not expressly declare in the adjudicative part of the sentence that the subject of condemnation was enemy's property; yet if it can be clearly collected from the whole of the sentence taken together that they must have proceeded on this ground, a breach of the warranty is established.

Kindersley v. Chase.

Goods "warranted Swedish property" were, with the ship, seized and condemned by the Prize Court of the Isle of France, whose sentence, after stating the principal question to be "whether the ship and cargo were enemy's property or Swedish property," proceeded to set forth several insufficient grounds of condemnation, and then, in the adjudicative clause of the sentence, referring to all that had preceded, used these words, "whereupon the Court declared the ship and cargo to be lawful prize." Sir William Grant, on appeal,

(*e*) Geyer *v.* Aguilar (1798), 7 T. R. 681; *S. P.* Hughes *v.* Cornelius (1682), Carth. 32; T. Raym. 473; 1 Shower, 143; *per cur.* Castrique *v.* Imrie (1861), in error, 30 L. J. C. P. 177, 184, 188.

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giving judgment at the Cockpit in this case, decided that, as the French tribunal had considered the question whether the property was enemy's or neutral, and had then adjudged it to be lawful prize, this was sufficient evidence of a breach of the warranty, as they must have been supposed to have proceeded on the ground that it was enemy's property (*f*).

"The result of all the cases," said this very learned judge, "is, that a sentence of a Court of Admiralty is conclusive as to all that it professes to decide. Now, is it possible to say that this Court did not profess to decide whether this was or was not enemy's property? It was the only question the Court did profess to decide." Sir William Grant also in this case observed that it is generally to be presumed that such sentences proceed on legitimate grounds, which throws on the parties impeaching them the duty of showing that they have proceeded on some other grounds (*g*). In a recent case, however, the Court of Appeal said that the cases in which a sentence of a foreign Court has been held conclusive evidence of the fact that the vessel condemned was not neutral, are exceptional, and that they have no application to judgments *in rem* in general (*h*).

The presumption *primâ facie* is that such sentences have proceeded on lawful grounds.

683. As we have already seen, a neutral ship, in order to comply with a warranty of neutrality, must be provided with all the documents required by treaty (*i*). Hence, if a sentence of condemnation profess to be on the ground that

Sentence on the ground that ship not properly documented.

(*f*) Kindersley *v.* Chase (1801), 1 Marshall, Ins. 425. See also Bolton *v.* Gladstone (1804), 5 East, 155; in error (1809), 2 Taunt. 85, which proceeded on the same principle.

(*g*) 1 Marshall, Ins. 426, 427. See the effect of judgments and of judgments *in rem* considered, 2 Smith's L. C., notes to Duchess of Kingston's Case. See also the opinion of Blackburn, J., delivered in the House of Lords in Castrique *v.* Imrie (1870), L. R. 4 H. L. 414; and as to foreign judgments generally, the judgments of the same learned judge in Goddard *v.* Gray (1870), L. R. 6 Q. B. 139, and Schibsby *v.* Westenholz (1870), *ibid.* 155.

(*h*) Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 463.

(*i*) *Ante*, § 661.

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the ship had not those evidences of neutrality on board, the warranty is deemed to have been broken (*k*).

Effect of sentence obviated by special agreement. Lothian *v.* Henderson.

Nevertheless, although the ship be warranted in the policy to belong to a neutral state, this may be explained by a subsequent agreement, so as to preclude the effect of a foreign sentence of condemnation as enemy's property where, in point of fact, the ship was neutral property. A ship was described in the policy as "an American vessel," and doubts having arisen whether this was not a warranty of neutrality, the underwriters signed a written paper, agreeing "that, in case of capture or seizure, the assured on producing papers to prove that the ship and cargo were really neutral should be entitled to his loss." The ship was captured and condemned as enemy's property, but the Court held that, though there was a warranty that the ship was American, yet the explanatory agreement coupled with proof of her neutrality prevented the sentence from establishing a breach of this warranty (*l*).

Sentence expressly on ground of breach of arbitrary regulation.

684. Although a ship cannot be neutral unless she is properly documented as required by treaties, the same consequence, as we have seen, does not follow from her mere failure to observe those arbitrary regulations, or ordinances of foreign states, which have not received the sanction of international law (*m*).

Thus, where a ship, "warranted Portuguese," was condemned by a French Prize Court expressly "because she had an English supercargo on board," contrary to a recent ordinance of the French government, but not contrary to the law of nations, or to any treaty between France and Portugal, Lord Mansfield held that this sentence did not falsify the warranty (*n*). On the same ground, where a ship, "warranted Danish," was condemned by a French Prize Court on the express ground of her "captain's being an enemy," contrary to a French ordinance, set out in the sentence, the Court held that the sentence did not falsify the warranty (*o*). And in the case of Bird *v.* Appleton, the Court of King's Bench fully sustained their decision in Pollard *v.* Bell, and broadly laid down the principle that no one state has authority, by any ordinance of its own, to vary the general law of nations as to other states (*p*).

(*k*) Barzillai *v.* Lewis (1782), 1 Marshall, Ins. 402; Baring *v.* Claggett (1802), 3 B. & P. 201. See the remarks of Lawrence, J., on the former case in Pollard *v.* Bell (1800), 8 T. R. 441, 442.

(*l*) Lothian *v.* Henderson (1803), 3 B. & P. 499.

(*m*) 1 Marshall, Ins. 401, 402.

(*n*) Mayne *v.* Walter (1782), 1 Marshall, Ins. 402.

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Sentence on grounds good in part.

685. If in a foreign sentence there be several grounds of condemnation set forth, and one of them be a good and legal ground, it will be conclusive to establish a breach of the warranty, though joined with several bad ones.

Baring *v.* Royal Exch. Ass. Co.

Thus, where a ship, "warranted American," was condemned by a French Prize Court, partly on the ground that she was not documented according to treaties, and partly for the breach of French ordinances, not binding upon America, the sentence was held conclusive to forfeit the warranty (*q*).

(*o*) Pollard *v.* Bell (1800), 8 T. R. 434.

(*p*) (1800), 8 T. R. 562. See also Price *v.* Bell (1801), 1 East, 663; Bernardi *v.* Motteux (1781), 2 Dougl. 575, for the true effect of which decision, see 1 Marshall, Ins. 406, and per Lawrence, J., in Pollard *v.* Bell (1800), 8 T. R. 441.

(*q*) Baring *v.* Royal Exch. Ass. Co. (1804), 5 East, 99.

CHAPTER IV.

IMPLIED WARRANTIES.

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685a. THE sections of the Marine Insurance Act, 1906, which deal with Implied Warranties (*a*) in particular are the thirty-seventh, the thirty-ninth, the fortieth, and forty-first. These are as follow:—

Sect. 37. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

Warranty of seaworthiness of ship.

Sect. 39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the

(*a*) As to warranties in general, whether express or implied, see *ante*, §§ 628, 634, 636; Mar. Ins. Act, 1906, ss. 33, 34.

ship shall be seaworthy for the purpose of the particular adventure insured. Sect. 685a.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

No implied warranty that goods are seaworthy.

Sect. 40.—(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

Warranty of legality.

Sect. 41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

General doctrine of seaworthiness.

686. By far the most important of the implied warranties is that of seaworthiness, which we will deal with first in order. In every voyage policy there is an implied warranty that the ship shall be seaworthy for the voyage when she sails, by which is meant that she shall be in a reasonably fit state as to repairs, equipment, crew, and all other respects,

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to encounter the ordinary perils of the voyage insured at the time of sailing on it (*b*).

There is nothing in the law of marine insurance more important to commerce and the preservation of human life than a strict compliance with this warranty (*c*). It is not implied, however, in time policies (*d*). In voyage policies it is an implied condition precedent to the underwriter's liability for any loss incurred in the course of the voyage (*e*), and can only be excluded by terms in writing in the policy expressed in the clearest language (*f*). Therefore, when in a voyage policy losses from "rottenness, inherent defects, and other unseaworthiness" were excepted, the Privy Council held that the implied warranty of seaworthiness was not thereby excluded. Consequently, the boiler being defective at starting, the plaintiff did not recover, although the defect had been made good before the loss (*g*). So, also, where a policy on cattle provided that the fittings of the ship were to be approved by Lloyd's surveyor, and they were approved by him, Bigham, J., held that as regards the sufficiency of the fittings, the warranty of seaworthiness was not excluded by the express provision as to the approval of the fittings (*h*).

Seaworthiness of ship a condition precedent in voyage policies.

Seaworthiness a relative term.

687. If, indeed, as in policies "at and from," the risk attaches before sailing (*i*), and the ship, while in the port,

(*b*) Mar. Ins. Act, 1906, s. 39 (4); *per cur.* Dixon *v.* Sadler (1839), 5 M. & W. 405, 414.

(*c*) See the observations of Lord Eldon in Douglas *v.* Scougall (1816), 4 Dow, 276; and of Lord Redesdale in Wilkie *v.* Geddes (1815), 3 Dow, 60.

(*d*) Mar. Ins. Act, 1906, s. 39 (5), *post*, § 697.

(*e*) Per Lawrence, J., Christie *v.* Secretan (1799), 8 T. R. 198; per Lord Ellenborough, Wedderburn *v.* Bell (1807), 1 Camp. 2.

(*f*) See *post*, § 694, and Mar. Ins. Act, 1906, s. 35 (3).

(*g*) Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234. The warranty may, however, be excluded by the common clause, "Held covered in case of any breach of warranty, &c., at a premium to be hereafter arranged": Greenock SS. Co. *v.* Maritime Ins. Co., Ltd., [1903] 1 K. B. 367, per Bigham, J.

(*h*) Sleigh *v.* Tyser, [1900] 2 Q. B. 333.

(*i*) See Mar. Ins. Act, 1906, Sched. I. rr. 3, 4.

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be in a state of seaworthiness commensurate with her then risk, her subsequently sailing in a state of unseaworthiness for the voyage will not avoid the policy *ab initio*, so as to entitle the assured to a return of premium (*k*); and in the same way, if she be lost in the course of a river navigation, the underwriters will be liable, provided her then state of equipment was adequate to her then risk, although it might not be such as to constitute a state of seaworthiness for her sea voyage (*l*).

As Alderson, B., expressed it in the case of Gibson *v.* Small, "on a voyage policy 'from' a port, the ship must be able, if seaworthy, to sustain the ordinary risk on that voyage. If insured 'at and from,' the ship must be seaworthy 'at, *i.e.*, sufficient for ordinary risks in port, and seaworthy 'from,' *i.e.*, fit for the voyage at the time of sailing" (*m*). "The term 'seaworthy,'" said Erle, J., on the same occasion, "when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in dock till it has reached the end of its voyage; but it expresses a relation between the state of the ship and the perils it has to meet in the situation it is in" (*n*).

Immaterial that unseaworthiness remedied before loss.

688. As unseaworthiness is a condition of the contract of insurance, breach of the condition avoids the contract and deprives the assured of any recourse against the insurers, whether his loss can be traced to such breach or not, even though the unseaworthiness was remedied before the loss (*o*).

(*k*) Annen *v.* Woodman (1810), 3 Taunt. 299; Mar. Ins. Act, 1906, s. 33 (3), *ante*, § 634.

(*l*) See *per cur.* in Dixon *v.* Sadler (1839), 5 M. & W. 405, 414; Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37; and see *post*, §§ 699—701.

(*m*) 4 H. L. Cas. 393.

(*n*) *Ibid.* 384.

(*o*) Mar. Ins. Act, 1906, s. 34 (2), *ante*, § 628; see Forshaw *v.* Chabert (1821), 3 Brod. & B. 158; Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234. The insurer, however, is only discharged from liability as from the date of the breach of warranty, without prejudice to any liability incurred by him before that date: Mar. Ins. Act, 1906, s. 33 (3).

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Ignorance of assured as to unseaworthiness immaterial.

Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference; if the ship was not, in fact, seaworthy at the outset of the adventure, either in the degree commensurate with her then risk, or for the voyage, as the case may be, that state of things never existed which was the foundation for the underwriter's promise, and he consequently can never be bound thereby. Hence, as Lord Eldon says, "It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions of the owner may be, if he is mistaken in the fact, and the vessel is, in fact, not seaworthy, the underwriter is not liable" (*p*).

Thus, where the owner had procured his ship to be surveyed and fully repaired, as the shipbuilder thought, before sailing, but she proved to be unseaworthy from a latent defect (the unsoundness of some timbers near her keel), not discovered during the survey or repair, Lord Mansfield held the underwriter discharged from his liability by the mere fact of unseaworthiness (*q*).

Warranty implied in policy on goods;

689. The warranty of the ship's seaworthiness is equally implied in a voyage policy, whatever be the subject of insurance. It therefore applies no less to insurances effected by the owner of the goods than to those effected by the owner of the ship (*r*). Thus, in an action brought by an innocent shipper of goods (who had no interest whatever in the ship), on proof being given that the ship was unseaworthy when she sailed, Lord Mansfield nonsuited the plaintiff, saying that the implied warranty could not be dispensed with in any case (*s*).

(*p*) Per Lord Eldon in Douglas *v.* Scougall (1816), 4 Dow, 276.

(*q*) Lee *v.* Beach (1762), 1 Park, Ins. 468; see also The Glenfruin (1885), 10 P. D. 103; The Caledonia (1894), 157 U. S. (50 Davis) 174.

(*r*) The law is the same in the United States. See The Caledonia, *supra;* and 1 Phillips, s. 695.

(*s*) Oliver *v.* Cowley (1765), 1 Park, Ins. 470. For some time past it has been the practice of underwriters on cargo not to set up the defence of unseaworthiness of the ship, but to pay the loss and avail themselves by subrogation of the assured's remedies against the shipowner. This practice does not modify the rule of law stated in the text. See per Stirling, J., in Brooking *v.* Maudslay (1888), 38 Ch. D. 642; per Bigham, J., in Sleigh *v.* Tyser, [1900] 2 Q. B. 336. By one of the Institute Cargo Clauses it is now provided that "the seaworthiness of the vessel as between the assured and the assurers is hereby admitted." See App. B.

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but does not extend to lighters in which they are landed; nor to the goods.

The warranty of seaworthiness which is implied as to the ship does not extend to lighters employed to land the cargo (*t*).

There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage, but there is an implied warranty that the ship, in addition to being seaworthy as a ship, is also reasonably fit to carry the goods to their destination (*u*).

Warranty may be waived by underwriters.

690. It is, however, in the power of the insurers, after a breach of the warranty, to make themselves liable on the risk, by memorandum indorsed on the policy (*v*).

Weir *v.* Aberdein.

Under an insurance "on ship and outfit," for a voyage "at and from London to Bahia," the ship sailed from London, and in the Channel encountered bad weather, and made so much water, that it became evident she was overloaded and could not continue her voyage in safety unless she were lightened. The master, with the consent of the underwriters, expressed by a memorandum on the policy (*x*), unshipped part of the cargo in Ramsgate Harbour; and proceeded on his voyage, in the course of which a loss occurred wholly unconnected with the original state of unseaworthiness of the ship when she first sailed from London; the jury found that the ship was seaworthy for her voyage when she sailed from Ramsgate, and the Court, upon this finding and

(*t*) Lane *v.* Nixon (1866), L. R. 1 C. P. 412.

(*u*) Mar. Ins. Act, 1906, s. 40; see Koebel *v.* Saunders (1864), 17 C. B. N. S. 71, and *post*, § 712. As to warranty of fitness of goods as between shipowner and shipper, see Acatos *v.* Burns (1878), 3 Ex. D. 282.

(*v*) By sect. 34 (3) of the Mar. Ins. Act, 1906, "a breach of warranty may be waived by the insurer."

(*x*) In these terms: "It is agreed that the ship may load, unload and reload goods and discharge part of her cargo at Ramsgate."

Sect. 690. the other facts of the case, held that the underwriters were liable for the loss (*y*).

Lord Tenterden's judgment, as reported, involves the proposition that if a vessel be at the outset unseaworthy, owing to some defect which is discovered and remedied before loss, the policy is not avoided, a proposition which, as we have seen, cannot now be maintained (*z*). The true ground on which the decision must rest is thus stated by Lord Penzance, in delivering the judgment of the Privy Council in Quebec Marine Insurance Co. *v.* Commercial Bank of Canada (*a*): "The case of Weir *v.* Aberdein did not proceed upon the language that is attributed to Lord Tenterden—whether he was fully and rightly reported or not—but the judgment proceeded, as it appears to their Lordships, distinctly upon the principle that the underwriters had been aware of the unseaworthiness, and had assented to the vessel putting back to the port to cure herself of the defect, and therefore they were held responsible. They had assented in writing on the policy to maintain their liability, notwithstanding the violation of the warranty."

No implied warranty that the ship shall continue seaworthy.

691. It is enough to satisfy this warranty that the ship be originally seaworthy for the voyage insured when she sails on it; the assured makes no warranty that the ship shall continue seaworthy in the course of it. "Every ship," says Lord Mansfield, "must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage" (*b*).

(*y*) Weir *v.* Aberdein (1819), 2 B. & Ald. 320.

(*z*) Mar. Ins. Act, 1906, s. 34 (2). See *ante*, § 688. Phillips has cited Lord Tenterden's words, and formulated them into a principle (s. 726); and Chancellor Kent considers his Lordship's argument very weighty: 3 Com. 289. The American cases are, however, indecisive. See Joyce, Ins. vol. iii. s. 2182.

(*a*) L. R. 3 P. C. 234, 244.

(*b*) Per Lord Mansfield in Bermon *v.* Woodbridge (1781), 2 Dougl. 788, and in Eden *v.* Parkinson (1781), *ibid.* 735; per Lord Eldon in Watson *v.* Clark (1813), 1 Dow, 344; so *per cur.* in Dixon *v.* Sadler (1839), 5 M. & W. 414, 415.

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On this ground it has been frequently held that under a policy on a voyage out and home, the risk being entire and indivisible, it is sufficient to satisfy the warranty if the ship be seaworthy for the entire voyage when she first sails from the home port of loading; and it is not necessary that she should be in a seaworthy condition on sailing from the outport on her homeward passage, or from any intermediate port.

Bermon *v.* Woodbridge.

Thus, where the voyage insured was "at and from Honfleur to the Coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur," Lord Mansfield said, that if this was one entire risk (which, as the premium was entire, he held it to be), the underwriters were liable if the ship was seaworthy when she left Honfleur, though she had not been so at Angola, or any of the subsequent stages of the voyage (*c*).

Holdsworth *v.* Wise.

So, where a ship was insured "at and from Belfast to her port or ports of loading in British America, during her stay there, and back to a port of discharge in the United Kingdom," &c., and the evidence showed that she was seaworthy when she sailed from Belfast, but unseaworthy when she left St. Andrew's on the homeward passage, the counsel for the defendants admitted that the implied warranty was satisfied (*d*).

Biccard *v.* Shepherd. Goods shipped at different ports under one policy.

The decision of the Privy Council in Biccard *v.* Shepherd (*e*) seems at first sight to conflict with the cases just cited. In that case the policy was on goods "at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea," from the loading of the goods on board the ship. She took part of her cargo at Hondeklip Bay, and was seaworthy when she sailed thence; but she was overloaded at Port Nolloth, and thus became unseaworthy. The cargo

(*c*) In Bermon *v.* Woodbridge (1781), 2 Dougl. 788.

(*d*) Holdsworth *v.* Wise (1828), 7 B. & Cr. 794. See also *S. P.*, Redman *v.* Wilson (1845), 14 M. & W. 476.

(*e*) (1861), 14 Moo. P. C. 471.

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was lost on the voyage, and the Privy Council held that the assured could recover in respect of the cargo shipped at Hondeklip Bay, but not in respect of that shipped at Port Nolloth. The ground of the decision seems, however, to have been that under the words of the policy two separate risks were insured, one on the parcel of goods shipped at Hondeklip Bay, the other on the parcel shipped at Port Nolloth, and that as to these parcels the voyage began, and therefore the warranty attached, at different times (*f*).

Implied warranty as to crew does not extend to their conduct during voyage.

692. The preceding cases establish the principle that no warranty is implied that the ship, in point of staunchness and repair, shall continue seaworthy throughout the voyage; it is equally certain that the assured makes no warranty for the continued good conduct of the master and crew in the course of the voyage (*g*). If the vessel, crew and equipment be originally sufficient, and the master a person of competent skill, the assured has done all he contracted to do; and although such master and crew should by their acts or omissions have brought the ship in the course of the voyage, and at the time of loss, into an unseaworthy (*i.e.*, uninsurable) state, yet the underwriter is liable for all loss which, though remotely occasioned by such superinduced state of unseaworthiness, is yet proximately caused by the perils insured against (*h*).

"It is the duty of the owner," says Bayley, J., "to have the ship properly equipped, and, for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done this he has discharged

(*f*) (1861), 14 Moo. P. C. 496.

(*g*) Trinder, Anderson & Co. *v.* Thames & Mersey Marine Ins. Co., [1898] 2 Q. B. 114, per Smith, L. J., p. 123.

(*h*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 73; Walker *v.* Maitland (1821), 5 B. & Ald. 171; Bishop *v.* Pentland (1827), 7 B. & Cr. 219; Holdsworth *v.* Wise (1828), 7 B. & Cr. 794; and see especially Phillips *v.* Headlam (1831), 2 B. & Ad. 380; Dixon *v.* Sadler (1839), 5 M. & W. 405; *S. C.*, in error (1841), 8 M. & W. 895; Redman *v.* Wilson (1845), 14 M. & W. 476; Phillips *v.* Nairne (1847), 4 C. B. 343; Biccard *v.* Shepherd (1861), 14 Moo. P. C. 471; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284.

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his duty" (*i*). "The assured makes no warranty," says Parke, B., "that the vessel shall continue seaworthy, or that the master and crew shall do their duty during the voyage; and their negligence and misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. Nor can any distinction be made in this respect between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire, which causes a loss, be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which makes a vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of slipping it or cutting it away; nor could it make any difference, whether any other part of the equipment were lost by mere neglect, or thrown away and destroyed in the exercise of an improper discretion by those on board" (*k*).

Case of unseaworthiness due to negligence during voyage. Redman *v.* Wilson.

693. The numerous cases illustrative of these positions will be considered more at large hereafter, when we come to treat of the losses covered by the policy. We will here, however, cite one which shows that it makes no difference whether the state of unseaworthiness which occasions the loss be caused by the negligence of the master and crew, or of other parties employed by the assured upon the business of the ship in the usual course of trade. A ship insured "from London to Sierra Leone, while there, and back to her port of discharge in the United Kingdom," was loaded with teak at an island on the Sierra Leone river by the African natives (who are generally employed in that trade for the purpose), and having completed her loading, began dropping down the river on her passage home; it was soon found, however, that, owing in all probability to the unskilful loading of the natives, she had become so leaky as to be unfit to put to sea,

(*i*) Per Bayley, J., in Walker *v.* Maitland (1821), 5 B. & Ald. 175.

(*k*) Per Parke, B., in Dixon *v.* Sadler (1839), 5 M. & W. 414.

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and having, on examination, been pronounced unseaworthy, she was voluntarily run on shore to prevent her sinking in the river, and ultimately sold where she lay, as not being fit for repair. The plaintiff claimed a total loss by the perils of the sea; and, the ship having been seaworthy when she sailed from London, the Court held the underwriters liable, as the loss, though remotely arising from the negligence of the natives, was proximately caused by a peril of the sea (*l*).

Effect of admission of seaworthiness in policy.

694. The principle that when the ship starts seaworthy the underwriter is liable for a loss caused remotely by the ship having become unseaworthy, but proximately by a peril insured against, is also illustrated by two cases, where the policy contained a clause by which the ship was "allowed to be seaworthy for the voyage": this clause having been decided to be "a dispensation with the implied warranty of seaworthiness," so as to preclude the underwriter from any defence, on the ground of the ship's not having been seaworthy for the voyage when she sailed, these cases stand on the same footing as though the jury had expressly found the fact of seaworthiness (*m*).

Parfitt *v.* Thompson.

In the earlier case a ship, insured "from Bristol to Sierra Leone, and back," had, by the violence of the winds and waves, become so damaged and leaky that she was obliged to run for Gambia, where she was found to be unseaworthy, and not within reach of the repairs, which had become indispensable, in consequence of which she was necessarily sold as she lay. The defendants proposed to show that the loss had

(*l*) Redman *v.* Wilson (1845), 14 M. & W. 476. See also Dixon *v.* Sadler (1839), 5 M. & W. 405; in error (1841), 8 M. & W. 895; and Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284, in both of which cases this question, apart from that of seaworthiness, was raised, and decided in accordance with the cases mentioned in the text.

(*m*) Parfitt *v.* Thompson (1844), 13 M. & W. 392, 396; Phillips *v.* Nairne (1847), 4 C. B. 343. In the United States it has been held that a certificate of seaworthiness from an inspector of a board of underwriters precluded a member of the board from alleging unseaworthiness. Western Ass. Co. *v.* Southern Cotton Oil Co. (1895), 68 Fed. R. 924. As to the effect of an admission of seaworthiness upon the assured's duty to disclose defects, see Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452.

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arisen solely from the decayed and unseaworthy state of the ship, but this they were precluded from doing by their admission of seaworthiness; and the Court held that even supposing the loss to be shown to have been occasioned by the unseaworthy state of the ship at the time of loss, yet that this would be no answer to the action, the loss having been proximately caused by the perils insured against.

Phillips *v.* Nairne.

In the other case the policy also contained the clause, "the ship to be allowed to be seaworthy for the present voyage." She met with a violent hurricane, by which she was so damaged as to be obliged to run for Mauritius, where, on survey, it was found that, from the damage caused by the storm and from the age and decayed state of the ship, she was not worth repairing and was accordingly sold. It appeared, however, upon the whole evidence, that but for the storm the decayed parts of the ship would have been strong enough to enable her to perform her voyage with safety. There was a verdict for the plaintiffs, and the Court refused to grant a new trial (*n*).

It follows from these cases that if the ship be admitted to have been seaworthy when she sailed, no subsequent state of unseaworthiness can preclude the assured from recovering for loss immediately caused by the perils insured against, though the state of the ship at the time of loss may be such as to render the damage caused by those perils greater than it might have been had the ship been sound (*o*).

Doctrine of seaworthiness in the United States.

695. The great leading principle, therefore, of the English doctrine of seaworthiness is that there is no implied warranty thereof, except at the commencement of the voyage (*p*). On

(*n*) Phillips *v.* Nairne (1847), 4 C. B. 343; 16 L. J. C. P. 194.

(*o*) It would be different if the loss were shown to be due directly to the unseaworthiness of the ship, without the concurrent operation of any peril insured against. See Fawcus *v.* Sarsfield (1856), 6 E. & B. 192, and Lord Penzance's remarks on that case in Dudgeon *v.* Pembroke (1877), 2 App. Cas. 296. See also per Scrutton, L. J., in Whittle *v.* Mountain, [1920] 1 K. B. 447, 457.

(*p*) The assured cannot, however, recover for a loss brought about by his own wilful act or default. Mar. Ins. Act, 1906, s. 55 (2) (a). See

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this point the law in the United States is at variance with our own, and gives a wider extent to the implied warranty; it is there held that the assured is bound not only to have his vessel seaworthy at the commencement of the voyage, but to keep her so, as far as it depends on himself and his agents, during the continuance thereof, and at the commencement of all its subsequent stages (*q*). Thus the underwriters in the United States are held discharged from any loss, which can be distinctly shown to have arisen from the negligence or misconduct of the assured in not keeping the ship in a proper state of repair.

Yet in that country unseaworthiness arising after the commencement of the voyage has, it seems, no retrospective operation in respect of losses accrued prior to the breach of the implied warranty; and it further seems to be the better opinion there, that if the ship sailed seaworthy for the voyage, subsequent unseaworthiness will not operate as a defence, except where the loss is distinctly occasioned by it, and the unseaworthiness itself has arisen from the negligence or misconduct of the assured or his agents: where the loss is totally unconnected with the subsequent state of unseaworthiness, it cannot avail as a defence for the underwriters (*r*).

Is parol evidence admissible to

696. An important question, on which there is no decisive authority (*s*), is whether parol evidence can be given to con-

Thompson *v.* Hopper (1856), 6 E. & B. 172; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284; Trinder, Anderson & Co. *v.* Thames & Mersey Marine Ins. Co., [1898] 2 Q. B. 114, C. A.

(*q*) A policy on *cargo* is, however, not avoided by the negligence of the master in leaving an intermediate port in an unseaworthy condition. Morse *v.* St. Paul Fire & Mar. Ins. Co. (1903), 122 Fed. R. 748.

(*r*) See 1 Phillips, Ins. ss. 728—736; 3 Kent, Com. 288, 289; 1 Parsons, Ins. 380; 3 Joyce, Ins. s. 2174; Union Ins. Co. *v.* Smith (1887), 124 U. S. 405. According to Parsons, breach may sometimes only suspend liability until seaworthiness be restored, even though the unseaworthiness exists when the risk commences. See also 1 Phillips, Ins. s. 726.

(*s*) See per Williams, J., in Clapham *v.* Langton (1864), 34 L. J. Q. B. 46.

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tradict or qualify the warranty of seaworthiness. Arnould's view is expressed in the following passage:—"It is not necessary . . . . that the assured should make any statement with regard to any of the constituents of seaworthiness. Should he, however, in answer to inquiries from the underwriter or otherwise, make a positive representation as to any of these facts, his position, as regards the underwriter, is not thereby altered in the slightest degree; *e.g.*, if he represented that the ship was copper-sheathed, or properly found in sails, he would not, because he had made the representation, be any the less bound by the implied warranty that she was also seaworthy in all other respects. If, indeed, he represents some fact inconsistent with a state of seaworthiness, and the underwriter, notwithstanding this statement, yet chooses to take the risk—as, if he represented that the ship was not properly coppered or not adequately found in sails—this would operate so as to release him to this extent from the obligation of the implied warranty" (*t*). This view, that an implied warranty may be qualified by evidence of a representation, has also the support of Phillips (*u*), Duer (*x*), and of Cockburn, C. J., in Burges *v.* Wickham (*y*), all of whom consider that an implied term in a contract rests on a presumed intention of the parties to be bound by it, and that the presumption may be rebutted by evidence of a contrary intention. On the other hand, Blackburn, J., in the same case, expressed a strong view that parol evidence cannot be admitted to qualify an implied warranty. The warranty of seaworthiness, said the learned judge, is as much a part of the policy as if there were written in it, "warranted seaworthy" (*z*). The Court of Queen's Bench held, in a some-

vary the warranty of seaworthiness?

(*t*) 2nd ed. vol. i. p. 577, in the chapter on "Misrepresentation."

(*u*) 1 Phillips, s. 602.

(*x*) 2 Duer, 669—672.

(*y*) (1863), 3 B. & S. 684; 33 L. J. Q. B. 23. Wightman, J., concurred in this judgment.

(*z*) 3 B. & S. 696; 33 L. J. Q. B. 28. Maclachlan strongly supports this view (Arnould, 6th ed. p. 541, n.).

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what earlier case, that a term of a written contract implied by usage cannot be varied by evidence of a parol agreement (*a*). The cases are analogous, and therefore the balance of judicial authority in this country is in favour of the view that the warranty of seaworthiness can only be dispensed with or qualified by a written term of the contract.

Evidence may be given of circumstances relevant to the determination of the extent of the warranty.

This does not, however, apply to extrinsic evidence, the purpose of which is to show what the subject-matter of the contract is, and consequently what degree of seaworthiness is required. There is no fixed standard of seaworthiness; the degree of seaworthiness required depends on the nature of the adventure (*b*). Therefore, for the purpose of determining the extent of the warranty, evidence can be given that a ship insured for a certain voyage was from her construction not capable of being made as fit to encounter the perils of that voyage as any ordinary vessel; and in such a case the utmost that the warranty requires is that the particular ship shall be made as fit for the voyage as is practicable (*c*).

No implied warranty of seaworthiness in a time policy.

697. Hitherto we have only considered the nature and extent of the implied warranty of seaworthiness in relation to voyage policies: it was for some time assumed, though not decided, that there was no distinction in this respect between voyage policies and time policies (*d*).

A series of cases, however, beginning with the decision of the House of Lords in the well-known case of Gibson *v.* Small, and ending with the decision of the same tribunal in

(*a*) Fawkes *v.* Lamb (1862), 31 L. J. Q. B. 98. See *ante*, § 57.

(*b*) See *post*, § 710.

(*c*) Burges *v.* Wickham (1863), 3 B. & S. 669; 33 L. J. Q. B. 17; Clapham *v.* Langton, in the Exch. Ch. (1864), 34 L. J. Q. B. 46. See *post*, § 710. The underwriter should, of course, be informed of the peculiar construction of the vessel. Whether, in the absence of such information, his defence to an action on the policy would be on the ground that the extent of the warranty is not to be limited by the existence of facts of which he was not informed, or on the ground of concealment of a material fact, appears to be a question of little or no practical importance.

(*d*) See, *e.g.*, per Tindal, C. J., delivering the judgment of the Exchequer Chamber in Dixon *v.* Sadler (1841), 8 M. & W. 895, 900.

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Dudgeon *v.* Pembroke, conclusively establish the rule, that in a time policy on ship a warranty that the vessel is seaworthy will under no circumstances be implied (*e*). Thus the rule holds good, even though at the commencement of the risk the ship be lying at a home port. "The case of Gibson *v.* Small," said Lord Penzance, in Dudgeon *v.* Pembroke, "supplemented as it was by the two cases of Thompson *v.* Hopper and Fawcus *v.* Sarsfield, must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy." If, however, through the personal misconduct of the owner, the ship be sent to sea in an unseaworthy state, he cannot recover for a loss brought about by such wilful act or default (*f*).

Insurer not liable if assured was privy to unseaworthiness which was a cause of the loss.

Upon the subject of this paragraph, sect. 39, sub-sect. 5, of the Marine Insurance Act, 1906, now provides in terms as follows:—

> In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

It is not necessary, in order to exonerate the insurer from liability, that the unseaworthiness should be the sole cause

(*e*) Gibson *v.* Small (1853), 4 H. L. C. 353; Thompson *v.* Hopper (1856), 6 E. & B. 172; Fawcus *v.* Sarsfield (1856), *ibid.* 192; Michael *v.* Tredwin (1856), 17 C. B. 551; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284.

(*f*) Thompson *v.* Hopper (1856), 6 E. & B. 172, 937; (1858), E. B. & E. 1038 (Ex. Ch.); Dudgeon *v.* Pembroke, *supra;* Trinder, Anderson & Co. *v.* Thames & Mersey Marine Ins. Co. (C. A.), [1898] 2 Q. B. 114. So, also, in the United States there is no implied warranty of seaworthiness in a time policy; but "if the vessel is in a port where repairs can be made, or equipment and supplies obtained, the insured cannot recover for any loss caused by the want of due diligence in making repairs and obtaining equipment or supplies": *per cur.* in New York & P. R. SS. Co. *v.* Ætna Ins. Co. (1913), 204 Fed. R. 255.

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of the loss; it is sufficient that the unseaworthiness was a proximate cause of the loss (*g*). On a literal construction of the sub-section, the insurer would be exempted from subsequent losses attributable to any kind of unseaworthiness, and not merely from those attributable to the particular defect, of which the insurer had knowledge when he sent the vessel to sea. In a recent case, however, it was held otherwise.

Thomas *v.* Tyne, &c. Ins. Assn.

A ship was sent to sea in an unseaworthy condition due to stranding in the course of a previous voyage, and also with an insufficient crew, the assured being aware of the insufficiency of the crew but not of the unseaworthiness caused by the stranding. She was lost owing to her unseaworthy condition and not in any way by reason of the insufficiency of the crew, and Atkin, J., held, that the assured could recover. "It was contended by the insurers," said the learned judge, "that as it was found that the ship was sent to sea in an unseaworthy state, namely, with an insufficient crew, with the privity of the assured, and that the loss of the ship was attributable to unseaworthiness in respect of the unfitness of the hull, they were protected. But I do not think that is the proper construction of the sub-section. I think it means that the insurer is not to be liable for a loss attributable to unseaworthiness to which the assured was privy. In the case of insurance under a time policy the intention was that the assured should be unable to recover in respect of a loss occasioned by his own fault. That was the rule under the law as it existed before the Act. It was always necessary to show that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured" (*h*).

(*g*) M. Thomas & Son Shipping Co. *v.* London and Provincial Mar. Ins. Co. (1914), 29 T. L. R. 736; 30 T. L. R. 595 (C. A.).

(*h*) Thomas *v.* Tyne & Wear SS. Freight Ins. Assn., [1917] 1 K. B. 938. It is possible to conceive cases where, with the privity of the assured, an unseaworthy ship may be sent to sea without any real misconduct on his part. For instance, in time of war, a shipowner fearing an attack upon a naval port may very properly order his vessel to sail at once, although he knows that she is not perfectly seaworthy in all respects. In such cases it may be that the insurer would now be relieved from liability for loss for which, before the Act, he would have been liable.

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There are degrees of seaworthiness.

698. We have already seen that the underwriter is liable for no loss after the ship sails, unless at that time she was seaworthy for the voyage; although, however, seaworthiness for the voyage at the time of sailing is a condition precedent to the underwriter's liability for loss in the course of the voyage, yet it is not necessarily a condition precedent to the policy's attaching.

There are, in fact, degrees of seaworthiness; seaworthiness for the voyage is one thing; and seaworthiness in port, or for an inland navigation, &c., quite another (*i*).

Seaworthiness in port under policy "at and from."

Thus it is quite certain that a ship under a policy "at and from" would be seaworthy in harbour while undergoing repairs, though it is equally clear that she would not be seaworthy for the voyage if she sailed in that condition (*j*).

Thus the Marine Insurance Act, 1906, provides that *at the commencement of the voyage* the ship must be seaworthy for the purpose of the particular adventure insured, *i.e.*, the voyage insured (*k*), and that where the policy attaches while the ship is in port, the ship must also be, *at the commencement of the risk*, reasonably fit to encounter the ordinary perils of the port (*l*).

(*i*) Forbes *v.* Wilson (1800), 1 Park, Ins. 472; 1 Marshall, Ins. 147; Hibbert *v.* Martin (1808), 1 Park, Ins. 473; Smith *v.* Surridge (1801), 4 Esp. 25; Parmeter *v.* Cousins (1809), 2 Camp. 235; Annen *v.* Woodman (1810), 3 Taunt. 299; and see Parke, B., in Dixon *v.* Sadler (1839), 5 M. & W. 405, 414—afterwards cited by himself in the judgment of the P. C. in Biccard *v.* Shepherd (1861), 14 Moo. P. C. 471, 491, and by Willes, J., in Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37, 42; Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(*j*) Forbes *v.* Wilson (1800), 1 Park, 472; Smith *v.* Surridge (1801), 4 Esp. 25, before Lord Kenyon. Lord Ellenborough ruled the same point in Hibbert *v.* Martin (1808), 1 Park, Ins. 473, and in Parmeter *v.* Cousins (1809), 2 Camp. 235.

(*k*) Sect. 39, sub-sect. 1.

(*l*) Sect. 39, sub-sect. 2.

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What that degree of seaworthiness is which is requisite to make a policy "at and from" attach upon a ship while in port has nowhere been very accurately laid down. Generally speaking, it may be said that under such a policy a ship will be sufficiently seaworthy to give an inception to the risk if she "be in such a condition while in port as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage." On the other hand, if she arrives so shattered as to be a mere wreck, the policy never attaches (*m*). Thus, if a ship be capable while "at" the port of being moved from one part of the harbour to another for the purpose of repair, and of being moored alongside its wharves or quays there in order to take in her cargo, the policy attaches. Consequently the assured is not entitled to a return of premium, as on a risk that never commenced, because the ship afterwards sailed from the port in a state of unseaworthiness for the voyage (*n*). "The condition that she shall be seaworthy for her voyage," says Lawrence, J., "does not attach till she sails" (*o*).

Ship seaworthy for port, unseaworthy on sailing.

Of course, if she ultimately sails unseaworthy for the voyage, this, according to the rule already laid down, wholly discharges the underwriter from all liability for loss on the voyage, although the policy may have attached on her while "at" the port, owing to her having been there seaworthy for her then risk (*p*).

Doctrine of voyages in stages.

699. The rule, thus established in the case of policies "at and from" a place, is in reality a particular instance of a more general principle suggested by Patteson, J., in Hollingworth *v.* Brodrick (*q*), and for the first time distinctly

(*m*) Parmeter *v.* Cousins (1809), 2 Camp. 235; Buchanan *v.* Faber (1899), 4 Com. Cas. 233. The law is the same in the United States. See cases cited 1 Phillips, Ins. ss. 695 *et seq.*; 3 Kent. Com. 289.

(*n*) Annen *v.* Woodman (1810), 3 Taunt. 299.

(*o*) *Ibid.* 300.

(*p*) Mar. Ins. Act, 1906, s. 39, sub-s. 2; Watson *v.* Clark (1813), 1 Dow, 336.

(*q*) (1837), 7 A. & E. 47.

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enunciated in 1839, by Parke, B., in the case of Dixon *v.* Sadler (*r*). The principle, which was established by decisions prior to the passing of the Marine Insurance Act, 1906 (*s*), is, that if the voyage insured consists of different stages requiring different states of seaworthiness, the warranty is satisfied if the ship be at the commencement of each stage in a fit condition for that stage, though not fit for a subsequent one. Thus, as was laid down in Dixon *v.* Sadler, "if the voyage be such as to require a different complement of men or a different state of equipment in different parts of it, as if it were a voyage down a *canal or river*, and thence across the open sea, it would be enough if the vessel were in each stage of navigation properly manned and equipped for it" (*t*). "The case of Dixon *v.* Sadler, and the other cases which have been cited," said Lord Penzance (*u*), "leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognized and distinctly separate stage of the voyage." The principle now being considered is itself a modification, in favour of the assured, of the rule that the warranty of seaworthiness is not satisfied, and the policy does not attach, until the ship is seaworthy for the whole voyage insured (*x*).

Effect of doctrine of stages.

700. It follows that if the ship were lost in one stage of the voyage, it would be no defence that she was not then seaworthy for a stage which she had not commenced; nor, if

(*r*) (1839), 5 M. & W. 405, 414.

(*s*) Sect. 39, sub-s. 3, of the Act was doubtless intended to affirm this principle. See *post*, § 707.

(*t*) Dixon *v.* Sadler, *ubi supra*; accord. Erle, J., in Thompson *v.* Hopper (1856), 6 E. & B. 172; Biccard *v.* Shepherd (1861), 14 Moore, P. C. 471, 491; Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234, 241.

(*u*) Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 241.

(*x*) See Greenock SS. Co. *v.* Mar. Ins. Co., [1903] 2 K. B., per Vaughan Williams and Romer, L. JJ., at pp. 661, 663, 664.

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lost in the course of her main voyage, could the underwriters discharge themselves from liability by showing that, though seaworthy when she commenced such main voyage, she had yet sailed on its earlier stages with an inferior equipment (*y*).

Thus, where a ship insured "at and from New Orleans to Liverpool" was so much injured by worms whilst she lay in the mud of the river Mississippi that she would have been in an unfit state for her sea voyage, Lord Ellenborough held, that as she was then sufficiently seaworthy for the purposes of lying in the mud and being in the river, and the defect had been discovered and repaired before she sailed on her sea voyage, her prior state of unfitness for the sea did not avoid the policy (*z*).

So, to take a case put by Lord Tenterden, suppose a ship would be unseaworthy unless she had two anchors, being destined for a long voyage, and she sails from London to Gravesend with only one, shall it be said that if no loss happens between London and Gravesend, and the vessel at Gravesend takes on board her second anchor, and then proceeds on her voyage, that the underwriters are not liable for her subsequent loss? His Lordship, as might be supposed, answers this question in the negative (*a*).

River and sea voyage.

701. The rule that there are different degrees of seaworthiness for different stages of the voyage is well illus-

(*y*) If by "inferior equipment" Arnould meant an equipment insufficient for the earlier stages, the editors submit that it is more in accordance with principle to say that in a policy for one entire voyage a breach of the warranty of seaworthiness avoids the insurance altogether from the time of the breach, even though the voyage be divided into stages.

(*z*) Oliverson *v.* Loughman (1815), cited in 2 B. & Ald. 322. The law is the same in the United States. See Treadwell *v.* Union Ins. Co. (1826), 6 Cowen's R. 270; and Bell *v.* Reed (1811), 4 Binn. R. 127; 1 Phillips, Ins. s. 720.

(*a*) Per Lord Tenterden, 2 B. & Ald. 324. It might, however, be a deviation to call at a place lower down a river than the *terminus a quo* to complete the equipment, unless necessity required or usage allowed this to be done. See Forshaw *v.* Chabert (1821), 3 Brod. & B. 158.

trated as regards a river and sea voyage by the following case:— Sect. 701.

A steamer insured "at and from Lyons to Galatz" sailed from Lyons with a river crew and captain, and without her masts, anchors and other heavy articles, which it was impossible for her to carry on the river voyage. At Arles she took on board her sea-captain and some of her seagoing crew, and was otherwise fitted for the voyage to Marseilles, where she had to call for a licence. At Marseilles she was fully equipped for the sea voyage, as was usual in similar adventures, and she was subsequently lost in the Black Sea. The Court held that, looking to the nature of the adventure and to mercantile usage, the ship had complied with the implied warranty of seaworthiness (*b*). Bouillon *v.* Lupton.

The division of a voyage into stages in relation to the warranty of seaworthiness may take place even in different parts of a sea voyage, as, for instance, in the Greenland whale fishery, where it has been customary to take on board extra hands on arriving at Shetland. There can be no doubt that the ship in sailing from Hull to Shetland would, by reason of the usage, be seaworthy with a different equipment from that which would be required to make her so, on sailing from Shetland to the North Seas (*c*). Fishing voyage.

702. If usage requires that at a particular stage of the voyage the ship should take a pilot on board, either before leaving or entering a port, it may be said that the part of the voyage on which it is usual to have the pilot is a separate stage, requiring a crew differing from the usual one in that it ought to include a pilot. It has not been laid down in terms that such part of the voyage is to be treated as a separate stage for the purpose of the warranty of seaworthiness, although there is a suggestion to that effect in Patte- Stage of voyage for which a pilot is required.

(*b*) Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37.

(*c*) See per Collins, L. J., in The Vortigern, [1899] P. 159; per Lord Penzance in Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 241.

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son, J.'s, judgment in Hollingworth *v.* Brodrick (*d*). It was, however, stated in the second edition of this work (*e*) that "generally speaking, no ship is seaworthy at the outset of the risk, unless she have on board a pilot where requisite by law or usage for her safe navigation" (*e*). It was further stated that "in all cases where it is necessary, either by law or usage, for the master to have a pilot on board in going out of an intermediate port, or in clearing from his outport homewards, it will be unseaworthiness not to take one, for it is in such cases always in his power to do so" (*f*).

Effect of not having pilot on entering a port.

The question, however, of the effect of a failure to take a pilot on board before entering an intermediate port or that of the ship's destination, is one of much doubt and difficulty. When usage requires that a pilot should be taken at such point of the voyage, it has been inferred that the ship's failure to do so, in consequence of which a loss accrues, will discharge the underwriters from their liability, although the loss may be proximately caused by the perils insured against and the ship have been in all respects seaworthy at the commencement of the voyage.

Result of the authorities.

The position established by the English cases seemed, however, in Arnould's opinion (*g*), to be that except where required by the positive regulations of an Act of Parliament (which according to Patteson, J., have the effect of creating an intermediate voyage on which the ship is not seaworthy without a pilot) (*h*), the negligence of the master in not

(*d*) (1837), 7 A. & E. 48.

(*e*) 2nd ed. p. 723. See also per Parke, J., in Phillips *v.* Headlam (1831), 2 B. & Ald. 383.

(*f*) 2nd ed. p. 724, citing Lord Tenterden in 2 B. & Ad. 382; see also 2nd ed. p. 703. Parke, B., however, in Gibson *v.* Small, in the House of Lords (1853), 4 H. L. C. 398, states in general terms that there is no warranty "that pilots shall be taken on board at proper places if the voyage has already commenced, unless, perhaps, when required by Act of Parliament."

(*g*) 2nd ed. vol. i. p. 700. See also *post*, § 724.

(*h*) In Hollingworth *v.* Brodrick (1837), 7 A. & E. 44. Mr. Arthur Cohen submits that the suggestion of Patteson, J., is inconsistent with recent cases and the provisions of the Mar. Ins. Act, 1906: Laws of England, vol. xvii. § 836.

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taking a pilot on board in entering a port at any intermediate stage of the voyage, where usage requires him to do so, will not discharge the underwriters from their liability, provided the ship were seaworthy when she sailed, the master and crew originally competent, and the loss, though remotely occasioned by the want of a pilot, be proximately caused by the perils insured against (*i*).

Phillips *v.* Headlam.

Thus the captain of a ship insured "from Liverpool to Sierra Leone, and back to her ports of discharge in the United Kingdom," on arriving off Sierra Leone (where there is an establishment of pilots, and where it is usual for all ships going in or out of the river to take one), made signals for a pilot to come off; but as none did so, after waiting some hours, he took his ship in without one, in doing which she struck the ground and was lost by the perils of the seas. The jury found that the master had acted with a wise discretion and as a prudent man ought under the circumstances: the Court, while agreeing with this verdict, intimated that even had the facts been otherwise and the loss had been remotely occasioned by the negligence or mistake of the master, yet, assuming him to have been originally a person of competent skill, the underwriters would have been liable, for the loss was proximately caused by the perils insured against (*k*).

Where pilotage compulsory on entering port. Law *v.* Hollingworth.

703. In the case of Law *v.* Hollingworth the captain of a ship insured "from Stettin to London," took a pilot on board at Orfordness, but improperly allowed him to leave the ship at Halfway Reach, after which, and before she came to her moorings, the ship was lost. The Court held that the underwriters were not liable for this loss, on the ground that at the time of loss the ship was unseaworthy for want of a pilot, owing to the negligence of the captain (*l*).

(*i*) Phillips *v.* Headlam (1831), 2 B. & Ad. 380; Law *v.* Hollingworth (1797), 7 T. R. 160, as commented upon by Patteson, J., 7 A. & E. 48, and by Tindal, C. J., 8 M. & W. 900.

(*k*) Phillips *v.* Headlam (1831), 2 B. & Ad. 380.

(*l*) Law *v.* Hollingworth (1797), 7 T. R. 160.

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This case, on the broad ground assumed by the Court, is inconsistent with the current of later authorities, and especially with what fell from the judges in the case of Phillips *v.* Headlam. The Courts, however, instead of overruling it, preferred putting it upon a narrower ground than that assumed as the basis of decision by the judges who tried it, but quite consistent with the facts of the case, viz., that the ship at the time of loss had not a pilot on board, as required by Act of Parliament (the then Pilot Act of 5 Geo. 2, c. 20).

Judicial comments on this case.

Thus Patteson, J., says: "In Law *v.* Hollingworth there was an intermediate voyage, if I may say so, constituted by Act of Parliament, upon which voyage the ship was not seaworthy unless she had a pilot" (*m*). And Tindal, C.J., says: "The decision may be maintainable on the ground of an implied warranty to observe the positive regulations of an Act of Parliament; but if it is to be taken as an authority that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew throughout the voyage, we think it cannot be supported against the weight of the later authorities" (*n*).

Conclusion.

704. It is indeed clear that Law *v.* Hollingworth cannot be supported on the ground that the loss by a peril insured against was due to unseaworthiness caused by the captain's negligence, for it is now established that the underwriter is liable for every loss by a peril insured against, unless it has been brought about by the wilful act or default of the assured himself (*o*). It may also be doubted whether the decision can be supported on the ground that the ship was not being navigated in accordance with the requirements of an Act of Parliament. The general rule established by

(*m*) In Hollingworth *v.* Brodrick (1837), 7 A. & E. 44.

(*n*) Per Tindal, C. J., in delivering the judgment of the Exchequer Chamber in Sadler *v.* Dixon (1841), 8 M. & W. 900.

(*o*) See Trinder *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. 114; Mar. Ins. Act, 1906, s. 55.

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later cases is that an illegality in the mode of performing a voyage does not avoid the insurance, unless the assured was a party to the illegality or aware of it when the insurance was made (*p*). Further, even if the warranty of seaworthiness does require that a pilot should be taken on board at the commencement of the stage when the ship is about to enter a port, the decision cannot be supported on the ground of this warranty; for the warranty of seaworthiness does not imply a further warranty that the pilot or any of the crew will continue to do their duty. It seems, therefore, that Law *v.* Hollingworth cannot be based on any sound principle.

There is no case which decides that the warranty of seaworthiness requires a pilot to be taken on board in entering a port where it is usual or prudent to have one. Phillips *v.* Headlam (*q*) is to some extent a decision to the contrary; though the case seems to have turned chiefly on the exploded theory that the underwriter is not liable for a loss by a peril insured against, brought about by the captain's negligence (*r*).

Arnould, though he adopted the view that the ship is not seaworthy in leaving an intermediate port without a pilot where it is proper to employ one, did not consider it a breach of the warranty for the ship to enter a port without a pilot (*s*), and Phillips takes the same view (*t*). There are certainly strong reasons why this view should prevail. It may not always be possible to get a pilot, and the state of the weather or condition of the ship may make it more prudent for the master to try to enter without one than to wait outside, or even render it imperative for him to make the attempt.

(*p*) See Wilson *v.* Rankin (1865), L. R. 1 Q. B. 162, and the other cases cited *post*, § 745.

(*q*) (1831), 2 A. & E. 380.

(*r*) Phillips cites it (vol. i. s. 716) to prove that the warranty has no application in this case.

(*s*) See 2nd ed. pp. 702, 703.

(*t*) 1 Phillips, ss. 715, 716.

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Stages for coaling.

705. In the cases already considered, where the voyage has been divided into stages in relation to the warranty of seaworthiness, the different stages have required different equipments or crews. The principle has also been applied in another class of cases, where the nature of the risk does not change in passing from one stage to another.

It is commercially impossible for cargo steamers on long voyages to take on board at the beginning a sufficient supply of fuel to last the whole voyage. Three decisions of the Court of Appeal, two in actions on charter-parties and one in an action upon an insurance policy, have established the rule that when a steamship starts on a long voyage with only enough coal for part of the voyage, the intention being to take on board a fresh supply at one or more intermediate ports, the voyage is considered as divided into stages for the purpose of coaling, and the warranty of seaworthiness attaches at each coaling port for the stage which ends at the next coaling port (*u*). "In my judgment," said Smith, L.J. (*x*), "when a question of seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage."

Cases on this point.

Thin *v.* Richards.

706. In Thin *v.* Richards (*y*), the voyage was from Oran to Garston, with liberty to call at Huelva. The ship left

(*u*) Thin *v.* Richards, [1892] 2 Q. B. 141; The Vortigern, [1899] P. 140; Greenock SS. Co. *v.* Mar. Ins. Co., [1903] 2 K. B. 657.

(*x*) In The Vortigern, [1899] P. at p. 155.

(*y*) [1892] 2 Q. B. 141.

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Oran with a supply of coal insufficient for the voyage to Garston, but sufficient to take her to Huelva, and through a mistake of the engineer, who over-estimated the quantity still on board at Huelva, sailed thence without taking a fresh supply. Day, J., held that the voyage was an entire voyage from Oran to Garston, and that the warranty of seaworthiness was broken when the ship sailed from Oran. The Court of Appeal did not decide whether the voyage was entire or was divisible into two stages—*i.e.*, from Oran to Huelva and the other from Huelva to Garston—but held that in either view of the case the warranty was broken. If the voyage was entire, they said, the ship should on starting have had enough coal to take her to Garston; if it was a voyage in stages, the ship ought to have been properly equipped at Huelva for the later stage.

The Vortigern.

In The Vortigern (*z*) the facts were that a steamer left Cebu in the Philippine Islands for Liverpool. She coaled at Labuan, and again at Colombo, intending to coal again at Suez (*a*). A reasonably sufficient quantity of coal was not, however, taken on board at Colombo for the stage ending at Suez, and when passing Perim, a coaling station in the Red Sea, the master did not call there owing to the negligence of the engineer in not telling him in answer to his inquiries that the coal was running short. The consequence was that some of the cargo had to be used as fuel to enable the ship to reach Suez. The Court of Appeal held, affirming the decision of Barnes, J., that the voyage was as regards the supply of coal to be treated as one in stages, that the ship was not seaworthy for the stage from Colombo to Suez, and that the charterer could recover from the shipowner the value of the cargo burned in consequence of the breach of the warranty of seaworthiness.

(*z*) [1899] P. 140.

(*a*) The original intention was to coal again at Port Said, but the case was treated by both parties on the footing of an intention to coal at Suez.

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The language of Barnes, J., in this case suggests that it is for the master to determine how the voyage is to be divided into stages (*b*); but it is clear from the decision of the Court of Appeal that whether or not the voyage can be divided into stages must depend on its length, not on the will of the assured; and according to Smith, L.J., "in each case it is a matter for proof as to where the necessity of the case requires that each stage should be" (*c*).

Provisions of Mar. Ins. Act as to voyages in stages.

707. The provisions of the Marine Insurance Act, 1906, which relate to the warranty of seaworthiness implied in policies on voyages to be performed in stages are contained in the first and third sub-sections of sect. 39.

They are as follow:—

> Sub-sect. 1. In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
>
> Sub-sect. 3. Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

A question which may arise is whether the warranty imposed by the third sub-section applies in a case where a steamship, though intended to call at one or more ports on the voyage, starts with a reasonably sufficient supply of coal for the whole voyage insured. Has the warranty in such a case been satisfied once for all, although owing to unforeseen events the vessel finds herself at an intermediate port without enough coal for the rest of the voyage, or does it operate anew at this port? Possibly the Courts, bearing in mind that the rule which enables a shipowner to divide the voyage

(*b*) [1899] P. 147. (*c*) *Ibid.* p. 155.

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into stages was declared previously to the Act (*d*) to be a relaxation in his favour of the more onerous obligation to equip the ship completely at the beginning of the voyage, might hold that sub-sect. 3 did not apply to such a case, and that the warranty of seaworthiness was completely satisfied at the outset of the risk. In favour of this construction it may be urged that when a steamship starts with a reasonably sufficient supply of coal for the whole voyage, so that there is no intention to call anywhere for the purpose of coaling, the policy is not one which relates to a voyage which is performed in different stages during which the ship requires further equipment.

Ship at sea when risk commences. Hucks *v.* Thornton.

708. It was held in one case, that where the risk first attaches on the ship, after she has been some time at sea, the implied warranty will be satisfied if she be then in such a state of repair and equipment that she may be safely navigated home, or is competent to pursue any part of her adventure. The policy, which was for time, first attached after the ship had been engaged for a year in the South Sea whale and seal fishery, and also in taking prizes; and it was laid down by Gibbs, C. J., that though at the time the policy attached the crew were so far reduced by death and desertion as to be inadequate for the twofold purpose of whaling and guarding the prisoners they had taken, yet, as they were fully competent for the seal fishery and other purposes of the voyage, and likewise to navigate the vessel home, the implied warranty of seaworthiness was satisfied (*e*).

This ruling was delivered before it was established that there is no warranty of seaworthiness in time policies, and is therefore of no authority whatever (*f*); and it is submitted,

(*d*) See Greenock SS. Co. *v.* Maritime Ins. Co., [1903] 2 K. B. at pp. 661 and 664.

(*e*) Hucks *v.* Thornton (1815), Holt, N. P. Cas. 30.

(*f*) See Parke, B.'s, remarks on this case in Gibson *v.* Small (1853), 4 H. L. C. 403.

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on the authority of the reasoning in Gibson *v.* Small (*g*), that there is no warranty in any insurance which commences when the ship is at sea, that the ship is seaworthy at the commencement of the risk (*h*). It may, however, well be, when a ship is insured for a part of a voyage described in the policy (*e.g.*, "from A. to B. for thirty days," or "from the 1st of January at and from A. to B."), that the warranty of seaworthiness implied in all voyage policies exists, and that the ship must therefore be seaworthy on sailing, though the risk only attaches subsequently (*i*). The question is, however, still an open one.

Is the warranty modified when the voyage begins at a distant port?

709. The ruling of Gibbs, C. J., in Hucks *v.* Thornton, has led some of the American authorities to lay down a further rule, viz., that when the risk attaches, after a long voyage, at a distant port, where proper facilities for repairs may not exist, the warranty must be construed with reference to the means of repair and equipment at hand (*k*). It is submitted, however, that the absence of means at the *terminus a quo* for making the ship seaworthy cannot be taken into consideration. It is no doubt true that the rule that there is a warranty of seaworthiness in all voyage policies rests on the presumption that the shipowner has the power to make his vessel seaworthy; and that the contrary rule in time policies was established because the ship may be at sea

(*g*) (1853), 4 H. L. C. 353.

(*h*) In view of the decision in Royal Exchange Corp. *v.* Sjoforsakrings Vega, [1902] 2 K. B. 384, it seems hardly worth while to consider the question of insurances commencing when the ship is at sea. The only passage in the Marine Insurance Act, 1906, which imposes a warranty of seaworthiness at the commencement of the risk, as distinct from the commencement of the voyage, is sub-sect. 2 of sect. 39; but this sub-section only relates to a risk which commences when the ship is in port.

(*i*) There is a guarded passage in Pollock, C. B.'s, opinion in Gibson *v.* Small (4 H. L. C. at p. 410) which supports this view, and an equally guarded expression of opinion to the contrary by Parke, B. (at p. 407.

(*k*) See per Shaw, C. J., in Paddock *v.* Franklin Ins. Co. (1831), 11 Pick. 227, 231; 1 Phillips, s. 727; 1 Parsons, 387.

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when the risk attaches, and it may therefore be impossible for the owner to provide for her seaworthiness. But these rules, once established, are of general application. "It may happen in some cases," says Parke, B., "from the want of proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage; but the law cannot regard these exceptional cases '*ad ea quae frequentius accidunt jura adaptantur*'; and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of cases, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage" (*l*). The question for a jury is whether the ship was fit at the beginning of the risk to encounter the perils of the voyage insured; and that question, it is submitted, must be answered without reference to the circumstances of an antecedent voyage, or to the means of having repairs effected or of obtaining fresh hands. The Marine Insurance Act, 1906, gives no support to any such modification of the general rule as the American authorities have suggested.

What constitutes seaworthiness. The standard varies with the voyage.

710. It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary with the varying exigencies of mercantile enterprise. "The ship," said Lord Cairns, "should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter" on the voyage (*m*). That state of repair and equipment which

(*l*) Per Parke, B., in Gibson *v.* Small (1853), 4 H. L. C. 404, cited with approval by Blackburn, J., in Burges *v.* Wickham (1863), 3 B. & S. 692; 33 L. J. Q. B. 26; see also per Talfourd, J., in Gibson *v.* Small (1853), 4 H. L. C. 376.

(*m*) Steel *v.* State Line SS. Co. (1877), 3 App. Cas. 72, 77. It has been held in the United States that "it is not the best and most skilful form of construction that is required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind

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would constitute seaworthiness for one description of voyage might be wholly inadequate for another; a ship seaworthy for the coasting or West Indian trade might be unseaworthy for a voyage to the Greenland Seas or the North-West Passage. Moreover, the extent of the warranty may be different for the same voyage at different seasons, or for the same voyage at the same season according to whether the ship is in ballast or loaded with one kind of cargo or another (*n*). And, as we have seen, the ship, though not fit to go to sea, may be fit for port or river risks, and it suffices that her state is commensurate to the risk (*o*).

The standard varies in respect of the class of ship.

Again, the class of vessel may be such as will not admit of being put into that condition of seaworthiness requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk (*p*). Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means (*q*). But he is bound to that

insured and the service in which they are engaged": per Hammond, D. J., in Moores *v.* Louisville Underwriters (1882), 14 Fed. R. 226.

(*n*) *Per cur.* Daniels *v.* Harris (1874), L. R. 10 C. P. 1, 6. See also Stanton *v.* Richardson (1874-75), L. R. 9 C. P. 390 (Exch. Ch.); 45 L. J. C. P. 78 (H. L.).

(*o*) Annen *v.* Woodman (1810), 3 Taunt. 299; Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37; *per cur.* Dixon *v.* Sadler (1839), 5 M. & W. 405, 414; per Alderson, B., in Gibson *v.* Small (1853), 4 H. L. C. 393.

(*p*) See *ante*, § 696, note (*o*).

(*q*) Burges *v.* Wickham (1863), 33 L. J. Q. B. 17; 3 B. & S. 669; cited with approval by Collins, L. J., in The Vortigern, [1899] P. 159; Clapham *v.* Langton (1864), 34 L. J. Q. B. 46 (in error). It is advisable in these insurances to insert in the policy an admission by the underwriter of seaworthiness, as was the case in Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452, or at least a description of

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much (*r*); and even such a description of the subject of insurance in the "slip," as that it is an "abandoned ship," does not dispense with this warranty, and the assured's obligation under it (*s*). Whether in fact the vessel was in such a condition as satisfies this warranty in the particular case is a question for the jury (*t*).

It has differed in different periods.

711. Again, the standard of seaworthiness has been gradually raised from a more perfect knowledge of ship-building, a more enlarged experience of maritime risks, and an increased skill in navigation (*u*).

Query, whether it varies according to the country to which the ship belongs.

So, again, a degree of equipment and preparation is deemed essential in some countries, which would be considered superfluous in others; in such cases it has been held in the United States that seaworthiness is to be measured by the standard in the ports of the country to which the vessel belongs, rather than by that in the ports of the country where the insurance was made (*x*). "It seems to me," says Story, J., "that where a policy is underwritten on a foreign vessel, belonging to a foreign country, the underwriter must be taken to have a knowledge of the common usages of trade in such country as to equipments of vessels of that class, for the voyage in which she is destined" (*y*). This rule appears full of good sense and equity, and worthy of adoption in our own jurisprudence.

the class of vessel, *e.g.*, "river steamer," and thereby remove any question of evidence modifying the stringency of the warranty. See per Blackburn, J., in Burges *v.* Wickham, *supra*.

(*r*) Turnbull *v.* Janson (1877) (C. A.), 36 L. T. 635, in which it was held that for want of reasonable strengthening of a river steamer for crossing the Atlantic, the policy had never attached.

(*s*) Knill *v.* Hooper (1857), 2 H. & N. 277; 26 L. J. Ex. 377. Similarly, it has been held in the United States that the warranty applies to a timber raft, though insured by a "cargo policy." Moores *v.* Louisville Underwriters (1882), 14 Fed. R. 226.

(*t*) Knill *v.* Hooper, *supra;* Burges *v.* Wickham, *supra*.

(*u*) 3 Kent, Com. 288. And cf. Burges *v.* Wickham (1863), 33 L. J. Q. B. at p. 27, per Blackburn, J.

(*x*) 3 Kent, Com. 288, n. (*a*).

(*y*) Per Story, J., in Tidmarsh *v.* Washington Ins. Co. (1827), 4 Mason, R. 439; 1 Parsons, Ins. 134, 386.

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Extent of the warranty depends on the subject of insurance.

712. The warranty must be construed with reference to the subject-matter of the insurance. Therefore the Court of Common Pleas held that it was not satisfied in a policy on a deck cargo, if in ordinary rough weather the goods must be jettisoned, although this could be done without difficulty, and the ship could then perform the voyage with safety to herself. The effect of the warranty, it was said, cannot be to contemplate the destruction, in an ordinary voyage, of the subject of insurance (*z*). On the other hand, the Court said that if the policy had been on the ship, and the deck cargo, by reason of the facility with which it could have been got rid of, would have caused no danger to the ship, the warranty would have been satisfied (*a*). So, also, where cattle were insured against mortality, and the appliances for ventilation and the number of cattle-men attending to the cattle were both insufficient, Bigham, J., held that the warranty of seaworthiness had not been fulfilled (*b*); and it is expressly enacted by the Marine Insurance Act, 1906 (*c*), that "in a voyage policy on goods or other movables there is an implied warranty that, at the commencement of the voyage, the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy."

(*z*) Daniels *v.* Harris (1874), L. R. 10 C. P. 1, 9.

(*a*) *Per cur. ibid.* p. 8.

(*b*) Sleigh *v.* Tyser, [1900] 2 Q. B. 333. Where a ship sailed from the port of loading with a foul bill of health, in consequence of which she would be required to undergo a process of fumigation at an intermediate port which would inevitably damage the cargo, Rowlatt, J., held in an action on a bill of lading that she was not reasonably fit to carry the goods: Ciampa *v.* British India Steam Nav. Co., [1915] 2 K. B. 774.

(*c*) Sect. 40, sub-sect. 2. It is submitted that in determining the question of the fitness of the ship to carry the goods, within the meaning of this sub-section, regard must be had to the nature of the perils insured against by the policy. Thus, if cattle were insured against mortality, the warranty would clearly not be satisfied if the appliances for ventilation were insufficient; but if the insurance were against war risks only, it might be held that defective ventilation did not under the circumstances render the vessel unfit. On a literal construction of the sub-section, however, the warranty would not be satisfied, even in such a policy, if the ventilation were imperfect.

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Thus it appears that on the same voyage the warranty may be complied with as regards a policy on the ship, and not satisfied as regards a policy on goods. As regards the ship, the warranty requires that she shall be fit to encounter the perils of the voyage; as regards goods, the warranty also requires that the ship shall be fit for the carriage of the particular cargo, *i.e.*, fit in respect of all those things which appertain to its safe carriage to its destination (*d*).

Bearing these observations in mind, we will proceed to examine what has been held to constitute unseaworthiness for the voyage; considering, first, those cases in which the unseaworthiness has arisen from something defective in the state of the ship; secondly, those in which it has arisen from deficiency or incompetency in the master and crew.

What is seaworthiness as regards the hull, stores and rigging of the ship.

713. The implied warranty of seaworthiness, as far as relates to the condition of the ship, requires that when the ship sails on her voyage she should be well furnished, tight, sound, staunch, and strong; competent, that is, in her hull to resist the ordinary attacks of wind and weather on the voyage insured, and properly rigged, stored and provisioned for such voyage. By the Marine Insurance Act, 1906 (*e*), "a ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured."

Ship found unseaworthy soon after sailing.

714. If in a short period after sailing on the voyage she become leaky and founder, or be obliged to put back or run for port in distress, without encountering any extraordinary peril, or other visible cause to produce such effect, there arises a presumption of fact that she was not seaworthy when she sailed (*f*). If, after her return to port, it be found on survey

(*d*) See [1900] 2 Q. B. p. 336.

(*e*) Sect. 39 (4).

(*f*) Munro *v.* Vandam (1794), 1 Park, Ins. 469; per Lord Eldon, Watson *v.* Clark (1813), 1 Dow, 344; Pickup *v.* Thames Ins. Co. (C. A.) (1877), 3 Q. B. D. 594. See such a case mentioned by Willes, J.,

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that the leakiness arose from loosening of the timbers of her hull, owing to the decayed state of her bolts and fastenings, this is, generally speaking, a clear case of unseaworthiness.

The case of the "Mills" frigate cannot be supported.

In the case of the "Mills" frigate, indeed, the Court of Exchequer allowed the assured to recover under a policy "at and from the Leeward Islands to London," where the ship without encountering any bad weather became so leaky the day after she put to sea, owing to the generally decayed condition of her bolts, that she was obliged to run for a port of distress, where she was condemned as irreparable; and the Court of Error confirmed the judgment (*g*). Park states that the judgment of the Court below proceeded upon the point, that though the ship was not seaworthy for the voyage when she sailed, yet she had been seaworthy at the commencement of the risk in port while loading, which was sufficient under a policy "at and from" to satisfy the implied warranty. It is unnecessary to say that a judgment proceeding on such a basis could not now be sustained (*h*).

Parker *v.* Potts.

Under a policy on freight "at and from Honduras to London" (*i*), the ship lay at Honduras about five months, taking in a cargo of mahogany and logwood, during which period she appeared to be in a seaworthy state. The day after sailing from Honduras, however, she encountered a gale of wind and was making $10\frac{1}{2}$ inches water per hour; the

where, however, the jury found against the presumption, Wilson *v.* Jones (1867), L. R. 2 Ex. at p. 143; see also 1 Phillips, s. 725, and Moores *v.* Louisville Underwriters (1883), 14 Fed. R. 226. In an action on a charter-party, the United States Supreme Court held that a defect in a vessel developed without any apparent cause is to be presumed to have existed when the service began. Work *v.* Leathers (1878), 97 U. S. (7 Otto) 379.

(*g*) Mills *v.* Roebuck (temp. Lord Mansfield), 1 Marshall, Ins. 154; 1 Park, Ins. 460.

(*h*) Parker *v.* Potts (1815), 3 Dow, 23, 27; Watson *v.* Clark (1813), 1 Dow, 336; Mar. Ins. Act, 1906, s. 39.

(*i*) The insurance in terms was on freight "beginning the adventure at Honduras, until the said ship, with her goods and merchandize, should be arrived at London." It was assumed throughout the argument, and not disputed by Lord Eldon in his judgment, that this amounted to an insurance "at and from."

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leakiness increased day by day for a week afterwards, and then she was making $3\frac{1}{2}$ feet water per hour; and, another gale coming on, she strained so much that the captain bore away in distress for Montego Bay, Jamaica. There a survey was had, and the report was that her iron fastenings were decayed, three of her beams broken, the main beam in two places; that she was making 18 inches water per hour from the loose state of the ship throughout; and that she had evidently spread, having no support for her lower deck from knees, either fore or aft or otherwise. Upon this evidence irrespective of the want of knees, Lord Eldon was clearly of opinion that, as nothing had occurred after she had left Honduras Bay to account for her being in such a state, the ship was unseaworthy when she sailed from Honduras, and consequently that the underwriters were not liable (*k*).

Want of knees. Watt *v.* Morris.

715. In an earlier case the House of Lords had decided that a ship was not seaworthy for a voyage to the Baltic for want of knees. The vessel, originally of 80 tons burden, had been lengthened so as to be of 110 tons, but the mainhold beams in the centre, where she had been cut asunder and lengthened, were not supported or strengthened by knees; no new anchor, sails, or rigging were provided, and the old anchor, sails, and rigging were insufficient for the altered ship. She had, besides, no stove in the cabin, though essential for a winter voyage in the Baltic, which the present was. Upon this state of facts, but principally on the ground of the want of knees, Lord Eldon held that the ship was not seaworthy when she sailed (*l*).

Decayed ironwork and timbers. Douglas *v.* Scougall.

716. A ship insured for a voyage "from Leith to Pictou" was repaired at Leith to the amount of about 280*l.*, which the repairers certified to cover every repair necessary for her voyage. This was in April. On the 23rd of May she sailed, and on the 6th and 7th of June she encountered a severe gale

(*k*) Parker *v.* Potts (1815), 3 Dow, 23.

(*l*) Watt *v.* Morris (1813), 1 Dow, 32.

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of wind, in which she sprang her bowsprit, and began to make so much water that the crew could not keep her free with both pumps, and the master in distress bore up for Greenock. There it was found that the ironwork in general was very much decayed and wrought loose; the timbers and planks, generally speaking, sound, but decayed about the bolts and nails, which in several places were quite gone. Several of the lower deck beams and knees were decayed and sprung, and one plank below the lower deck beams on each side was decayed; the bowsprit was also sprung and the stem wrought loose on account of the decayed iron and labouring of the ship at sea. Upon these facts, Lord Eldon was clear that the vessel was not seaworthy when she sailed (*m*).

Overloading and want of trim.

717. If a ship is so heavily or so improperly loaded, when she sails on the voyage insured, as to be incapable of encountering the voyage, that is unseaworthiness (*n*).

Ship not fitted to carry the particular cargo safely.

A ship may also be unseaworthy because she cannot with safety to herself carry the kind of cargo with which she is loaded. The warranty, said the Court in Daniels *v.* Harris(*o*), is "different according to whether the same ship . . . . was loaded with one kind of cargo or another." Thus, in an action on a charter-party, where the ship was laden with a cargo of wet sugar, the drainage from which was such that ordinary pumps, such as she was fitted with, could not deal with it and the ordinary leakage from the ship, though they were sufficient for ordinary purposes, and the ship could not safely go to sea with the cargo on board, she was found to be

(*m*) Douglas *v.* Scougall (1816), 4 Dow, 269. The want of panting beams, causing leakage, was held to be unseaworthiness in Lund *v.* Thames & Mersey Mar. Ins. Co. (1901), 17 T. L. R. 566.

(*n*) Weir *v.* Aberdein (1819), 2 B. & Ald. 320; Redman v. Wilson (1845), 14 M. & W. 476; Biccard *v.* Shepherd (1861), 14 Moo. P. C. 471; Foley *v.* Tabor (1861), 2 F. & F. 663. So, also, improper stowage, which endangers the safety of the ship and cannot readily be remedied on the voyage, is unseaworthiness: Ingram *v.* Services Maritimes du Tréport, [1913] 1 K. B. 538, an action on a bill of lading. See also The Frey (1899), 92 Fed. R. 667.

(*o*) (1874), L. R. 10 C. P. 1, 6.

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unseaworthy for the voyage (*p*). There can be no doubt that, under the circumstances described, the warranty of seaworthiness in a policy would not have been satisfied.

Rigging, stores and provisions.

718. Besides being competent in hull to resist the ordinary attacks of wind and weather on the voyage insured, the ship must be properly equipped with sails, ground tackling, stores, provisions, and all other things which the custom of trade has made requisite for the voyage.

Rotten sails. Wedderburn *v.* Bell.

A ship insured in time of war "at and from Jamaica to London" was held unseaworthy because at the time of sailing, although her stern sails were in good condition, yet her maintop-gallant and studding-sails were extremely rotten and unserviceable, and she was therefore not as secure as possible from capture. And the assured on this ground was held precluded from recovering, though the ship went down in a hurricane in which such sails would have been useless (*q*).

Defective boiler.

A vessel insured "at and from Montreal to Halifax in Nova Scotia" sailed with a defective boiler; but the defect did not appear until she had passed into salt water, and then it became necessary to put back and repair the boiler. After sailing again she was lost by perils of the sea. It was held that she was not seaworthy, at all events at the stage when she passed into salt water, and consequently that the underwriters were not liable (*r*).

Deficient ground tackling.

A vessel is unseaworthy if not provided with ground tackling sufficient to encounter the ordinary perils of the sea, as where a ship sailed with the cable of the small bower anchor so worn and decayed as to be unfit for service, and with a best bower anchor too light and short in the shank for a vessel of her tonnage (*s*).

(*p*) Stanton *v.* Richardson (1872), L. R. 7 C. P. 421; in the Exch. Ch. (1874), L. R. 9 C. P. 390; in the H. of L. (1875), 45 L. J. C. P. 78.

(*q*) Wedderburn *v.* Bell (1807), 1 Camp. 1.

(*r*) Quebec Marine Ins. Co. *v.* Commercial Bank of Canada (1870), L. R. 3 P. C. 234.

(*s*) Wilkie *v.* Geddes (1815), 3 Dow, 57.

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Sufficient stores. Proper medicines.

719. Sufficient stores and supplies for the voyage are requisite to seaworthiness (*t*). Lord Eldon at Nisi Prius declared it to be his opinion that the assured was as much bound to show that he had provided proper medicines and necessaries for the voyage, as he was to establish the tightness of the ship (*u*).

Fuel and candles.

In the United States a vessel not properly supplied with fuel and candles has been held not to be seaworthy (*x*).

Bunker coals for steamship.

A steamship must, in order to be seaworthy, have a supply of fuel sufficient for the ordinary vicissitudes of the voyage (*y*).

Adjustment of compasses.

720. In one case in the United States, where a vessel ran on a rock in consequence of the needle of the compas being drawn out of its direction two or three points by an iron fastening near which the compass was placed, it was contended that this was unseaworthiness; but the Court, on evidence being given that there was no negligence in this case in the construction of the ship, were of opinion that it was not so (*z*).

There can hardly be a doubt that the proper adjustment of the ship's compass, especially in iron vessels, is an essential element of seaworthiness.

Neglect of some precaution.

The fact that some precaution has been neglected at the time of sailing does not make the ship unseaworthy, if she be in such a state and so equipped that, if the master and crew do their duty, no extra danger will be incurred. Thus, if a

Open port-hole.

port-hole be left open, through which, in the event of bad

(*t*) Per Lord Ellenborough, Wedderburn *v.* Bell (1807), 1 Camp. 2; Stewart *v.* Wilson (1843), 12 M. & W. 11.

(*u*) Woolf *v.* Claggett (1800), 3 Esp. 257, 259. There are Board of Trade regulations under the Merchant Shipping Act, 1894, s. 200, relating to the medical stores required for different voyages, but these, it is apprehended, cannot be conclusive as to seaworthiness in relation to the warranty.

(*x*) Fontaine *v.* Phœn. Ins. Co. (1813), 10 Johnson's R. 58.

(*y*) Greenock SS. Co. *v.* Maritime Ins. Co., [1903] 2 K. B. 657. As to the division of voyages into stages, see *ante*, §§ 705—707.

(*z*) Stanwood *v.* Rich, State Court of Massachusetts, Nov. 1817, cited 1 Phillips, Ins. s. 701.

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weather, the water would enter, the ship is not unseaworthy if in such event the port-hole could at once be closed. If, however, the port-hole be so circumstanced (as where the cargo has been piled up against it) that it could not, if bad weather came on, be readily closed at sea, the ship may on that account be unseaworthy (*a*). So also it has been held in the United States that the obstruction of a water-pipe by a piece of wood, being accidental and temporary in character, was not unseaworthiness (*b*).

Ship must have a competent master and crew.

721. We come now to consider that kind of unseaworthiness which consists in the deficiency or incompetence of the crew.

Every ship at the time of sailing must be properly manned, with a master of competent nautical skill, a crew sufficient to navigate her on the voyage insured, and a pilot on board whenever there is an establishment of pilots at the port and the nature of the navigation requires one (*c*).

1. Of the master.

First, of the master.—According to Arnould he must be

(*a*) Steel *v.* State Line SS. Co. (1877), 3 App. Cas. 72, 82, 90; Hedley *v.* Pinkney & Sons SS. Co. (C. A.), [1892] 1 Q. B. 58. See also Gilroy *v.* Price, [1893] A. C. 56. The law is the same in the United States: see The Silvia (1898), 171 U. S. (64 Davis) 462. There is a suggestion in Hedley *v.* Pinkney & Sons SS. Co. that a defect which touches the safety of individuals on board, but does not affect the safety of the ship, does not constitute unseaworthiness within the meaning of the Merchant Shipping Act, 1894, ss. 457, 458.

(*b*) The Mexican Prince (1897), 82 Fed. R. 484. Similarly, a slight leakage in a tap, such as can be and is ordinarily remedied in the course of the voyage, was held by Hamilton, J., not to be unseaworthiness: Virginia Carolina Chemical Co. *v.* Norfolk, &c. SS. Co. (1912), 17 Com. Cas. 277.

(*c*) Per Parke, J., in Phillips *v.* Headlam (1831), 2 B. & Ad. 383. Arnould's text was, "A pilot on board whenever required by law" (2nd ed. p. 720); on p. 723 he said, "Where requisite by law or usage for her safe navigation." The rule as stated by Parke, J., seems the better one, as in relation to the warranty of seaworthiness the real question is, what is requisite for the safe navigation of the ship. The law may, for the encouragement of pilots, make their employment compulsory where a competent master could himself safely conduct his ship. There may, however, be a presumption of fact that a pilot is necessary, wherever pilotage is compulsory. As to pilots at intermediate ports or port of discharge, see *ante*, §§ 702—704.

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a person sufficiently well acquainted with the usual course of navigation on the voyage insured to be able to conduct the vessel in safety through its ordinary perils; and if he is grossly ignorant of that, the ship is not seaworthy.

Tait v. Levi.

For this statement Arnould cited a decision of the Court of King's Bench in a case where the ship was insured "from Cork to the ship's loading port or ports on the coast of Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean," and the captain, through entire ignorance of the coast, mistook Barcelona for Tarragona, and was captured in endeavouring to enter the former port, which is higher up the Mediterranean than Tarragona, and was then in possession of the forces of Napoleon. The Court considered this a breach of the implied warranty to provide a master of reasonably competent skill (*d*). That decision, however, was founded on the special circumstances of the case, and does not justify the inference that the master must necessarily be deemed lacking in competent skill for want of acquaintance with the course of navigation on the particular voyage insured.

Proof of mistakes in navigation and suspicious circumstances attending the captain's appointment will not necessarily show that he was incompetent. It is a question of fact in each case, on which a Court of Appeal will be slow to reverse the finding of the judge who presided at the trial (*e*).

The question of the competency of captain and crew depends on the voyage. The mates.

722. The question as to the competency of the captain and crew must always depend upon the nature of the voyage on which they are employed under the policy.

The insurance being on a voyage "from Mauritius to

(*d*) Tait *v.* Levi (1811), 14 East, 481. It is submitted that the warranty can be stated more broadly, viz., as one to provide a competent master. Thus, a master of competent skill might be incompetent by reason of habitual intemperance. There is a decision in the United States that the incompetence of a pilot is not established by proof of a single instance of intoxication, where previous good character and competence are proved. Rogers *v.* Ætna Ins. Co. (1896), 76 Fed. R. 569.

(*e*) Thames & Mersey Mar. Ins. Co., Ltd. *v.* The "Gunford" Ship Co., Ltd., [1911] A. C. 529.

London," the captain on sailing from Mauritius was very ill, and next day feeling himself, from increased illness, incompetent to take charge of the ship, he inquired of his two mates whether they could manage the voyage to England, but finding no one competent to undertake it, he put back: Lord Tenterden, on this evidence, asked the jury "whether they thought, considering the length of the voyage from Mauritius to England, that a ship could be sufficiently manned when, in the event of an accident to the captain, there was no one else on board able to perform his duties." The jury, which was special, found for the underwriters (*f*). Sect. 722.

Chancellor Kent questions the soundness of this doctrine in any case, and observes that the warranty of seaworthiness "would seem to imply no more than that the assured must have a sound and well-equipped vessel with reference to the voyage, and have on board a competent person as master, a competent person as mate, and a competent crew as seamen"; he also cites American cases in which Lord Tenterden's doctrine has been discarded, as far as regards the American coasting and West Indian trade (*g*).

The doctrine thus impugned would undoubtedly operate with a good deal of harshness if enforced with regard to short voyages, or vessels of small burden. It ought probably to be confined to similar voyages of great length. With this limitation it is accepted by Phillips (*h*).

Want of certificate.

A question has been raised whether shipping an uncertificated master or mate or engineer, contrary to statute, would amount to unseaworthiness (*i*). Viewed in the light of decisions on kindred questions, it would seem to be an illegality which, in the case of privity on the part of the assured, would avoid the policy. Whether it is necessarily conclusive when the question is one of unseaworthiness is more doubtful. When an officer, though unqualified, has

(*f*) Clifford *v.* Hunter (1827), Moo. & M. 103; *S. C.*, reported in 3 C. & P. 16.

(*g*) 3 Kent, Com. 287, n. (*e*).

(*h*) 1 Phillips, Ins. s. 708. (*i*) See 1 Phillips, Ins. s. 713.

Sect. 722. performed his duties properly and no loss has taken place which can be imputed to him, a jury would probably be justified in refusing to find that his mere lack of qualification had the effect of rendering the vessel unseaworthy (*j*).

2. As to the crew.

723. Secondly, as to the crew.—"The owner," says Lord Tenterden, "as a condition precedent is bound to provide a crew of competent skill" (*k*). "The crew," says Lord Ellenborough, "must be adequate to discharge the usual duties, and to meet the usual dangers to which she is exposed" (*l*).

If the crew be sufficient when the ship sailed on the voyage insured, the implied warranty is fully satisfied, unless it be a voyage of successive stages differing in degree or kind of risk, and consequently in the description of crew required (*m*). The assured does not contract that the ship shall continue to be properly manned throughout the voyage, nor is he responsible for any subsequent negligence or misconduct on the part of the crew (*n*).

It is, however, indispensably necessary that the ship should be properly manned for the voyage at the time she sails on it (*o*); if not, the underwriters are not liable. Thus, a policy was effected on a voyage "at and from Cuba to Liverpool," without any leave given to touch and stay in the original policy. The captain having lost some of his outward crew

(*j*) See Hathaway *v.* St. Paul Fire & Mar. Ins. Co. (1880), 1 Fed. R. 197; *post*, § 724.

(*k*) Shore *v.* Bentall (1828), 7 B. & Cr. 798, n.

(*l*) In Hunter *v.* Potts (1815), 4 Camp. 203.

(*m*) Bouillon *v.* Lupton (1863), 33 L. J. C. P. 37.

(*n*) Busk *v.* Royal Exch. Co. (1818), 2 B. & Ald. 73; Walker *v.* Maitland (1821), 5 B. & Ald. 175; Bishop *v.* Pentland (1827), 7 B. & Cr. 219; Shore *v.* Bentall (1828), *ibid.* 798, n.; Dixon *v.* Sadler (1839), 5 M. & W. 405; *S. C.*, in error (1841), 8 M. & W. 895.

(*o*) Arnould said (2nd ed. vol. i. p. 722), on the authority of Hucks *v.* Thornton (1815), Holt, N. P. 30, that "if at the time the policy attaches, the ship has been some time engaged on a distant voyage, although the numbers of the crew may have been greatly reduced by death or desertion, yet the implied warranty will be satisfied if they are at that time sufficient for navigating the ship home, or for performing any of the purposes of the voyage insured." See, however, as to this case, *ante*, § 708.

Sect. 723. by sickness and desertion at Cuba, and finding it impossible there to engage ten men, his proper complement, for Liverpool, sailed from Cuba with only eight men engaged for Liverpool, and two for Montego Bay (Jamaica), where he touched and landed the two men, and whence, having procured others to supply their place, he proceeded on his voyage to Liverpool. The Court held that the ship was not seaworthy when she sailed from Cuba for a voyage to Liverpool, as she ought then to have had on board a full complement of men engaged for the whole voyage (*p*).

3. As to the pilot.

724. Thirdly, as to the pilot.—This question has already been considered, and we will here only state the result of the authorities. Generally speaking, no ship is seaworthy at the outset of the risk unless she have on board a pilot, where requisite for her safe navigation.

Result of the cases.

The law also seems to be, that it is not a breach of the warranty of seaworthiness for a ship to enter a port where it is usual to employ a pilot, without having one on board. Consequently, when a ship is lost by a peril insured against, in entering such a port without a pilot, the assured can recover, although the loss might not have occurred if a pilot had been on board, and was remotely caused by the negligence or misconduct of the master in entering without a pilot (*q*). *A fortiori* the underwriter will be so liable if the master on arriving off the port have done his best to procure a pilot to come off, and has only entered the harbour without one when it became the wisest course for him, as a prudent and skilful man, so to do (*r*).

(*p*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158. The judgment of the Court in this case mainly proceeded on the ground that there had been a material alteration in the policy, and also a deviation, but all the Judges except one held that the ship was unseaworthy. See also Ridsdale *v.* Newnham (1814), 4 Camp. 111. The decision in Forshaw *v.* Chabert is criticised by Phillips (vol. i. s. 710).

(*q*) Phillips *v.* Headlam (1831), 2 B. & Ad. 380; see also Trinder, Anderson & Co. *v.* Thames & Mersey Mar. Ins. Co., [1898] 2 Q. B. 114; and *ante*, §§ 702—704.

(*r*) Phillips *v.* Headlam, *supra*.

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If not only usage, but the positive regulations of an Act of Parliament, require a pilot to be taken on board on entering either an intermediate or a home port, then it has in one case of doubtful authority been held to be unseaworthiness to enter such port without one (*s*).

And in all cases where it is necessary, either by law or usage, for the master to have a pilot on board in going out of an intermediate port, or in clearing from his outport homewards, it is in the opinion of some learned judges unseaworthiness not to take one, for it is in such cases always in his power to do so (*t*). The question may arise whether, if the warranty of seaworthiness requires a pilot to be on board, it is satisfied when an unqualified pilot is employed. In the United States it has been held that the mere fact that a ship has an unlicensed pilot on board is not *primâ facie* proof of unseaworthiness (*u*). It is submitted that to satisfy the warranty it is enough that the pilot should be competent (*x*). If he navigate the ship properly, this is evidence of his skill. A pilot appointed by authority is presumed to be competent (*y*).

Of the proof of unseaworthiness.

725. The burden of proof on the issue of unseaworthiness is on the underwriter (*z*). Where, however, a ship soon after sailing founders, or becomes so leaky or disabled as to be unable to proceed, and this cannot be ascribed to any violent storm or other adequate cause, the fair presumption is that it arose from causes existing at the time of her sailing, and consequently that she was not then seaworthy. That, however, is but an inference from the facts, and not a presumption of law (*a*). Yet if such inference of fact be well

(*s*) Law *v.* Hollingworth (1797), 7 T. R. 160. See *ante*, §§ 703, 704.
(*t*) Per Lord Tenterden in 2 B. & Ad. 382. See *ante*, § 702.
(*u*) Hathaway *v.* St. Paul Fire & Mar. Ins. Co. (1880), 1 Fed. R. 197.
(*x*) 1 Phillips, ss. 712, 713.
(*y*) 1 Phillips, s. 712.
(*z*) Parker *v.* Potts (1815), 3 Dow, 23; Davidson *v.* Burnand (1868), L. R. 4 C. P. 117; Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594.
(*a*) Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594; followed in the United States in Moores *v.* Louisville Underwriters (1883), 14 Fed. R. 226. See Ajum Goolam Hossen *v.* Union Mar. Ins. Co., [1901] A. C. 362; Lindsay *v.* Klein, [1911] A. C. 194.

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founded, it has the effect of shifting the burden of proof to the assured (*b*).

If, on the other hand, the loss takes place long after sailing, or under such circumstances that it may fairly be attributed, *primâ facie*, to the violent and immediate action of the winds and waves, or other perils insured against, then, if the underwriters mean to rely on the defence that the ship was unseaworthy when she sailed, the *onus probandi* will be on them (*c*).

Even when a ship has been at sea some time, "if during the whole of the time she has had favourable weather, fair winds and calm seas, and yet goes down or proves unable to continue on her course, the same inference as to unseaworthiness presents itself as in" the case of a ship proving unseaworthy shortly after sailing, "though perhaps with diminished cogency in proportion as the interval has been longer" (*d*).

Even though shortly after sailing the ship may have encountered boisterous weather, bad and dangerous seas, stiff breezes, or even severe gales, yet, if she be then in a state of decay or damage which cannot fairly be accounted for by the perils to which she has been exposed, the inference may still be that she was unseaworthy when she sailed (*e*).

Effect of clause admitting ship to be seaworthy

Of course, if there be a clause in the policy, admitting the seaworthy state of the ship on sailing, the underwriters are thereby precluded from any defence on the ground of unsea-

(*b*) Per Cockburn, C. J., and on appeal, per Brett and Thesiger, L. JJ., in Pickup *v.* Thames Ins. Co., *infra;* and see Munro *v.* Vandam (1794), 1 Park, Ins. 469; per Lord Eldon, Watson *v.* Clark (1813), 1 Dow, 336, 344; Parker *v.* Potts (1815), 3 Dow, 23; Anderson *v.* Morice (1874—75), L. R. 10 C. P. 58, 609.
(*c*) Per Blackburn and Lush, JJ., in Wilson *v.* Jones (1867), L. R. 2 Ex. 139, 143; and per Thesiger, L. J., in Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594, 604.
(*d*) *Per cur.*, Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594, 598.
(*e*) Watson *v.* Clark (1813), 1 Dow, 336; Parker *v.* Potts (1815), 3 Dow, 23; Douglas *v.* Scougall (1816), 4 Dow, 269; and see Foster *v.* Steele (1837), 3 Bing. N. C. 892.

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worthiness, in the absence of fraud on the part of the assured in obtaining this admission (*f*).

Evidence of unseaworthiness.

726. With regard to the means of proving that the ship was seaworthy, or the reverse, the most satisfactory evidence is that of the persons who were employed to survey and examine the vessel; after their evidence has been given, however, experienced shipwrights, who never saw the ship, may be called to say whether, upon the facts sworn to, she was in their opinion seaworthy or not (*g*).

Where a ship has been ordered to be sold abroad, as unseaworthy, by the sentence of a Vice-Admiralty Court, such sentence is no evidence of the facts or grounds on which the condemnation proceeded (*h*).

The question of seaworthiness is for the jury.

The whole question as to what constitutes seaworthiness is peculiarly a question for a jury; and hence, where a special jury of merchants had twice given their verdict one way on a question of seaworthiness, the Court, although they considered the verdict not altogether satisfactory, refused to grant a rule for a third trial (*i*); nor would they allow the consolidation rule to be opened, in order to try the same question in another action against another underwriter on the same policy (*k*).

Implied condition that the ship shall be properly documented.

727. "There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk" (*l*).

(*f*) Parfitt *v.* Thompson (1844), 13 M. & W. 392; Phillips *v.* Nairne (1847), 4 C. B. 343; 16 L. J. C. P. 194. See *ante*, § 694.

(*g*) Per Lord Kenyon, Thornton *v.* Royal Exch. Co. (1790), 1 Peake, 25; per Lord Ellenborough, Beckwith *v.* Sydebotham (1807), 1 Camp. 116. See Nome Beach Co. *v.* Munich Ass. Co. (1903), 123 Fed. R. 820.

(*h*) Wright *v.* Barnard (1798), 2 Esp. 700; 1 Marshall, Ins. 152; 2 Park, Ins. 863. See also Ballantyne *v.* Mackinnon (C. A.), [1896] 2 Q. B. 455; The Eliza Cornish (1853), 1 Spinks, Ecc. & Ad. R. 36; and Maclachlan, Merch. Shipping, 5th ed. pp. 172—174.

(*i*) Foster *v.* Steele (1837), 3 Bing. N. C. 892.

(*k*) Foster *v.* Alvez (1837), *ibid.* 896.

(*l*) Mar. Ins. Act, 1906, s. 37. See Clapham *v.* Cologan (1813), 3 Camp. 382; Dent *v.* Smith (1869), L. R. 4 Q. B. 414.

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But "where a ship is expressly warranted 'neutral,' there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract" (*m*).

Proofs of national character.

And, even where there is no express warranty of neutrality, it was stated by Arnould (*n*) that, in view of the danger of a ship being condemned, especially in seasons of general maritime war, for the want of proper proofs of her national character, it is an implied condition in every policy effected by the shipowner that the ship in the course of the voyage and *at the time of seizure* shall have on board all such documents, whether her national character be or be not the subject of warranty or representation in the policy: it is not, however, requisite that she should *sail* with such documents, unless she be represented or warranted as of a particular national character (*o*).

This implied condition, however, where there is no warranty of neutrality, if it ever really existed, is not recognized by the Marine Insurance Act, 1906, and it has been suggested that the authorities supposed to establish it are only examples of the rule that the assured cannot recover for a loss caused by his own default (*p*).

(*m*) Mar. Ins. Act, 1906, s. 36 (2). As to this condition, see §§ 661—685, *ante*.

(*n*) 2nd ed. vol. i. pp. 727, 728.

(*o*) Unless the ship be warranted or represented as of a particular nation, she need not *sail* with documents of neutrality. Per Lord Ellenborough in Bell *v.* Carstairs (1811), 14 East, 374, 393 (see as to this case per Willes, J., in Thompson *v.* Hopper (1858), E. B. & E. 1048); *aliter*, if there be a warranty, Rich *v.* Parker (1798), 7 T. R. 705. By the 68th section of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the national character of every ship is to be declared before clearance.

(*p*) See per Collins, L. J., in Trinder *v.* Thames, &c. Ins. Co., [1918] 2 Q. B. at p. 128.

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Difference between this implied condition and the implied warranty of seaworthiness.

728. The consequences of a failure to comply with this supposed implied condition are very different from those that follow upon a breach of the implied warranty of seaworthiness.

The warranty of seaworthiness, in the words of Lawrence, J., "is implied from the very nature of a contract of insurance; the consideration of an insurance is paid in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies, and it supposes the possibility of the underwriters gaining the premium; but if the ship be incapable of performing the voyage, there is no possibility of the underwriters gaining the premium, and if the consideration fails the obligation fails. But that is not the case with a ship not having proper documents on board: she may nevertheless perform the voyage; at least, there is no certainty that she will not, as there is in the case above alluded to" (*q*).

Accordingly, it is established that a want of proper documents on board discharges the underwriter from his liability only when the sentence of a foreign Prize Court shows that the condemnation proceeded either expressly upon that as the sole ground, or as one of the grounds (*r*); and it has further been held by Lord Ellenborough, and not contradicted by any subsequent authority, that even in this case the underwriter will not be discharged unless his contract was with the owner of the ship, from whom he had a right to expect, and who had the power to provide, that she should have on board all documents required for her protection (*s*).

(*q*) Per Lawrence, J., in Christie *v.* Secretan (1799), 8 T. R. 192; see also the observations of the Court in Price *v.* Bell (1801), 1 East, 663. So, in the United States, Chancellor Kent (then Ch. J.) intimated that it was no part of the implied warranty of seaworthiness that the ship should be properly documented, on the ground "that the vessel, without such documents, might be quite competent to perform the voyage." In Elting *v.* Scott (1807), 2 Johnson's R. 157, cited 1 Phillips, Ins. s. 746.

(*r*) See the remarks of Lawrence, J., in Price *v.* Bell (1801), 1 East, 673.

(*s*) Dawson *v.* Atty (1806), 7 East, 367.

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1. The foreign sentence must obviously proceed on this ground.

729. First, in order to discharge the underwriter on the ground of a failure to provide proper documents of nationality it must distinctly appear, from the whole of the foreign sentence taken together, that the want of such documents was the ground, or a ground, of condemnation.

At one time, as we have already seen, our Courts, in interpreting the sentences of foreign tribunals of prize, would only look to the adjudicative part of the sentence for the ground on which the foreign Court proceeded (*t*).

A more reasonable canon of construction was adopted afterwards; and the later rule was that, if upon examination of the whole sentence taken together it appears that want of proper documents, as required by treaties, was one of the alleged grounds on which the sentence of condemnation proceeded, our Courts would consider the sentence proof that the assured had failed to comply with the implied condition, and hold the underwriter discharged from his liability (*u*).

Bell *v.* Carstairs.

Consequently, where an American ship (not warranted American) was condemned in a French Court of Prize on the express ground, alleged in the premises of the sentence, that she was not properly documented according to the existing convention between the French Republic and the United States, Lord Ellenborough held that the underwriters on ship were discharged from their liability, although the sentence also proceeded on the ground of a suppression of papers by the master after her capture (*x*).

Steel *v.* Lacy.

So where an American ship, which had sailed from New York to London with naval stores, was chartered from London for a voyage to the Baltic during the height of Napoleon's Continental system, and ultimately condemned in

(*t*) Christie *v.* Secretan (1799), 8 T. R. 192. See *ante*, § 680.

(*u*) Bell *v.* Carstairs (1811), 14 East, 374; Bell *v.* Bromfield (1812), 15 East, 364; Steel *v.* Lacy (1810), 3 Taunt. 285. In Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 463, it was said that the cases in which a want of neutrality is conclusively proved by the sentence of a foreign Court are exceptional, the general rule being that a decision *in rem* is not conclusive as to the grounds thereof.

(*x*) Bell *v.* Carstairs (1811), 14 East, 374.

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a Danish Prize Court for want, amongst other grounds of condemnation, of a sea passport and muster rolls, the Court held the underwriters discharged from their liability, although if the ship had produced her sea passport it would have subjected her to French condemnation under the Berlin decree as showing that she had last come from London (*y*).

2. The lacking document must be required by law or treaty.

730. Secondly, the implied condition that the ship shall be properly documented does not extend to any document except those required by the general law of nations or by subsisting international treaties; for the purpose of this defence, therefore, it must clearly be made out that the documents, for want of which the ship was condemned, fell within one or other of these two categories (*z*).

Price *v.* Bell.

Hence, where an American ship was condemned on the express ground that she had not the documents required by certain recent French Ordinances, which were contrary to the terms of the treaty then subsisting between France and the United States, and not adopted by any public international act of the two governments, it was held that the underwriters were not discharged from their liability (*a*).

Bell *v.* Bromfield.

Again, where an American ship was condemned in a Danish Prize Court because her sea passport was not verified with the notary's name and seal of office, the Court called upon the counsel for the underwriters to show by what rule of the law of nations, or by what clause in any subsisting treaties between Denmark and the United States, it was required that the sea passport of an American ship should be so verified (*b*).

Le Cheminant *v.* Allnutt.

A register is not a document required by the law of nations as evidence of a ship's national character; hence, where a ship described in the charter-party as a Pappen-

(*y*) Steel *v.* Lacy (1810), 3 Taunt. 285. The ship had been represented American.

(*z*) Per Bayley, J., in Bell *v.* Bromfield (1812), 15 East, 368.

(*a*) Price *v.* Bell (1801), 1 East, 663.

(*b*) Bell *v.* Bromfield (1812), 15 East, 364, 368.

burgher, was condemned in a Danish Prize Court "for want of a Pappenburgh register," the Court held that the underwriter, in order to discharge himself from liability, must show that a register was required as a proof of national character by some subsisting treaty between Denmark and the country to which the ship belonged (*c*). "We want evidence," says Mansfield, C. J., in giving judgment against the underwriters, "to show on what reasons the want of this register was made a ground of condemnation." Sect. 730.

3. Want of proper documents is only a defence against the shipowner.

731. Thirdly, the want of proper documents only discharges the underwriter when the matter was within the control of the assured (*d*). Thus it was laid down by Lord Ellenborough, after full consideration, that a want of proper documents only discharged the underwriter when the insurance was effected for the shipowner, and not for the owner of the goods.

Carruthers *v.* Gray.

Where, from an omission of the captain, goods insured for a voyage from this country to a foreign port were not mentioned in the ship's manifest as required by Act of Parliament, but it did not appear that the loss was in any degree owing to this defect, Lord Ellenborough held the underwriters liable on the ground that there was no implied warranty, on the part of the owner of the goods, that the ship should be properly documented (*e*).

Dawson *v.* Atty.

Again, where the policy was "on goods" on board a ship which was in fact, but not represented to be, an American, and the ship being captured by the Spaniards was condemned on the express ground of her not being properly documented according to the treaties then subsisting between Spain and the United States, Lord Ellenborough held that the under-

(*c*) Le Cheminant *v.* Allnutt (1812), 4 Taunt. 367.

(*d*) Mar. Ins. Act, 1906, s. 36 (2).

(*e*) Carruthers *v.* Gray (1811), 3 Camp. 142; *S. C.* (1812), 15 East, 35; accord. Hobbs *v.* Henning (1864), 17 C. B. N. S. 791; 34 L. J. C. P. 117. If the want of a proper document was not the ground of condemnation in Carruthers *v.* Gray, even the shipowner would not have been prevented thereby from recovering. *Ante*, §§ 728, 729.

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Confirmed in Bell *v.* Carstairs.

writers were not discharged on this account (*f*); and on this case being mentioned in that of Bell *v.* Carstairs, his Lordship supported it on the ground that it was the case of an insurance on goods, "where the owner of the goods has no concern in the obtaining of the proper documents with which the vessel is to be furnished for the voyage": whereas in a policy on ship "the shipowner is bound to have such documents as are required by treaties with particular nations to evince his neutrality in respect to such nations" (*g*).

Of carrying simulated papers and false clearances.

732. Owing to the unexampled difficulties thrown in the way of English commerce during the great French wars, it became necessary to carry on trade with the Continent by the aid of simulated papers: yet our Courts uniformly held that the sentences of foreign tribunals of prize, expressly proceeding on the ground of the ship's carrying simulated papers, were conclusive to discharge the underwriter from his liability except where there was an express leave given in the policy to carry them.

Without leave of the underwriter.

Thus, where a British ship sailed from London for the Baltic and was condemned in a Russian Prize Court on the ground of carrying simulated papers, Lord Ellenborough and the Court of King's Bench held that, as the policy contained no liberty to carry such papers, the assured could not recover although it was notorious that the trade sought to be protected by the policy could not be carried on without such papers, so that the fact of having them on board actually

(*f*) Dawson *v.* Atty (1806), 7 East, 367; see also Carruthers *v.* Gray (1811), 3 Camp. 142; *S. C.* (1812), 15 East, 35.

(*g*) In Bell *v.* Carstairs (1811), 14 East, 393. Marshall (1 Ins. 173, n. (*a*)) and Phillips (1 Ins. p. 344, 2nd ed.) seem to think this distinction made by Lord Ellenborough a very questionable one, though in the 3rd edition of his treatise (s. 746) Phillips appears to modify his objection, and admits that as regards the shipper it is going far enough to put the case on the ground of representation and concealment—*i.e.*, to make it the shipper's duty to disclose want of documents, &c. if known to him and not to the underwriter. But the distinction seemed to Arnould to rest on a satisfactory foundation, and, as we have seen, it is substantially adopted in s. 36 (2) of the Marine Insurance Act, 1906.

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tended to diminish the risk (*h*): and the decision of the Court was the same where the fact of carrying such simulated papers appeared by the sentence to be at least one of the efficient causes of condemnation (*i*).

***Aliter*, where leave to that effect is reserved.**

Of course, if the underwriters have agreed to the insertion on the face of the policy of a licence to carry simulated papers, they are not discharged from their liability by a condemnation which proceeded on this ground.

Thus, where an American ship having sailed from London on a Baltic risk under a policy which contained an express licence "to carry simulated papers," was subsequently condemned by the sentence of a Danish Prize Court, which although it recited many other motives of condemnation, yet proceeded mainly upon the ground of the ship's having carried simulated papers, Lord Ellenborough and the Court of King's Bench held that the underwriters were not discharged from their liability (*k*).

Legality of the adventure.

733. Another warranty or condition implied by the law in the policy is that the adventure insured shall be in its own nature, and in the manner and means by which it is pursued, in accordance with law. But the importance of the subject, the modifications that affect it, and the various classes of illegal acts that require consideration, make it desirable to treat of the whole subject of illegality in a separate chapter.

(*h*) Horneyer *v.* Lushington (1812), 15 East, 46; (1811), 3 Camp. 85; see also *S. P.*, Oswell *v.* Vigne (1812), 15 East, 70. These cases resolve in the affirmative a point left open by the Court of Common Pleas in Steel *v.* Lacy (1810), 3 Taunt. 285—viz., whether it is necessary to have permission in the policy to carry simulated papers, in cases where it is notorious that the trade cannot be carried on without them.

(*i*) Oswell *v.* Vigne (1812), 15 East, 70.

(*k*) Bell *v.* Bromfield (1812), 15 East, 364.

CHAPTER V.

ILLEGALITY OF THE RISK.

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General rules in Mar. Ins. Act.

734. By the third section of the Marine Insurance Act of 1906 it is declared that, subject to the provisions of the Act, "every lawful marine adventure may be the subject of a contract of marine insurance." The forty-first section declares that "there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner."

Division of the subject.

No species of property or interest at risk on a sea venture can be the subject of a valid contract of marine insurance, if the course of trade, or the voyage, in the prosecution of which it is so exposed to risk, be in contravention either of the laws or of the war policy of the country of the insurer. We shall treat of these several kinds of illegal risks in their order, after having first stated generally how the illegality of the risk affects the rights and liabilities of the parties to the policy.

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There is a third class of illegal risks, however, in respect of which this term "illegality" is used in a very modified signification. In these cases this term denominates such a contravention of international law in respect of other parties as entitles them legally to take and confiscate the property embarked in the adventure. At the same time, this right in these others is not incompatible with the existence of a right in the adventurers, under a different law, to pursue the adventure on which they were engaged when their property was confiscated. These are the conflicting rights of peace and war in presence of each other: the neutral, in virtue of the former, being justified in prosecuting the objects of commercial enterprise; the belligerent, in enforcing the latter, if such commercial pursuits are in effect an intervention in subsisting war. A policy on such an adventure is not necessarily invalid, provided the underwriter was informed of the aggravated nature of the risk which he was assuming, and that it was not assumed in contravention of the war policy of his own government.

We shall advert to this modified view of illegality before the close of the chapter; meanwhile we proceed to consider illegality in its proper signification and in its effect upon the contract of marine insurance.

General doctrine of the illegality of the risk as it affects the policy.

735. "Where a voyage is illegal," says Tindal, C. J., "an insurance upon it is invalid; for it would be singular if, the original contract being invalid and incapable to be enforced, a collateral contract founded upon it could be enforced" (*a*). Such is the rule and the reason for it. The following decided points will show within what limitations the rule applies.

Illegality as to part of an entire voyage discharges the underwriter as to the whole.

If the voyage be an integral and entire voyage under charter-party or otherwise, any illegality at the commencement or in the course of it will make the whole illegal; so that the assured cannot recover on a policy effected to protect any part of it, although there may have been no illegality in

(*a*) Redmond *v.* Smith (1844), 7 M. & Gr. 457, 474.

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the part of the voyage so insured (*b*). Thus, if a ship be chartered for one entire voyage "from London to Madeira and thence to the East Indies," and a policy be effected on ship only "from Madeira to the East Indies," then, if the ship has been engaged in smuggling or any other illegal act between London and Madeira (*c*), this will prevent the assured from recovering on the policy "from Madeira to the East Indies," although there may have been no illegality in this latter stage of the voyage.

Query, where a voyage consists of distinct stages separately insured.

736. An attempt was made on one occasion to carry this principle still further, and it was contended that if an entire voyage under a charter-party consist of two distinct stages separately insured, an illegality on the latter stage of the voyage will vitiate a policy on the former, although in itself quite free from the taint of illegality: *e.g.*, supposing a ship to be chartered for a voyage out and home, as from A. to B., and back again to A., and two separate policies to be effected, one on the outward and another on the homeward passage; it was urged that although there might be no illegality on the outward passage, yet the policy thereon would be vitiated by a subsequent illegality on the homeward passage. The Court gave no express decision on the point, but the inclination of their opinion seemed decidedly unfavourable to the doctrine thus advanced (*d*).

A contingent illegality on

At all events where, as in the case before them, the loss

(*b*) Admitted by Lord Kenyon in Wilson *v.* Marryatt (1798), 8 T. R. at p. 46, and expressly ruled by him at N. P. in Bird *v.* Pigou (1800), 2 Selw. N. P. 932, 13th ed. This statement of the law has been criticized by Story, J., and Phillips (see 1 Phillips, s. 231), who consider that it is "difficult in point of principle to distinguish an illegality in a former voyage and that in a prior part of the same voyage, when the policy covers only the part which is legal."

(*c*) *I.e.*, with the privity of the assured, so as to make the forty-first section of the Mar. Ins. Act, 1906, applicable.

(*d*) Sewell *v.* Royal Exch. Ass. Co. (1813), 4 Taunt. 855. Gibbs, J., at the trial, seems to have been clear that the homeward voyage would not contaminate the outward voyage (see *ibid.* 858), and Sir J. Mansfield, in giving judgment, shows clearly the bias of his opinion to be the same way. (*Ibid.* 864.)

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had occurred before the commencement of the risk under the homeward policy, so that no illegality had, in fact, taken place on the homeward passage, and there was nothing to show that the master might not before sailing on it have taken steps for performing such passage with all due legal requisites, they held that there was no pretence for saying that such contemplated, or rather contingent, illegality on the homeward passage could vitiate the policy on the outward passage (*e*).

the homeward passage will not vitiate the outward policy.

Where the voyages are distinct the illegality must be on the voyage insured.

737. Of course, if the voyage of the ship is not thus intregal and entire, but the case is one in which either several distinct voyages of the ship are insured in several distinct policies, or, out of several distinct voyages of the ship, only one is insured in the policy on which the action is brought, an illegality on any such other voyages cannot possibly affect the claims of the assured. The only question is, Was there any illegality in the course of the very voyage insured in the policy?

Bird *v.* Appleton.

Thus, where it appeared that an American ship had sailed from London to Canton, and thence back to Europe, but it was distinctly found that the voyage from London to Canton and that from Canton to Europe were two distinct voyages, it was held that an illegality committed in the course of the ship's voyage between London and Canton could not possibly affect a policy intended to protect the voyage from Canton to Europe (*f*).

If the policy be "at and from" an illegality at the port vitiates the policy.

738. In case of a policy on a ship "at and from," if there be any illegality in the risk while the ship is at the place that will vitiate the policy though the illegality may cease before the ship sails.

Thus, where a policy was effected on an American ship "at and from Canton to Hamburg," and it appeared that the ship on arriving at Canton, and for a short time while

(*e*) Sewell *v.* Royal Exch. Ass. Co. (1813), 4 Taunt. 855. See Waugh *v.* Morris (1873), L. R. 8 Q. B. 202, an action on a charter-party

(*f*) Bird *v.* Appleton (1800), 8 T. R. 562.

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she lay in harbour there (consequently after the inception of the risk on ship under this policy), had on board an illegal cargo, which she had taken in at Bombay for sale at Canton, in the course of a separate and distinct voyage: this was held to vitiate the policy on the ship, though she disposed of all her illegal cargo at Canton, and sailed thence for Hamburg with another (*g*). The principle is that "an illegal cargo on board but for an hour after a policy attaches will avoid that policy and discharge the underwriters from all subsequent liability" (*h*).

Policy not void, because on cargo bought with the proceeds of an illegal cargo.

In the same case a policy was effected for the same voyage, *i.e.*, "at and from Canton to Hamburg," on goods which were purchased at Canton for the homeward voyage partly with the proceeds of the illegal cargo, and none of which were, consequently, shipped on board till the whole of the illegal cargo was unloaded: this policy the Court held to be good; the risk on the goods under it did not attach till they were loaded on board, when all illegality was at an end by the prior discharge of the illegal cargo. "The voyage homeward from Canton," says Lord Kenyon, "being found to be a separate and distinct voyage from that to Canton, the homeward voyage cannot be affected by the former outward voyage" (*i*).

With regard to the objection that the risk on the goods was illegal, because they had been purchased with the proceeds of an illegal cargo taken on board in the course of a separate adventure, Lord Kenyon and the rest of the Court wholly refused to entertain it. "In such a case as the present," says Lawrence, J., "we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods" (*j*).

Result of the cases.

739. The positions, therefore, derivable from the cases appear to be: 1. That any illegality in the prior stages or

(*g*) Bird *v.* Appleton (1800), 8 T. R. 562.
(*h*) 1 Marshall, Ins. 68.
(*i*) Bird *v.* Appleton (1800), 8 T. R. 566.
(*j*) *Ibid.* at p. 569.

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at the outset of an integral voyage vitiates a policy, though effected only to protect some later stage of it on which there is no illegality. 2. That an illegality in any part of an entire risk, or voyage insured, vitiates the insurance as to the whole of it. 3. That the illegality of a wholly distinct and separate voyage can have no effect on the voyage described in the policy.

Generally no return of premium.

740. Where the policy is thus avoided in consequence of the illegality of the risk, the underwriter is entirely discharged from all liability, and this, although he himself was aware of the illegal nature of the adventure (*k*). Nor is the assured (even though a foreigner) entitled to any return of premium (*l*), except under very special circumstances, from which the Court may fairly infer that at the time of making the policy, he was not, nor, in fact, could have been aware of the real nature of the transaction (*m*). And the circumstances must be very special to induce the Court to depart from the general rule based on the broad and intelligible principle, that where the contract is founded on a consideration clearly illegal, neither party shall be allowed a *locus standi* so as to receive any assistance in a Court of Justice (*n*).

Underwriter insuring illegal risk cannot sue for premiums.

In further application of this principle the Courts have also determined that, where the premiums have not been paid, the underwriter cannot sue the broker for them in cases where the policy, for effecting which they are claimed, is in its language

(*k*) Bynkershoek, 1 Quæst. Juris Public. lib. i. c. 21. Roccus (No. 21) mistakenly advanced the opposite doctrine. See Lord Mansfield's judgment in Holman *v.* Johnson (1775), 1 Cowp. 343. Nor, it seems, can the illegality be waived, notwithstanding sect. 34, sub-sect. 3, of the Mar. Ins. Act, 1906. For sect. 3, sub-sect. 1, implies that only a lawful adventure can be insured.

(*l*) Vandyck *v.* Hewitt (1800), 1 East, 96; Lubbock *v.* Potts (1806), 7 East, 449; Palyart *v.* Leckie (1817), 6 M. & S. 290; see *post*, Chapter on Return of Premium.

(*m*) Oom *v.* Bruce (1810), 12 East, 225; Hentig *v.* Staniforth (1816), 5 M. & S. 122; see *post*, Chapter on Return of Premium.

(*n*) Per Lord Ellenborough in Palyart *v.* Leckie (1817), 6 M. & S. 293.

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large enough to comprise an illegal adventure, and was intended by the assured to be applied thereto (*o*).

In the case last cited, in reference to a point that had been made in the argument, viz., that consistently with the words of the policy the adventure might have been legal, and the underwriter had no means of knowing that it was not, Lord Ellenborough said: "The policies being large enough to cover an illegal adventure, and an illegal adventure being, in fact, intended to be covered by them, if the plaintiff (the underwriter) really meant to protect that adventure, his subscription was illegal, and consequently his present demand, being grounded on an illegal consideration, cannot be sustained. If he did not mean to protect that adventure, but supposed that some other and lawful adventure was intended by the assured, then, admitting the subscription to have been an innocent act on his part, there will be no consideration at all to support his present demand" (*p*).

Principles on which these decisions depend.

The principles on which the foregoing decisions depend are —1. That no Court of Justice can interpose to assist either of the parties to an illegal contract; 2. That *in pari delicto potior est conditio possidentis*.

Voyages illegal by the revenue laws: smuggling.

741. The most extensive branch of illegal traffic is that which is prohibited by the revenue laws of the state; in other words, the smuggling trade.

It is a clear and settled principle, that an insurance on property intended to be employed in carrying on trading adventures contrary to the revenue laws of the state where the contract is sought to be enforced, is void. No Court, consistently with its duty, can lend its aid to carry into execution a contract which involves a violation of the laws that Court is bound to administer (*q*). All insurances, therefore, sought to be enforced in this country on goods, the exportation or importation of which is prohibited by the revenue

(*o*) Jenkins *v.* Power (1817), 6 M. & S. 282.
(*p*) Per Lord Ellenborough in Jenkins *v.* Power (1817), 6 M. & S. 289.
(*q*) *Post*, § 744; 1 Emerigon, c. vii. s. 5, p. 215; 3 Kent, Com. 262.

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laws of the United Kingdom, are unenforceable on the principle just laid down (*r*).

But this country pays no attention to revenue laws of foreign states.

742. The same respect has not been required by our Courts to be paid to the revenue laws of foreign states. It was long ago declared by Lord Mansfield, and has never since been doubted, to be the clear rule of English law, that this country "pays no attention to the revenue laws of another state," and therefore, that no insurances can be void merely because effected on property embarked in enterprises which those laws would prohibit (*s*). So far has this principle been carried in English law, that Lord Mansfield in one case held that an insurance on an adventure, in which it was manifestly and avowedly intended to defraud the revenue of a foreign state, was not illegal, though fictitious papers were fabricated for the purpose of carrying out the fraud (*t*).

Foreign writers as to the morality of the rule.

743. Grave questions have been raised by many able writers as to the morality and justice of this rule of law. In

(*r*) The importation and exportation of goods into and from the United Kingdom are chiefly regulated by the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), which has, however, been greatly modified by a large number of later Acts.

(*s*) Lever *v.* Fletcher (1780), 1 Park, Ins. 507; see also Planché *v.* Fletcher (1779), 1 Dougl. 251. Arnould stated in the text that Lord Mansfield ruled in Lever *v.* Fletcher that an insurance was valid "where the trade insured was carried on, not only in fraud of the revenue laws of a foreign state, but even against the express conditions of a treaty to which Great Britain and the foreign state were parties." This is certainly stated in Park's report of Lord Mansfield's judgment, the words being "every trading with the subjects of Spain is illicit by the Treaty of Paris." Maclachlan says, in a long note (Arnould, 6th ed. vol. ii. p. 693), that there is no such condition in the Treaty of Paris of 1763, and he suggests a different interpretation of Lord Mansfield's judgment, which as reported is by no means clear. As, however, Arnould questions the soundness of Lord Mansfield's decision as he understood it (see 2nd ed. p. 743, n. (*t*)), and as it is contrary to the later decisions that treaties are part of the law of the states who are parties to them (see *post*, § 746), the editors do not think it necessary to reprint Maclachlan's note.

(*t*) Planché *v.* Fletcher (1779), 1 Dougl. 251.

Sect. 743. France, Valin (*u*), Emerigon (*x*), and Pardessus (*y*) admit such insurances to be valid, but ground their validity chiefly on the concurrent usage of all commercial nations. Pothier, on abstract principles of morality, vehemently condemns the practice (*z*), and his views have been ably supported by Marshall in this country (*a*), and on the other side of the Atlantic by Chancellor Kent (*b*) and Story, J. (*c*). The reasonings, however, adduced by these eminent persons against the rule as established in this country by Lord Mansfield, and universally acted on in practice, did not appear to Arnould to be convincing (*d*).

The underwriter must be informed of the risk.

744. The ship or the goods thus engaged in the foreign smuggling trade are of course liable to seizure and confiscation by the foreign government. This liability materially increases the risk of the adventure, and ought, therefore, on the plainest principles of equity, to be disclosed to the underwriter at the time of effecting the insurance. Hence the rule is well established that the assured cannot recover on policies effected for the purpose of protecting a trade prohibited by foreign revenue laws, unless the underwriter were fully informed of the nature of the risk (*e*).

Effect of *lex loci contractus*.

Pardessus has raised the question whether, if the contract of insurance were made in the country whose revenue laws are violated by the traffic it is effected to protect, such contract

(*u*) 2 Valin, Comment. on Ordonnance de la Marine, tit. vi. art. 49.
(*x*) 1 Emerigon, c. viii. s. 5, p. 216.
(*y*) 3 Pardessus, Droit Com. art. 772.
(*z*) Traité d'Assurance, No. 58.
(*a*) 1 Marshall, Ins. 55.
(*b*) 3 Kent, Com. 263—265.
(*c*) Story, Conflict of Laws, s. 256, and on Agency, ss. 195 *et seq.*
(*d*) 2nd ed. vol. ii. p. 744, citing Lampredi, Del Commercio dei Neutrali, Pt. i. s. 1, cited in Azuni, Diritto Marittimo dell' Europa, Pt. ii. c. 2, art. i. vol. ii. pp. 47—50; 1 Emerigon, c. vii. s. 5, p. 216; and Pardessus, Droit Com. tom. 3, No. 772, and tom. 6, No. 1492.
(*e*) Emerigon, in the opinion with which he favoured Valin upon this question, and which is inserted in that writer's commentary on the Ord. de la Marine (2 Valin, tit. vi. art. 49), gives the authorities by which this rule is established. See also Fracis *v.* Sea Ins. Co. (1898), 3 Com. Cas. 229, *infra*.

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can nevertheless be enforced in the country of the assured: he is clearly of opinion that it might (*f*). No such general rule can be said to exist in this country. *Primâ facie*, according to English law, a contract is governed by the law of the country where it is made; but if it should appear clearly from other circumstances that the parties intended that their rights should be determined by some other law, our Courts will give effect to such intention. The fact that the contract is to be performed in another country is strong evidence of such intention (*g*).

Prohibition by obsolete foreign law.

The question whether an insurance illegal by the law of a foreign state is void in this country was raised, but not determined, some years ago. The policy was on arms on a voyage to Persia, and by Persian law their importation was forbidden. It was, however, proved that this law had never been enforced, and that arms had invariably been allowed to be imported into Persia on payment of duty; and Bigham, J., held that under the law of Persia, as it was in fact administered, the adventure was not illegal (*h*).

Illegality under trade and navigation laws.

745. As all traffic and all voyages carried on in contravention of the Acts passed for regulating the trade and navigation of the United Empire are illegal, it follows, on the same principles, that all insurances intended for their protection are void. Of these Acts the most celebrated were the Navigation Laws, now repealed. The principal Act in force for regulating the navigation of the United Kingdom is the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), by which the previous Merchant Shipping Acts were repealed and consolidated. Reference may also be made under this head to

(*f*) 6 Pardessus, Droit Com. art. 1492.
(*g*) See In re Missouri Co. (1889), 42 Ch. D. 321; Chatenay *v.* Brazilian Submarine Telegraph Co., [1891] 1 Q. B. 79; Royal Exchange Ass. Corp. *v.* Sjoforsakrings Aktiebolaget Vega, [1901] 2 K. B. at p. 574, per Bigham, J.; and the judgment of Swinfen Eady, J., in British S. Africa Co. *v.* De Beers Consolidated Mines, Ltd., [1910] 1 Ch. 354; affirmed, [1910] 2 Ch. 502; but reversed on another point, [1912] A. C. 52.
(*h*) Fracis *v.* Sea Ins. Co. (1898), 3 Com. Cas. 229.

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the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), as amended by a number of later Acts (*i*); to the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21) s. 8, as amended by the Customs (Exportation Prohibition) Act, 1914 (5 Geo. 5, c. 64), and by the Trading with the Enemy and Export of Prohibited Goods Act, 1916 (6 & 7 Geo. 5, c. 52); to the Exportation of Arms Act, 1900 (63 & 64 Vict. c. 44), as amended by the Customs (Exportation Restriction) Act, 1914 (5 Geo. 5, c. 2), and for the duration of the late war by the Customs (Exportation Restriction) Act, 1915 (5 & 6 Geo. 5, c. 52); and to the Pacific Islanders Protection Acts, 1872 and 1875 (35 & 36 Vict. c. 19; 38 & 39 Vict. c. 51).

An innocent assured is not affected.

When, however, the adventure is not itself unlawful, the fact that in the performance of the voyage a law relative to navigation is contravened does not make the insurance void unless the assured was aware of the illegality at the time when the insurance was made, or was himself a party to the illegality (*j*). Mere knowledge on the part of the assured that there is some illegality in the performance of the voyage does not make him a party to the illegality, when he has no control over the navigation of the ship (*k*).

This principle applies when the innocent assured is the owner of the ship, as well as when the insurance is made for other parties (*l*), and an authority from the owner to the master of the ship to do an illegal act will not be implied from the general powers of the latter. Thus, where the

(*i*) Some of the amending Acts, *i.e.*, the Customs (War Powers) Acts, 1915 and 1916, were only in force for the duration of the late war.

(*j*) Mar. Ins. Act, 1906, s. 41; Farmer *v.* Legg (1797), 7 T. R. 186; Carstairs *v.* Allnutt (1813), 3 Camp. 497; Metcalfe *v.* Parry (1814), 4 Camp. 125; Cunard *v.* Hyde (1858), E. B. & E. 670; 27 L. J. Q. B. 408; Cunard *v.* Hyde (1859), 2 E. & E. 1; 29 L. J. Q. B. 6; Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. 581; Wilson *v.* Rankin (1865), L. R. 1 Q. B. 162. See also Hobbs *v.* Henning (1865), 17 C. B. N. S. 791; 34 L. J. C. P. 117. Law *v.* Hollingworth (1797), 7 T. R. 160, is not consistent with the later decisions; see *ante*, §§ 703, 704.

(*k*) Cunard *v.* Hyde, *supra*.

(*l*) Dudgeon *v.* Pembroke, *supra*.

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master of a ship bound on a voyage from British North America to England, after the 1st of September, loaded part of a timber cargo on deck contrary to the provisions of the Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107), and sailed without the certificate required by that statute, the Exchequer Chamber held that the owner could recover on a policy on the freight of the voyage, though the master had a general authority to stow the cargo (*m*).

Even where the consequence of an illegality in the performance of the voyage was the condemnation of the ship for a breach of the Pacific Islanders Protection Act, 1872, it was held that an insurance by the innocent shipowner was not void, and that he could recover as for a loss by barratry (*n*).

Treaties of commerce part of the law of the land.

746. Besides the Acts of trade and navigation already referred to, our commercial intercourse with different states is mainly regulated by commercial treaties, which have at different times been entered into between our own country and the principal maritime states of Europe and America.

"Every treaty," says Lord Stowell, "is part of the private law of each of the countries which are parties to it, and is as binding on the subjects of each as any part of their own municipal laws" (*o*). Consequently, all insurances on ships or goods, navigated or conveyed contrary to the provisions of any commercial treaty subsisting between our own country and any foreign state, are inoperative and void, on the same principle as those effected on trading adventures which contravene the positive prohibitions of our own statutes (*p*).

Enactments for a collateral purpose do not affect the insurance.

747. It is where the Acts of Parliament or treaty regulations form part of the general commercial policy of the empire that a violation of their provisions renders illegal the

(*m*) Wilson *v.* Rankin, *supra*.

(*n*) Australasian Ins. Co. *v.* Jackson (1875), 33 L. T. N. S. 286.

(*o*) In the case of the Eenrom (1799), 2 C. Rob. 1, 6.

(*p*) See Wilson *v.* Marryatt (1798), 8 T. R. 31; *S. C.* in the Ex. Ch. (1799), 1 B. & P. 430; and Bird *v.* Appleton (1800), 8 T. R. 562.

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traffic or voyage, and avoids the insurances which are carried on or effected in contravention of their terms. The same consequences, it has been held, do not necessarily follow from the violation of Acts of Parliament, which, though connected with the trade and navigation of the country, are yet passed for a collateral purpose. Thus the want of a written agreement with the crew, in the form and of the contents required by the Merchant Seamen's Act (5 & 6 Will. 4, c. 19), was held not to render a voyage illegal, and consequently an insurance thereon void (*q*), nor the ship unseaworthy (*r*).

Illegality under the Convoy Acts

748. During the great maritime wars arising out of the French Revolution our government passed two Acts, one in 1797 (*s*), and a second, re-enacting the former, on the renewal of the war, in 1802 (*t*), with a view of compelling all ships not expressly excepted in the Act to sail with convoy, it having been found that, owing to their neglect to do so, our trade and shipping had suffered to a very considerable extent. These Acts, having been only passed to continue in force during the hostilities then existing, expired, the first on the ratification of the Peace of Amiens, and the second on the termination of the war in 1814. Sections 3 and 4 of the earlier Act imposed penalties for infringements, and expressly provided that in such case the insurance should be void and the premium not recoverable back.

Illegality under other occasional statutes.

749. Even in the absence of a provision specially avoiding the insurance, a policy on any subject for a voyage or trading, contravening the terms of occasional Acts of Parliament, is void.

Johnston *v.* Sutton.

Thus, where during the first American war an Act was passed expressly prohibiting all trading with the province of New York except in provisions for the use of the British forces, and then only provided a licence were produced

(*q*) Redmond *v.* Smith (1844), 7 M. & Gr. 457.
(*r*) Per Tindal, C. J., and Coltman, J., 7 M. & Gr. 474, 475.
(*s*) 38 Geo. 3, c. 76.
(*t*) 43 Geo. 3, c. 57.

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authorizing their export, an insurance effected on unlicensed goods on board a British ship, intended for the New York market, was held illegal and void under this statute, although the commander of the forces had by proclamation (unauthorized, however, by the statute) allowed the entry into New York of such unlicensed goods (*u*).

Parkin *v.* Dick.

Where, during the French war, an Act had been passed empowering his Majesty to prohibit the exportation of all naval stores without a licence, and an Order in Council was accordingly made, in which such exportation was prohibited under penalty of forfeiting the goods themselves and treble their value; it was held that a policy effected "on goods to be thereafter specified" for an outward voyage was rendered wholly void by the assured including in the specification afterwards made up by him some goods, the exportation of which was prohibited by this Order in Council, he having obtained no licence authorizing their exportation (*v*).

Lord Ellenborough in this case declared that, although the prohibited goods formed an exceedingly small portion of the whole venture, yet, as the whole was sought to be covered by one entire contract of insurance, such contract was entirely vitiated. "I have no scales," said his Lordship, "to weigh degrees of illegality" (*w*).

Seus, where a licence has been obtained.

750. In these cases no licence at all had been procured for the exportation of the prohibited goods, and all were insured under one policy; where, however, such licence had been obtained by the assured, the policy of insurance was held valid, notwithstanding prohibited goods of other persons had been put on board the same ship, but not covered by the same

(*u*) Johnston *v.* Sutton (1779), 1 Dougl. 254. The Act was 16 Geo. 3, c. 5 (1775).
(*v*) Parkin *v.* Dick (1809), 2 Camp. 221; *S. C.* 11 East, 502. Contrast Hagedorn *v.* Bazett (1813), 2 M. & S. 100, where, although goods were included in one policy, yet as they in fact belonged to different owners, only one of whom was an enemy, the insurance was held to be valid except as to the enemy's parcel.
(*w*) 2 Camp. 222.

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policy (*x*). In another case, where the assured had shipped more prohibited goods than the licence authorized, the insurance was held good as to those prohibited goods protected by the licence, and void as to the excess (*y*).

Informality in performing conditions of licence vitiates the entire insurance.

In a later case, before Lord Tenterden in the King's Bench, an informality in performing the conditions on which a licence for exporting gunpowder had been granted was held to vitiate the entire insurance on a general cargo, all belonging to the same owner, and of which the gunpowder exported under the licence formed part (*z*). The ground of this decision was that the informality in question rendered the licence wholly void, so that the case stood on the same ground as though no licence at all had been procured, and therefore fell within the general principle established in the case of Parkin *v.* Dick.

Gibson *v.* Service.

The following curious case shows the extent to which this principle has been carried by the English Courts:—A British ship had been permitted to take out a cargo of arms and gunpowder, on giving a bond, as required by law (*a*), that the same should be expended in trade on the coast of Africa, whither she was bound. An American ship, in pursuance of a previous agreement made before she sailed, met her in the river Congo in order to take the arms and gunpowder out of her there and carry them to America. In order to protect this enterprise an insurance was effected on the American ship "at and from the river Congo to Charleston": it was held, that this insurance was illegal and void, on the ground that the American ship was at the river Congo, in order to violate the laws of the country where the contract of insurance was made and sought to be enforced (*b*).

(*x*) Pieschell *v.* Allnutt (1813), 4 Taunt. 792.

(*y*) Keir *v.* Andrade (1816), 6 Taunt. 498. See also Butler *v.* Allnutt (1816), 1 Stark. 222; Shiffner *v.* Gordon (1810), 12 East, 296.

(*z*) Camelo *v.* Britten (1820), 4 B. & Ald. 184.

(*a*) 33 Geo. 3, c. 2, s. 4.

(*b*) Gibson *v.* Service (1814), 5 Taunt. 433; 1 Marshall's R. 119; *S. C.* Gibson *v.* Mair (1813), *ibid.* 39.

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Voyage legal in fact but not in terms.

751. In the following case a voyage was held legal, because justified by its object, though contravening the strict terms of an Order in Council:—Goods were insured on a voyage "from London to Helmsberg (a Swedish port), the Sound, and Copenhagen, all or either": the ship sailed under false clearances for the Swedish port, but with a real destination for Copenhagen, all intercourse with which place was strictly prohibited by certain Orders in Council then in force; as, however, it was proved, to the satisfaction of the jury, that the real object of the venture was to carry provisions to the British armament, then supposed to be at Copenhagen, and not to defeat the Order in Council by trading with the enemy, the Court held that the voyage was not illegal; they also held that, though the taking out a clearance for a place to which it was not intended to go subjected the party to a penalty, under the stat. 13 & 14 Car. 2, c. 11, s. 3, yet there was nothing in the Act, on the principle already referred to, to make the voyage illegal (*c*).

Voyages in contravention of embargo.

752. The sovereign power of every state has in time of war a clear right to establish, by proclamation or otherwise, an embargo on all ships in any port of its dominion; all insurances, therefore, effected on any ships, whether the property of foreigners or subjects, which sail in contravention of such embargo will be deemed in that state to be illegal and void. Thus, where the British Government in time of war had laid an embargo on all ships sailing with provisions from any port in Ireland, an insurance effected on a neutral (Venetian) ship, in contravention of such embargo, was on this ground held void (*d*).

Voyage illegal because against our war policy.

753. It is generally laid down by writers on the laws of war that the object of every belligerent state in time of war is to inflict on the enemy all the mischief, and deprive him of all the advantage, which the law of nations will permit.

(*c*) Atkinson *v.* Abbott (1808), 1 Camp. 535; (1809), 11 East, 135.

(*d*) Delmada *v.* Motteux (1785), 1 T. R. 85, n.; 1 Park, Ins. 505.

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Insurances on enemy's property void.

As one of the main sources of wealth and strength to every mercantile state consists in its maritime commerce, the law of nations has hitherto permitted each belligerent to endeavour, by every effort, to impede and annihilate such commerce, by destroying or making prize of the enemy's ships and merchandise; and, upon the same principles, the municipal or common law of every state has declared all insurances by its own subjects upon such ships or merchandise to be void (*e*).

We have elsewhere had occasion to advert to the course of decisions by which our Courts established that insurances by or on behalf of alien enemies were wholly illegal and void (*f*). We have seen it progressively decided that alien enemies could not sue on such contracts in our Courts, either by themselves or their agents (*g*); that such insurances were in themselves illegal, and therefore that, although effected before the breaking out of hostilities, yet they could not protect an enemy against the consequences of British capture after war had broken out (*h*); that no action, consequently, could be maintained upon them, even after the restoration of peace, in respect of such loss, or any other that had taken place during hostilities (*i*); although, supposing both the policy to have been effected and the loss to have accrued before the commencement of hostilities, the right of the alien enemy to sue upon such policy was only suspended during the continuance of war, and would revive upon its close (*j*).

Insurances on British trade with the enemy void.

754. In the decisions just referred to the insurance was generally effected on behalf of enemies, to protect their

(*e*) Cf. Janson *v.* Driefontein Mines, Ltd., [1902] A. C. at p. 499, per Lord Davey.

(*f*) *Ante*, Part. I. Chap. V.

(*g*) Brandon *v.* Nesbitt (1794), 6 T. R. 23; Bristow *v.* Towers (1794), *ibid.* 35.

(*h*) Furtado *v.* Rogers (1802), 3 B. & P. 191.

(*i*) *Ibid.*; Brandon *v.* Curling (1803), 4 East, 410; Gamba *v.* Le Mesurier (1803), *ibid.* 407.

(*j*) Flindt *v.* Waters (1812), 15 East, 260, 266; Harman *v.* Kingston (1811), 3 Camp 150; Bolton *v.* Dobree (1808), 2 Camp. 163; Hagedorn *v.* Bazett (1813), 2 M. & S. 100; Janson *v.* Driefontein Consolidated Mines, Ltd., [1902] A. C. 484.

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property during war from liability to British capture or other casualties: in these we are now to consider the design was to protect the interest of British subjects, during war, in trade carried on with the enemy without the king's licence. The question, therefore, involved in them was, whether trading with the enemy during war, without licence, was illegal in British subjects.

Potts *v.* Bell.

The question came before the Courts of common law in the case of an insurance effected by, and for, a British subject in time of war, to protect his interest in goods purchased by his agent of an enemy in the enemy's country, and shipped thence for England without a licence.

The Court of Common Pleas decided that this insurance was legal (*k*); but the Court of King's Bench, after two arguments, first by common lawyers and afterwards by civilians, and on the maturest deliberation, unanimously held that the insurance was wholly illegal and void (*l*).

This case, and that of the "Hoop," decided by Lord Stowell in the Admiralty Court shortly before it, have established the rule that all trading by the subjects of this country in time of war, without a licence, with the subjects, to the country, or by means of the property, of the enemy, is wholly illegal; and all insurance to protect such trading absolutely void (*m*).

British subject domiciled in a neutral state has the privileges of neutrality. Bell *v.* Reid.

755. A British subject, however, domiciled in a foreign country becomes, we have seen (*n*), for all commercial purposes, the subject of the foreign state; and he may, if it be a neutral state, legally trade even with the enemies of this country, and protect such trading by a policy effected here (*o*).

(*k*) Bell *v.* Gilson (1798), 1 B. & P. 345.

(*l*) Potts *v.* Bell (1800), 8 T. R. 548.

(*m*) Trading with the enemy by subjects of an allied state is equally unlawful, and renders the property engaged in such trade liable to condemnation in a British Prize Court: The Panariellos (1915), 1 Brit. & Col. Prize Cases, 195, affirmed on appeal (1916), 2 *id.* 47.

(*n*) *Ante*, § 93.

(*o*) The Danaüs (1802), cited in 4 C. Rob. 255; Bell *v.* Reid, and Bell *v.* Buller (1812), 1 M. & S. 726.

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Wilson *v.* Marryatt.

We have seen elsewhere (*q*) that if a neutral or a British subject continue in time of war to keep up a trading establishment in a hostile state, all his property connected with such hostile firm is liable to British seizure as enemy's property (*r*). There seems no doubt that all insurances effected here in time of war by a British subject, to protect such property, would be held wholly illegal and void.

Objection of illegal trading with the enemy must be taken in the first instance.

Where the underwriter intended to raise the objection that the insurance was void because effected to cover a trading with the enemy, it was held that he must take such objection in the first instance: where there was a verdict against him, the Court refused to grant him a new trial in order to avoid the contract on this ground (*s*).

The ship must have a distinct hostile destination at time of loss to make the voyage illegal.

756. In order to avoid a policy on the ground that it was intended to protect a voyage to a hostile port, it must be clearly made out that the ship was bound for a distinct hostile destination at the time of loss. Thus, it has been held that a policy "to any port or ports in the Baltic" was legal though some of those ports were hostile to this country and no licence had been obtained; for it was not shown that the ship, when captured, was sailing for a hostile Baltic port (*t*).

(*p*) Wilson *v.* Marryatt (1798), 8 T. R. 31. This does not apply to those subjects who migrate into the neutral country *flagrante bello*. The Dos Hermanos (1817), 2 Wheat. S. C. R. 76.

(*q*) *Ante*, § 97.

(*r*) The Vigilantia (1798), 1 C. Rob. 1; The Portland (1800), 3 C. Rob. 41.

(*s*) Gist *v.* Mason (1786), 1 T. R. 88.

(*t*) Wright *v.* Welbie (1819), 1 Chitt. 49; *S. P.* Anon. *ibid.* See also, as to insurance to any port or ports in the island of St. Domingo, when partly in possession of the French, partly of King Christophe, Johnson *v.* Greaves (1810), 2 Taunt. 344; Blackburn *v.* Thompson (1811), 3 Camp. 61; Muller *v.* Thompson (1811), 2 Camp. 610, per Lord Ellenborough.

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Insurance on goods of resident in a port of hostile occupation.

When such ports deemed neutral.

757. An insurance on goods to a friendly or neutral port, there to be delivered to a neutral, is valid though the neutral himself be resident in a port of hostile occupation (*u*).

During the unexampled circumstances of the great French war, when Napoleon, by the Berlin and Milan decrees, endeavoured to exclude English commerce from all the ports of the Continent, our Courts were frequently called upon to decide as to the hostile or non-hostile character of ports which were occupied by the arms, or coerced by the power, of the conqueror who aspired, and almost attained, to an universal empire over Europe.

Our Courts were naturally desirous not to defeat any contracts made to protect British trade with ports so situated, where they could possibly be upheld in compliance with the known rules of the law of nations. The principle, accordingly, upon which they acted with respect to such ports was to treat them as neutral, and, consequently, all trading to them as legal, in all cases where they still preserved the forms of an independent neutral government, though the enemy might have such a body of troops stationed there as effectively to exercise the real powers of sovereignty.

Donaldson *v.* Thompson.

Thus, although there was an overwhelming Russian force in the island of Corfu, yet, as the flag of the Ionian republic still flew in its ports, and the republican government continued to appoint a port admiral and receive consuls from foreign states, Lord Ellenborough held that Corfu was neutral (*v*).

Hagedorn *v.* Bell.

Similarly, while Hamburg was in the military occupation of Davoust with an overwhelming French force, but the Senate of Hamburg still continued in the full exercise of sovereign civil authority, Lord Ellenborough and the Court of King's Bench held that merchants domiciled there were neutrals; for Hamburg, having still the forms of her own

(*u*) Bromley *v.* Hesseltine (1807), 1 Camp. 75.

(*v*) Donaldson *v.* Thompson (1808), 1 Camp. 429.

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government, must be regarded as a neutral port though under hostile occupation (*x*).

Muller *v.* Thompson.

So, in 1811, when our commerce was totally excluded from Prussia under the Berlin decree, and no diplomatic intercourse subsisted between the two states, Lord Ellenborough held that, in the absence of open hostility, Prussia was not to be considered in a state of war with this country, and therefore that an insurance effected on the property of a British subject shipped hence for a Prussian port was not illegal (*y*).

The Courts are ruled by the government.

758. It is for the government of the country to determine in what relation any other country stands towards it. Wherever our government, in the course of the war, by Order in Council, Proclamation, or other act of supreme authority, declared any ports in the colonial or other possessions of the enemy not to be hostile, or when such order, &c., though issued for another purpose, contained a recognition that there were such non-hostile ports, a trading with such ports, though not directly sanctioned or permitted by the Order, was held to be legal without a licence, and insurances effected to protect such trading were upheld as valid. This principle was illustrated by decisions of the Courts with regard to those ports in the island of St. Domingo in possession of King Christophe, then in a state of rebellion against our enemies the French; and it was held on more than one occasion, that trading between this country and such ports was valid without any licence (*z*).

The government may license trading with the enemy.

The executive power of the state, being the sole and supreme arbiter of all questions relating to peace and war, may grant to any such of its subjects as it pleases any privilege or licence to trade with the enemy, or to hostile ports, on any terms and for any period that may appear expedient (*a*).

(*x*) Hagedorn *v.* Bell (1813), 1 M. & S. 450.

(*y*) Muller *v.* Thompson (1811), 2 Camp. 610.

(*z*) Johnson *v.* Greaves (1810), 2 Taunt. 344; Blackburn *v.* Thompson (1811), 3 Camp. 61; see also Atkinson *v.* Abbott (1809), 11 East, 135.

(*a*) Cf. Vandyck *v.* Whitmore (1801), 1 East, 475; Schrœder v. Vaux (1812), 15 East, 52; Robinson *v.* Touray (1813), 1 M. & S. 217; Rucker *v.* Ansley (1816), 5 M. & S. 25.

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Illegality under the law of nations.

Neutrality generally.

759. A neutral state is one which, on the breaking out of war between any two or more Powers, continues in a state of peace, and wholly abstains from taking any part in the hostilities of the belligerents.

Such is the definition generally given of neutrality by the writers upon public law. The state of neutrality, in their view of it, rather imports the duty which a neutral owes to the belligerents than the relative situation in which either of the belligerents may choose to place the neutral state. But it must not be forgotten that it belongs to every state to pronounce upon the continuance either of amity, hostility, or neutrality as between itself and any other state; and consequently there is no doubt that either belligerent may continue for his own purposes to treat any state as neutral, long after such state has ceased to observe towards him a strictly neutral conduct. Nations are not bound to take up every cause of just offence, nor are they of necessity to be considered as hostile to each other, if there be a sort of condonation on the one side, for the purpose of continuing commerce with the other, which has given just cause of offence. The term neutrality, in a more enlarged sense, may be extended to signify this kind of permitted relation between any two states, after the right to its continuance has been forfeited by one of them (*b*).

Principal duties of neutrals.

760. The following rules embody the most important duties of neutrality according to our Prize Law. Their infringement renders neutral voyages and neutral trading illegal from the belligerent point of view, and consequently, in the Courts of the belligerent state, avoids insurances designed to protect them:—

1. Neutrals must not, during the continuance of hostilities, furnish the enemy with warlike stores or other articles which

(*b*) See the judgment of Lord Ellenborough in Hagedorn *v.* Bell (1813), 1 M. & S. 450, 459.

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2. Neutrals must not engage in voyages or carry on traffic in violation of blockades, established by a belligerent state and maintained with an effective force.

3. Neutral states must not, in time of war, engage in the privileged colonial or coasting trade of the enemy, which in time of peace was not open to them, but solely confined to the subjects of the enemy state.

4. All neutral ships are liable in time of war to be searched by belligerent cruisers, in order to ascertain their national character and whether they are carrying on any traffic prohibited by the laws of war.

5. Enemy's goods were, under the old established law of nations, not protected from seizure by being carried in neutral ships. The Declaration of Paris, however, introduced a different rule among the Powers that have adhered thereto (*d*) in these terms: "The neutral flag covers enemy's goods, with the exception of contraband of war" (*e*). But even under the old rule the carriage of enemy's goods was no violation of neutrality, and imposed no forfeiture on the rest of the venture belonging to other owners.

(*c*) *A fortiori*, a neutral vessel acting as a transport or fleet auxiliary in the service of a belligerent commits a breach of the duty of neutrality, for which she is liable to condemnation. See The Friendship (1807), 6 C. Rob. 420; The Orozembo (1807), *ibid.* 420; The Bangor, [1916] P. 181. Cf. The Alwina, [1918] A. C. 444; The Svithiod, [1920] A. C. 718. The carriage of despatches for a belligerent may also, unless done innocently, be a violation of the duty of neutrality and involve the condemnation of the vessel. See The Atalanta (1807), 6 C. Rob. 440; The Caroline (1807), *ibid.* 461; The Madison (1810), Edw. Adm. R. 224; The Rapid (1810), *ibid.* 228. Art. I. of The Hague Maritime Convention, No. XI. of 1907, declares that the postal correspondence of neutrals or belligerents, whether official or private, is inviolable, and therefore the rule should not apply to the carriage of mails.

(*d*) See *ante*, § 672.

(*e*) In The Dirigo, [1919] P. 204, the Crown contended that this provision only enured for the benefit of the neutral shipowner, and therefore gave him alone the right to complain of the seizure of the goods; but Lord Sterndale held that the Declaration protected the goods themselves.

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In the case of a war between foreign states, our Courts recognize the rights of British subjects and other neutrals to carry on their trade with a belligerent (subject to the other belligerent's right of capture). Consequently the carriage of contraband goods, or voyages in breach of blockade, are not considered illegal (*f*); and it necessarily follows that insurances on such goods or voyages are not illegal (*g*). If, however, the nature of the risk be not disclosed to the underwriter, he will be entitled to avoid the insurance on the ground of concealment.

We will consider briefly the consequences of some of the more important breaches of neutral duty, as far as they bear on the validity of contracts of marine insurance.

Insurances on articles contraband of war.

761. The first and most important restriction is on the supply to a belligerent, by a neutral, of articles which are contraband of war. The natural question then is, What articles of commerce are contraband of war?

What articles are contraband.

Classification of Grotius.

Grotius, in a classification which has been adopted in our Prize Law and that of the United States, divided all articles of commerce, with reference to this subject, into three classes:—(1) Articles such as arms and ammunition, which are of use in war only (*h*); (2) Articles which are of no use in war, but are only luxuries; (3) Raw materials which may be wrought up, or articles which may be used, for the purposes of war, but which are also of use for peaceful purposes, and are hence frequently termed articles *ancipitis usus* (*i*).

With regard to the two former classes there never has been

(*f*) Ex parte Chavasse, In re Grazebrook, per Lord Westbury (1865), 34 L. J. Bank. 17; The Helen (1865), L. R. 1 A. & E. 1; Caine *v.* Palace SS. Co., [1907] 1 K. B. at p. 679. See also The Santissima Trinidad (1822), 7 Wheaton, 283, and Richardson *v.* Maine Ins. Co. (1809), 6 Mass. 102.

(*g*) Duer maintains (vol. i. p. 755) that an insurance effected in a neutral country on a voyage to a blockaded port is illegal, and relies on Harratt *v.* Wise (1829), 9 B. & Cr. 712; Naylor *v.* Taylor (1829), *ibid.* 718; and Medeiros *v.* Hill (1832), 8 Bing. 231. These cases are, however, inconclusive, and cannot prevail against the later authorities.

(*h*) See also Azuni, Diritto Marittimo, c. iii. art. 2, vol. ii. p. 181.

(*i*) Grotius, De Jure Belli, lib. iii. c. 1, s. v. § 1.

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any doubt; the *instrumenta belli*, which form the first class, have always been held contraband of war; and the articles of mere luxury never. It is with regard to the third class, or articles *ancipitis usus*, that the great uncertainty has prevailed; neutral states having uniformly contended in regard to these articles for freedom of commerce, while belligerents have insisted on the rigour of war. Attempts to fix a settled list of contraband articles were never so difficult as at present, when the system and means of warfare are the subject of constant change (*k*).

Claims of the Armed Neutrality of 1780.

The Armed Neutrality of 1780, and again of 1801, was a confederation of the northern Powers, headed by Russia, the object of which was to insist, amongst other things, that no articles should be deemed contraband of war, except those which were actually wrought up into the form of instruments of offensive or defensive warfare (*l*).

Articles *ancipitis usus*, when contraband.

762. Some articles *ancipitis usus*, which are in their nature peculiarly serviceable in warfare, *e.g.*, materials directly used for shipbuilding, have invariably been held to be contraband.

The great question is, for what object are

The criterion whereby to determine whether other articles *ancipitis usus* are contraband or not is the object for which they are destined—whether for the ordinary uses of life, or

(*k*) See Azuni, Diritto Marittimo, c. ii. art. 5, for the provisions of treaties on this subject, anterior to the French Revolution. It is the practice of most states, on the outbreak of hostilities in which they are engaged, to issue proclamations specifying the articles which they will treat as contraband. The Declaration of London adopts the threefold classification of Grotius, and contains (arts. 22, 24) lists of articles which may without notice be treated as absolute or conditional contraband, and (art. 28) a list of articles which are never to be deemed contraband; but in the late war it soon became obvious that many omitted articles ought to be included in the lists of absolute or conditional contraband. See *post*, § 763.

(*l*) 2 Azuni, Diritto Marittimo, c. ii. art. 5, pp. 131, 137. Most of the naval Powers, except Britain, acceded to the Armed Neutrality in 1780. The principles of the armed confederacy were abandoned in 1793 by the naval Powers of Europe; in 1801 they were attempted to be revived, but the attempt was immediately repressed by England, and in the course of that year finally abandoned: 1 Kent, Com. 126, 127.

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for military use? If the former, they are not contraband; if the latter, they are. Therefore they are now usually called conditional contraband. The nature of the port to which they were sent used to be considered the best practical test of this question. If the port were a general commercial one, it was presumed that the articles were going for civil use, though occasionally a ship of war might be constructed in that port; but if the great predominating character of the port, like Brest in France, or Portsmouth in England, were that of a port of naval equipment, it was presumed that the articles were going for military use, though it was possible they might have been applied to civil consumption (*m*). This test has, however, lost most of its worth in this age of railway conveyance, when in most civilized countries goods can easily be transported by land from one place to another.

articles *ancipitis usus* destined?

The best practical test of this question used to be the nature of the port to which they were sent.

Tests in Declaration of London.

By art. 33 of the Declaration of London conditional contraband is liable to capture when destined for the use of the armed forces or of a government department of the enemy (unless in the latter case it cannot in fact be used for the purposes of the war); and by art. 34 such a destination is presumed if the goods are consigned to enemy authorities, or to a trader (commerçant) established in the enemy country who, as a matter of common knowledge, supplies goods of this kind to the enemy, or if they are being sent to a fortified place of the enemy, or to a place serving as a base for his armed forces.

Tests in Orders in Council, 1914—1916.

The Order in Council of the 20th August, 1914, by which the Declaration of London was adopted and put in force with certain modifications, declared that the distinction referred to in art. 33 should also be presumed to exist if the goods were consigned to or for an agent of the enemy state or to or for a merchant or other person under the control of the authorities of the enemy state. Further modifications were made by subsequent Orders in Council, and finally the Order of the 7th July, 1916, by which the

(*m*) The Jonge Margaretha (1799), 1 C. Rob. 189. See also The Neptunus (1800), 3 C. Rob. 108.

Sect. 762. Declaration of London was abrogated, after reciting that on account of the changed conditions of commerce and the diversity of practice doubts might arise as regards some rules which Great Britain and her allies regarded as being in conformity with the law of nations, declared that the hostile destination required for the condemnation of contraband should be presumed to exist, until the contrary was shown, if the goods were consigned to or for an enemy authority, or an agent of the enemy state, or to or for a person in territory belonging to or occupied by the enemy, or to or for a person who during the war had forwarded contraband goods to such authority, agent or person, or if the goods were consigned "to order," or if the ship's papers did not show who was the real consignee of the goods (*n*).

Articles held to be contraband of war.

763. In earlier wars ships, naval stores, timber, and all other materials which serve directly for the purposes of shipbuilding, were generally held to be contraband of war, unless excepted by particular treaties (*o*). Sail-cloth was held to be universally contraband, even when destined to ports of mere mercantile naval equipment (*p*). Tallow was held not to be contraband unless destined for a port, such as Brest, of mere hostile equipment (*p*). Cordage, generally speaking, was held to be contraband; and so were anchors and all other *armamenta navis* (*q*). Sulphur and saltpetre, as being main ingredients of gunpowder, were almost invariably regarded as contraband, and were admitted to be

(*n*) It was held that the ship's papers did not show who was the consignee where the shipper retained control by consigning the goods to himself or his agent: The Hellig Olav, [1919] A. C. 526; The Kronprins Gustav, [1919] P. 182; The Urna, [1920] A. C. 809; or where the person to whom the goods were made deliverable by the bill of lading was a mere dummy without any real control over the goods: The Louisiana, [1918] A. C. 461; The Rijn, [1917] P. 145; [1919] A. C. 546; The Sydland, [1917] P. 161, n. Cf. The Kronprinzessin Victoria, [1919] A. C. 261.

(*o*) See Rutherforth, Ins. lib. i. c. 9.

(*p*) The Neptunus (1800), 3 C. Rob. 108.

(*q*) The Jonge Margaretha (1799), 1 C. Rob. 194.

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so even by the terms of the Armed Neutrality (*r*). Tar, pitch, and hemp were also held to be contraband in the last French war (*s*).

Provisions. Provisions, generally speaking, were not treated as contraband, especially if they were the produce of the country which exported them, unless they were directly sent for the supply of a military force or in relief of besieged or blockaded places (*t*).

Coal. Coal being used for a great number of innocent purposes is in its nature an article *ancipitis usus*, and although no English Prize Court had been called upon to decide as to its quality, the declarations of British governments showed an intention to consider it contraband or not according to circumstances (*u*).

Contraband in the late war. At the commencement of the late European war the British Government issued a Proclamation which specified the articles which they intended to treat as absolute and conditional contraband respectively. The lists were short and identical with those contained in arts. 22 and 24 of the

(*r*) Azuni, Diritto Marittimo, c. ii. art. 5, vol. ii. pp. 137, 138.

(*s*) The Twee Juffrowen (1802), 4 C. Rob. 242; The Maria (1799), 1 C. Rob. 340, 372. Pitch, tar and hemp, the produce of neutral states, owned by their subjects and carried in neutral ships, were, however, held to be subject to the right of pre-emption only, instead of confiscation, or were even restored: *ibid.*; The Apollo (1802), 4 C. Rob. 158.

(*t*) The Jonge Margaretha (1799), 1 C. Rob. 189, 193. See 1 Kent, Com. 135, collecting the authorities. In the Franco-Chinese War of 1885, France asserted the principle that it is lawful to reduce an enemy by famine (a principle put forward by her enemies in 1793, and in theory then maintained by England: see Wheaton, History of the Law of Nations, 373—380), and declared rice to be contraband of war. The British Government protested against this attempt to treat provisions indiscriminately as contraband; but the early close of the war left the question unsettled (see Parl. Papers, France, I. 1885). In the war with Japan, Russia at first declared provisions to be absolutely contraband, but afterwards, in consequence of the strong representations of neutral governments, agreed to regard them as only conditional contraband.

(*u*) See Hansard, 3rd Ser. vol. 203, p. 1093; Parl. Debates, 4th Ser. vol. 56, p. 656. France declared coal not to be contraband in 1870, while Prussia strongly maintained the contrary. In the war between Russia and Japan the former Power declared coal to be contraband; the latter placed it in the list of articles conditionally contraband.

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Declaration of London, except that aircraft and the accessories thereof became absolute instead of conditional contraband. As the war progressed considerable additions were made to the lists, and the Proclamation of the 2nd July, 1917, which consolidated those previously issued, specified thirty-four articles as being conditional, and nearly two hundred articles as being absolute contraband. The final list of absolute contraband included not only arms, projectiles, explosives, warships, armour plates and other articles of a distinctively military character, but also barbed wire, gold, silver and securities, motor vehicles, hides, alcohols, mineral oils, lubricants, rubber, silk, cotton, wool, starch, tar, hemp, sulphur, and many chemical preparations and other substances used in the manufacture of the numerous articles employed in modern warfare. Among the articles treated as conditional contraband were foodstuffs (*x*), forage for animals, fuel, harness, oils and fats, railway materials, clothing suitable for use in war, and vessels and craft of all kinds.

Art. 1 of the Hague Convention, No. XI. of 1907, declares that the postal correspondence both of neutrals and of belligerents is inviolate on the high seas. It was held that the article did not protect contraband articles which the Germans attempted to import in letter or parcels mails (*y*).

Contraband is of an infectious nature.

Contraband articles are said to be of an infectious nature, contaminating whatever of the cargo and of the ship belongs to the same owner, so as to render them liable to seizure and confiscation (*z*).

(*x*) Coffee, cocoa-beans and sausage casings have been held to be foodstuffs: see The Sydland, [1917] P. 161, n.; The Rijn, [1917] P. 145; [1919] A. C. 546; The Cometa (1916), 2 Brit. & Col. Prize Cases, 306; but not borax, although it is used as a preservative for foodstuffs: The Progreso (1917), 2 Brit. & Col. Prize Cases, 430.

(*y*) The Simla (1915), 1 Brit. & Col. Prize Cases, 281; The Tubantia (1916), 32 T. L. R. 529. See also The Noordam (No. 2), [1920] A. C. 904.

(*z*) The Staadt Embden (1798), 1 C. Rob. 26; The Ringende Jacob (1798), *ibid.* 89; The Jonge Tobias (1799), *ibid.* 329; The Kronprinsessan Margareta, [1917] P. 114; [1921] W. N. 22; The Posteiro (1917), 3 Brit. & Col. Prize Cases, 275; The Parana, [1919] P. 249; [1921] W. N. 22.

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Penalty for carriage of contraband.

763a. In the last French war the only penalty imposed on the shipowner for having contraband articles on board was the loss of freight and expenses, unless there was fraud on the part of the ship for the purpose of protecting the contraband articles by a false destination or false papers, which subjected the ship also to confiscation (*a*). There was some authority in the judgments of Lord Stowell for the stricter rule that if the shipowner is privy to the carriage of the contraband goods, the vessel is involved in their fate (*b*), but there was no case in which the ship was condemned in the absence of misconduct. Several of the Continental states had rules which made the ship liable to forfeiture when a certain proportion of the cargo was contraband (*c*), and this principle was adopted in the Declaration of London, art. 40 of which provides "that the vessel may be condemned if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo" (*d*). In the late war the question was fully considered in The Hakan (*e*), a case of a Swedish vessel captured while carrying a full cargo of salted fish to Germany. Sir Samuel Evans held that apart from art. 40 of the Declaration of London, the Prize Court was justified in accepting as part of the law of nations the rule that the vessel might be condemned where the contraband formed more than half the cargo; but his

(*a*) The Mercurius (1799), 1 C. Rob. 288; The Franklin (1801), 3 *ibid.* 217; The Edward (1801), 4 *ibid.* 68; The Ranger (1805), 6 *ibid.* 125. See The Jeanne, [1917] P. 8; but the Court can exercise a discretion in exceptional cases, and in The Prins der Nederlander, [1920] P. 216 (under appeal), Sir Henry Duke allowed the freight of a cargo of conditional contraband which the shipowners were innocently carrying to a neutral port.

(*b*) See The Jonge Tobias (1799), 1 C. Rob. 329; The Neutralitet (1801), 3 C. Rob. 295. In Carrington *v.* Merchants' Ins. Co. (1834), 8 Peters, 495, the Supreme Court affirmed the milder rule that the ship is only liable to forfeiture when there has been fraud. See also The Bermuda (1865), 3 Wallace, 514, 555.

(*c*) See The Hakan, [1916] P. at p. 278, where the rules adopted by the chief maritime states are stated in the judgment.

(*d*) This rule was retained by the Order in Council of the 8th July, 1916 (see *ante*, § 672, note (*k*), which rescinded the adoption of the Declaration of London.

(*e*) [1916] P. 266; [1918] A. C. 148.

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opinion was not adopted by the Privy Council, where the condemnation of the ship was affirmed only on the principle that knowledge of the character of the goods on the part of the shipowner is sufficient to justify the condemnation of a vessel—at any rate, the judgment continued, where the goods in question constitute a substantial part of the whole cargo (*f*). There was also a suggestion in the judgment of the Privy Council that the like knowledge on the part of the charterer or master might be a ground for confiscation of the ship. In later cases where the whole cargo was contraband, both Lord Sterndale and Sir Henry Duke refrained from condemning the vessel under the "half contraband" rule (*g*). Where a ship was chartered for a single voyage to a neutral port, and carried a miscellaneous cargo, including a small quantity of contraband, but neither the owner nor the master knew that it had an ultimate enemy destination, Lord Sterndale refused to condemn the vessel on the ground of the charterer's knowledge (*h*). Where, on the other hand, some ships had been let on time charter for a number of years and the charterers, having full control over the employment of the vessels, used them with the masters' knowledge in a line to Copenhagen which they had organized for the purpose of supplying foodstuffs to the German Government, Sir Henry Duke condemned the vessels on the broad facts as to the whole undertaking (*i*).

The decisions, therefore, have established that knowledge on the part of the shipowner of the nature and destination of the goods may, even in the absence of fraudulent devices, be a sufficient ground for the condemnation of the vessel, and that such knowledge on the part of the master and

(*f*) In The Hillerod, [1918] A. C. 412, where the ship was condemned for carrying a cargo of contraband to a neutral port, it was held that knowledge of an ultimate enemy destination ought to be inferred where, as reasonable men, the shipowners must have known that the business was not the ordinary kind of importation and refrained from making inquiries.

(*g*) See The Dirigo, [1919] P. 204; The Kim, [1920] P. 319.

(*h*) The Ran, [1919] P. 317.

(*i*) The Kim, *supra*.

charterer may also in some cases warrant her condemnation. Notwithstanding the decision of Sir Samuel Evans in The Hakan (*k*), however, it seems not to be established that the "half contraband" rule has become part of the Prize Law of this country. Sect. 763a.

Are goods on a voyage to a neutral port ever contraband?

764. It was held by Lord Stowell that the question of contraband could not arise, except in the case of goods taken in the actual prosecution of a voyage to an enemy's port (*l*); and there is no instance, in the English prize cases, before the late war, of goods being condemned which were at the time of seizure on their way to a neutral port. The conditions under which our wars were formerly carried on, and the difficulties of land transit, had no doubt made it unnecessary for this country to assert a greater right; but in our time, especially when there is communication by railway between the neutral port and the enemy's country, a limitation of the right of seizure to goods actually on their way to an enemy's port has become unreasonable. On principle, the proper rule ought to be that all goods of a contraband kind which are intended for the use of the enemy in the operations of war are liable to seizure, and this is the rule which in later years was acted upon by the Courts of other countries (*m*). Thus in The Peterhoff (*n*), the Supreme Court of the United States condemned goods of a contraband kind which were on a voyage during the Civil War to Matamoras, a Mexican town, whence they would have

(*k*) *Supra*.

(*l*) The Imina (1800), 3 C. Rob. 167.

(*m*) By the Supreme Court of the United States in The Commercen (1816), 1 Wheaton, 382; The Springbok (1866), 5 Wallace, 1; The Peterhoff (1866), *ibid*. 28. By the French Prize Court during the Crimean War, in The Vrow Howina, Calvo, Droit International, 4th ed. vol. 5, s. 2767. By the Italian Prize Court in the Abyssinian War, in The Doelwyk: see Ruys *v*. Royal Exchange Ass. Corporation, 2 Com. Cas. 201; [1897] 2 Q. B. 135. The decision in The Springbok led to a correspondence between the British and American Governments, but was finally acquiesced in by the former. (See Parliamentary Papers, 1900, Miscellaneous, No. 1.)

(*n*) *Supra*.

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been transported across the river to the Confederate States. In an action on a policy on this identical voyage, the Court of Common Pleas re-affirmed the rule that goods on a voyage to a neutral port are not liable to be condemned as contraband (*o*); but the decision was explained in a later case in the same Court, also on a policy on this voyage, as relating merely to a question of pleading, and the Court held that a warranty "no contraband" was broken in the case of goods going to Matamoras with an ulterior hostile destination (*p*). It was decided by Sir Samuel Evans in the case of The Kim (*q*) that this application of the doctrine of "continuous voyage" or "ultimate destination" to the carriage of contraband goods captured on their way to a neutral port had become part of the law of nations before the late war. In nearly all the cases in the Prize Court in which goods were condemned as contraband, the ship was on a voyage to a neutral port, and in The Louisiana (*r*) the Privy Council held that the doctrine must be applied in every case of contraband in which the Crown had not waived its rights (*rr*).

(*o*) Hobbs *v.* Henning (1864), 17 C. B. N. S. 791; 34 L. J. C. P. 117.

(*p*) Seymour *v.* London & Provincial Mar. Ins. Co. (1872), 41 L. J. C. P. 193.

(*q*) [1915] P. 215.

(*r*) [1918] A. C. 461, 464. Other cases in which the Privy Council affirmed the condemnation of contraband goods seized on a voyage to a neutral port are the Hellig Olav, [1919] A. C. 526; The Rijn, [1917] P. 145; [1919] A. C. 546. In The Balto, [1917] P. 79, Sir Samuel Evans held that contraband material on its way to a neutral country for the purpose of being manufactured there into contraband articles for the use of the enemy forces, was subject to condemnation under the doctrine of continuous voyage. Where, however, the intention was to convert raw material captured on its way to a neutral country into a manufactured article for consumption there, he held that it could not be condemned merely because its importation would allow other articles of a like kind to be imported by other parties to the enemy: The Bonna, [1918] P. 123.

(*rr*) The Declaration of London makes a distinction between absolute and conditional contraband. The former is liable to capture "whether the carriage of goods is direct or entails transhipment or a subsequent transit by land" (art. 30); the latter is not liable to capture when it is to be discharged at an intermediate neutral port, unless the enemy country has no seaboard (arts. 35, 36).

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Insurances on contraband void in the belligerent country.

Aliter, in the Courts of a neutral state.

765. Insurances on articles contraband of war are wholly void in the country of the hostile belligerent, and incapable of being enforced in its Courts (*s*).

If, however, the policies were effected by or for neutrals and sought to be enforced in the Court of a neutral state, the case, as we have seen (*t*), would be different. The contraband articles, indeed, are liable to seizure and confiscation at the hands of the enemy; but the insurance by a neutral of articles contraband of war being *per se* a valid contract, may be enforced in the Courts of the neutral country, provided the nature of the trade and of the goods was disclosed to the underwriter, or provided there be just ground, from the circumstances of the trade or otherwise, to presume that he was duly informed thereof (*u*).

Contraband trade implies a state of war.

The term "contraband of war" implies the existence of war. A policy, therefore, on arms and ammunition exported from Great Britain to Madeira in the dominions of Portugal in time of peace, was held valid, notwithstanding a clause in our treaty of 1810 with that country excepting commerce in articles contraband of war (*x*).

Insurances on voyages in violation of blockade.

766. It is an invariable principle of the law of nations, that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he thereby renders his ship and cargo liable to confiscation (*y*). All

(*s*) 1 Marshall, Ins. 75; see Gibson *v.* Service (1814), 5 Taunt. 433; 1 Marshall, R. 119.

(*t*) *Ante*, § 760.

(*u*) 3 Kent, Com. 267. There is a possible exception in the case of adventures unlawful under the Foreign Enlistment Act.

(*x*) Wilbraham *v.* Wartnaby (1830), Lloyd & Wels. 144.

(*y*) Where the existence of the blockade could not have been known to the owner of the cargo at the time of shipment, Lord Stowell ordered its release in the case of The Mercurius (1798), 1 C. Rob. 80. It may be doubted whether he would have relaxed the strictness of the rule in a case where the cargo-owner could have given orders when the blockade became known to divert the goods to another destination. See his judgments in The Adonis (1804), 5 C. Rob. 256; and The Adelaide (1801), 3 C. Rob. 281. Where the cargo has been shipped at a time when notice of the blockade may be imputed to the cargo-owner, he cannot be allowed to say that he was not

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insurances, consequently, on voyages or trading adventures commenced or carried out with a fixed purpose of violating, or in actual violation of, the laws of blockade, are incapable of being enforced in the Courts of the state which imposed the blockade. But, as we have already seen (*z*), neither the voyage nor any contract connected with it is illegal (notwithstanding the distinct object be to run the blockade), except in the Courts of the hostile belligerent. Yet as an intention to commit a breach of blockade increases the risk, it vitiates the policy, unless this intention was known to the underwriter at the time when the policy was made.

The consequences of a breach of blockade being highly penal, the law of nations has been very careful to determine this point, and has declared that it can only take place under the three following conditions (*a*):—

What constitutes a breach of blockade.

First, the port must be in an actual state of effective blockade, and such fact must be clearly established to the satisfaction of the Court.

Secondly, the neutral must have had due previous notice of the existence of such blockade.

Thirdly, he must have been guilty of some distinct act of violation, either by coming into or out of the port with a cargo laden after the commencement of the blockade, or by setting out, after knowledge that the blockade exists, with the intention of violating it.

Entry into port must be dangerous.

767. A port is in a state of blockade when it is invested by a number of vessels sufficiently near the port to make the entry evidently dangerous (*b*). If, however, the attacking

privy to the master's violation of the blockade; a different rule would make it impossible to maintain the blockade effectively: see Baltazzi *v.* Ryder (1858), 12 Moo. P. C. 168, and the cases therein cited.

(*z*) *Ante*, § 760.

(*a*) Although in effect the Reprisals Order of the 11th March, 1915, established a blockade of Germany, technically a blockade was not established, and our Prize Law on the subject, as declared in previous wars, has not been affected by the decisions of the Prize Court.

(*b*) The Mercurius (1798), 1 C. Rob. 80; The Betsey (1798), *ibid.* 93; The Stert (1801), 4 C. Rob. 65. See also the definition given in the convention between Great Britain and Russia on 17th June, 1801; 1 Kent, Com. 145. The 4th Article of the Maritime Declaration of the Treaty of Paris of 1856 is in these words: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The rule that a blockade must be effective was affirmed by the Supreme Court of the United States in The Olinda Rodrigues (1899), 67 Davis (174 U. S.), 510. In the conditions of modern warfare the blockading ships will no doubt operate at a much greater distance from a blockaded port than formerly.

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force have been dispersed by storm, the commander retaining the purpose of returning immediately to the station, and using due diligence for that purpose, this does not amount to a suspension of the blockade (*c*). But if the blockade be raised, either wholly or partially, whether by the coercion of a superior force, or by the deliberate act of the belligerent state, or even by the remissness of its cruisers, the trade of neutrals ought to be free (*d*).

A blockade is properly a uniform and universal exclusion of all vessels; if, therefore, some vessels are permitted to pass, others have a right to infer that the blockade is raised, and as there is no valid blockade, there can be no breach thereof (*e*).

Neutral must have notice of the blockade.

768. In the second place, it is absolutely necessary that the master shall have notice of the blockade before his ship or cargo can be confiscated for violating it. It is immaterial in what way he comes to the knowledge of the blockade; if it actually exists, and he has knowledge of it, he violates it at his peril. Even where he may not have actual knowledge of it, yet, if it have been notified to his government by the blockading Power, he will not be permitted to aver ignorance of it; for notice to foreign governments is held to be notice to all their subjects, to whom it is their duty to communicate it (*f*); nay, it was even held in one case by Sir W. Scott that

(*c*) The Frederick Molke (1798), 1 C. Rob. 86; The Columbia (1799), *ibid.* 154; The Hoffnung (1805), 6 C. Rob. 112.

(*d*) The Hoffnung (1805), 6 C. Rob. 112, 116.

(*e*) The Rolla (1807), 6 C. Rob. 344.

(*f*) The Neptunus (1799), 2 C. Rob. 110; The Adelaide (1799), *ibid.* 111, n.; see also The Calypso (1799), *ibid.* 298.

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a notification of blockade given to one state must be presumed, after a reasonable time, to have reached the subjects of neighbouring states, and it affects them with the knowledge of the fact (*g*).

The fixed time, however, allowed for the news of blockade to reach neutral countries is not the sole criterion of the right to enter the blockaded port; but it may be submitted as a question of fact to the jury whether the captain actually had such notice or not (*h*).

Effect of notice of cessation of blockade.

The effect of this notice may be purged by subsequent information, given by a fleet of the blockading government, that the blockade has ceased, although such information may be false (*i*). But the information to have this effect must proceed from someone on whom the captain would be justified in relying. Thus, the mistaken permission of an officer of a belligerent cruiser, not forming part of the blockade force, to enter a port of whose blockade the captain had notice, was held not to justify him in so entering (*k*). On the other hand, it will not be a violation of blockade for a captain to enter or clear out of a blockaded port, with a permission to that effect from the commander of the blockading squadron (*l*).

There must be an intention to break the blockade.

769. Thirdly, before the neutral trader can forfeit his neutrality on the ground of a breach of blockade, he must be shown to have had an intention to break the blockade, and also to have done some act towards putting that intention into execution. This may take place in different ways.

The most obvious act of violation is attempting to effect an entrance into a blockaded place in defiance of the investing

(*g*) The Adelaide (1799), 2 C. Rob. 111, n. The presumption of knowledge of a blockade would no doubt in these days of rapid communication be much greater than it was in Lord Stowell's time.

(*h*) Harratt *v.* Wise (1829), 9 B. & Cr. 712. See also Winder *v.* Wise (1829), Danson & Lloyd, 238.

(*i*) The Neptunus (1799), 2 C. Rob. 110.

(*k*) The Courier (1810), 1 Edw. 249.

(*l*) The Juffrow Maria Schroeder (1800), 3 C. Rob. 147; The Vrow Barbara (1799), *ibid.* 158, n.

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squadron; but, as the object of blockade is to prevent egress as well as ingress, the attempt to force a way out of a blockaded port is no less a violation of the blockade than an attempt to enter it, and if done knowingly or fraudulently will subject the neutral to a forfeiture of his neutrality and the confiscation of his ship (*m*).

Neutral may quit blockaded port if cargo *bonâ fide* loaded before declaration.

If the cargo, however, has been *bonâ fide* purchased or laden on board before the declaration of the blockade, the neutral will be allowed to come out of port with it, notwithstanding the blockade, without a forfeiture of his neutrality (*n*): in all cases a vessel that has entered a port before notice of the blockade may come out of it in ballast after such notice (*o*), or may bring away with her the cargo that she had imported before notice of the blockade, and which still remains on board of her. But a ship purchased at the blockaded port after the declaration of blockade cannot be cleared out from the port while the blockade continues (*p*).

Overland transit of goods to or from a blockaded port no breach.

It is not a violation of blockade in a neutral to purchase goods at the blockaded port and transport them thence overland to another port not blockaded, and then export them from the latter port (*q*); by parity of reasoning, it is not a breach of this warranty to transport goods by inland navigation from or to the blockaded port (*r*).

(*m*) The Frederick Molke (1798), 1 C. Rob. 86; The Neptunus (1799), *ibid.* 170; The Vrow Judith (1799), *ibid.* 150.

(*n*) The Betsey (1798), 1 C. Rob. 93; The Comet (1808), 1 Edw. 32. The general practice of belligerents is, in notifying a blockade, to allow a certain number of days for neutral ships to complete their loading and leave the port.

(*o*) The Frederick Molke (1798), 1 C. Rob. 86.

(*p*) The General Hamilton (1805), 6 C. Rob. 61; The Vigilantia (1805), *ibid.* 122.

(*q*) The Ocean (1801), 3 C. Rob. 297.

(*r*) The Stert (1801), 4 C. Rob. 65; The Jonge Pieter (1801), *ibid.* 79. See also The Peterhoff (1866), 5 Wallace, 28. The Order in Council of the 7th July, 1916, which revoked the application of the Declaration of London, declared that the principle of continuous voyage or ultimate destination should be applicable in cases of blockade as well as of contraband. For the effect of an Order in Council declaring or altering the rules of prize law see The Zamora, [1916] 2 A. C. 77.

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Sailing with notice of blockade generally a breach.

770. To constitute a breach of blockade, it is not in every case necessary that there should be a positive act of entry within the limits of the blockade. Where the captain before sailing has either impliedly or actually had notification of the existence of the blockade, the very act of sailing for the blockaded place with the intention of entering it if found practicable or expedient will (except in the case of very long voyages (*s*)) amount, from the very commencement of the voyage, to a breach of the blockade, and subject the neutral from that time to all the penalties of its violation (*t*).

So, although the neutral may have had no notice of the blockade at the time of first sailing, yet, if he be informed of the fact at any port at which he may afterwards touch, and still attempt to enter the blockaded port, this is a ground of condemnation (*u*).

Lingering near a blockaded port is a breach of blockade.

Lingering near a blockaded port, as well as continuing in the course towards it after notification, when it shows an intention to enter the port, is a breach of the blockade (*x*).

So sailing with instructions to make inquiries at blockaded port, except in case of distant voyages.

So, sailing after notification of a blockade, with instructions to proceed to the mouth of the harbour of a blockaded place to inquire if the blockade was raised, is a ground for confiscation (*y*).

Even an agreement by charter-party to proceed to a port which is afterwards blockaded does not justify the captain's proceeding on the voyage after notification of the blockade (*z*).

The mere act, however, of sailing for a blockaded port,

(*s*) Naylor *v.* Taylor (1829), 9 B. & Cr. 718.

(*t*) The Columbia (1799), 1 C. Rob. 154; The Neptunus (1799), 2 C. Rob. 110. Under the Declaration of London, a neutral vessel could only be captured for breach of blockade within the area of operations of the ships of war detailed to render the blockade effective (art. 17), and could not be captured if actually on her way to a non-blockaded port (art. 19).

(*u*) The Columbia (1799), 1 C. Rob. 154; Winder *v.* Wise (1829), Dans. & Ll. 238. See the *S. P.* variously decided in the Courts of the United States, 1 Phillips, Ins. s. 840.

(*x*) The Elizabeth (1810), Edw. 198; The Arthur (1810), *ibid.* 202.

(*y*) The Irene (1804), 5 C. Rob. 76.

(*z*) The Tutela (1805), 6 C. Rob. 177.

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after notice of the blockade, is not a forfeiture of neutrality, unless there was a premeditated design of breaking the blockade, supposing it should be found to continue in force on the ship's arriving at the port. In the case of distant voyages, such as those across the Atlantic, vessels were allowed to sail, after notice of a blockade, on a contingent destination for the blockaded port, subject to the duty of subsequent inquiry, at suitable places, as to the continuance of the blockade (*a*).

It it be attempted to prove by the sentence of a foreign Court of Admiralty that the ship was condemned for a breach of blockade, this can only be done by showing that the sentence on the face of it explicitly proceeded on that ground (*b*).

Insurance on neutral ships engaged in the coasting or colonial trade of the enemy.

771. It is contrary to the principles of the English Prize Law, that a neutral should be allowed to carry on the coasting or colonial trade of the enemy, not open to foreigners during peace, and thereby increase the enemy's resources during war.

Accordingly, the rule established by England is, that ships and cargo engaged in such trade shall be liable to confiscation as prize of war. This, which is frequently called the rule of 1756, from its having been first settled in that year, was frequently acted upon by Lord Stowell in the course of the wars arising out of the French Revolution (*c*).

There can be no doubt that an insurance, effected in this country, England being at the time a belligerent Power, to protect such privileged neutral trading, would be treated as wholly illegal and void by our Courts, on the ground that "trading to an enemy's colony with all the privileges of an enemy's ship causes a neutral vessel to be regarded as an enemy's ship, and renders her lawful prize" (*d*).

(*a*) The Shepherdess (1804), 5 C. Rob. 264; Naylor *v.* Taylor (1829), 9 B. & Cr. 718; Dalgleish *v.* Hodgson (1831), 7 Bing. 495; Medeiros *v.* Hill (1832), 8 Bing. 231.

(*b*) Dalgleish *v.* Hodgson (1831), 7 Bing. 495; 5 M. & P. 407.

(*c*) See The Immanuel (1799), 2 C. Rob. 186. The rule was applied by the Japanese Courts in The Montara (1905), 2 Russ. & Jap. Prize Cases, 403.

(*d*) Berens *v.* Rucker (1761), 1 W. Bl. 313.

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The coasting trade of this country was thrown open to foreign ships by the 17 & 18 Vict. c. 5.

Enemy's goods on board neutral ships.

772. Until the Declaration of Paris in 1856, it had come to be considered as an established rule of the law of nations, though none has been at times more vehemently contested by those states whose interests for the time being it opposed, that the neutral flag does not in time of war protect enemy's property from hostile seizure (*e*).

The carrying, however, of enemy's goods from the neutral territory to the enemy's country was not held to be a breach of neutral conduct, and if there were nothing unfair in the transaction, the neutral carrier was held entitled at the hands of the captors to the full freight due for the carriage of the goods upon the whole voyage, though he had not carried them to their place of destination, because a surrender of them to the captors is a delivery to the person who, by the rights of war, is put in the place of the consignee (*f*).

Insurance on goods of belligerent on neutral ship.

No insurance on such goods themselves could, of course, be enforced in the Courts of the hostile belligerent, and would by them be considered absolutely illegal and void if made by any of his subjects. If made, however, by neutrals, and sought to be enforced in neutral Courts, it would be otherwise; for as the neutral may lawfully carry enemy's property, there can be no doubt that he may lawfully insure it (*g*).

Insurances on neutral goods going to enemy's port.

An insurance may be lawfully effected in the belligerent country on the property of neutral owners, on board a ship which is also conveying enemy's goods to an enemy's port. The fact of carrying enemy's goods may (unless the belligerent is bound by the rule of the Declaration of Paris) subject the neutral ship to be detained and carried into port for investigation; yet it does not render the adventure illegal so as to affect the interest of neutral owners if not covered by the same policy as that by which the enemy's goods are insured.

(*e*) See Grotius, De Jure Belli ac Pacis, lib. iii. c. 6, s. 6: Vattel, Droit des Gens, liv. iii. c. 7, s. 115. Azuni, Diritto Marittimo dell'Europa, c. iii. art. 2, vol. ii. p. 172, s. 152; Manning's Commentaries on the Law of Nations, 203—244.

(*f*) The Copenhagen (1799), 1 C. Rob. 289. See The Juno (1914), 1 Brit. & Col. Prize Cases, 151, 161, where a distinction was made between the carriage of enemy goods in a British and a neutral ship, and only *pro rata* freight allowed to the former.

(*g*) 3 Kent, Com. 267.

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Barker v. Blakes.

Hence, where an American ship from New York to Havre was carried into Bristol by British cruisers for examination, and found to have a small portion of enemy's property on board, it was held that British underwriters were nevertheless answerable to neutral owners of neutral goods insured on board the same ship, but not by the same policy, in respect of loss incurred on such goods by the breaking up of the voyage consequent on the ship's being so brought in for examination (*h*).

Neutral property on enemy's ships.

773. It is a clear rule of the law of nations that the effects of neutrals found on board enemy's ships shall be free, and both cases rest on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend (*i*).

The captor, in case of neutral goods found on board an enemy's vessel, is entitled to freight upon them if he performs the voyage and carries the goods to their port of original destination, but not otherwise (*k*).

The immunity of neutral goods, however, on board an enemy's ship is confined to the case of a merchantman, and does not extend to an armed cruiser; for by placing them on board an armed ship of the enemy the neutral shows an intention to resist visitation and search, and to that extent an adherence to the enemy (*l*).

(*h*) Barker *v.* Blakes (1808), 9 East, 283.

(*i*) Grotius, De Jure Belli ac Pacis, lib. iii. c. 6, s. 16; Vattel, liv. iii. c. 7, s. 116.

(*k*) The Fortuna (1802), 4 C. Rob. 278; The Diana (1803), 5 C. Rob. 67.

(*l*) The Fanny, 1 Dodson, Adm. R. 443.

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Declaration of Paris.

774. The 2nd and 3rd Articles of the Declaration of Paris are as follow:—

2. The neutral flag covers enemy's goods, with the exception of contraband of war (*m*).

3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

No states are bound by this Declaration except those who were parties to it at the time, or who have adopted it subsequently; but all the important maritime states have either adhered to the Declaration or agreed to the exemption of enemy's goods in neutral ships from capture (*n*).

The 2nd Article of the Declaration of Paris does not, it is submitted, affect the operation of the rule, founded on public policy, that insurances on the property of a belligerent are considered invalid in the Courts of the other belligerent.

(*m*) The case of enemy's goods carried in a ship of the captor's country is not dealt with in the Declaration. By the law of nations such goods are liable to capture, and many German cargoes afloat in, or discharged from, British ships were seized and condemned on the outbreak of the late war: see *e.g.* The Roumanian, [1915] P. 26; [1916] 1 A. C. 124.

(*n*) See *ante*, § 172; The Marie Glaeser, [1914] P. 218, 232.

PART III.

OF LOSSES, AND THE RELATIONS OF THE ASSURED AND UNDERWRITER THENCE ARISING.

CHAPTER I.

LIMITATIONS OF UNDERWRITER'S LIABILITY.

SECT.

By Wear and Tear, Inherent Vice, Leakage, Breakage, Mortality..775—782
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Included and excluded losses.

Mar. Ins. Act, s. 55.

775. BEFORE proceeding to consider that clause in the policy which enumerates the specific perils against which the underwriters engage to indemnify the assured, we will direct our attention to certain general principles which, in all cases alike, limit and modify the underwriter's responsibility.

So far as the main subject of this chapter is dealt with by the Marine Insurance Act, 1906, the material section is the fifty-fifth, which provides as follows:—

> (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.
>
> (2) In particular,—
>
> (a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

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(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

Loss by wear and tear.

Thus an important limitation on the underwriter's liability is, that he undertakes to indemnify the assured only against loss caused by the direct (*a*) operation of the perils insured against, and not against the ordinary wear and tear of the voyage.

No ship can navigate the ocean for any length of time, even under the most favourable circumstances, without suffering a certain degree of decay and diminution in value, which we speak of as wear and tear; for this, however considerable, the underwriter is never liable; he is only liable when the damage sustained is the result of some casualty, or "something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen" (*b*).

Distinction between wear and tear and average loss.

Such is the undoubted rule; but its application is often a matter of great nicety. In fact, few things in the law of Marine Insurance have been found more difficult in practice than to discriminate between damage occasioned by the ordinary service of the voyage and that caused by the perils of the sea.

(*a*) Arnould added "and violent." For the reason why these words are omitted, see *post*, § 777, note (*m*) and § 812.

(*b*) Per Lord Herschell in The Xantho (1887), 12 App. Cas. at p. 509. See also the ruling of Lush, J., in Merchants' Trading Co. *v.* Universal Marine Co. (1870), 2 Asp. M. L. C. N. S. 431, n., cited L. R. 9 Q. B. at p. 596, and the criticisms thereon by Lowndes (Mar. Ins. s. 187) and Gow, Mar Ins. p. 95.

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Phillips observes that it is most difficult to distinguish what is wear and tear and decay, from the damage which constitutes a loss, in the case of sails, rigging, cables and anchors. Where sails are purposely cut away, or a cable is purposely cut for the purpose of escaping from an impending peril, the voluntary sacrifice clearly gives a claim against the insurers, though the thing sacrificed is old and would soon have been worn out and destroyed by use. "But where the damage or loss is not voluntary, it is difficult in many instances to determine whether it ought to fall upon the owner of the vessel or the underwriter. The parting of a rope or cable, or the splitting of a sail, is not in itself necessarily a proof of the extraordinary operation of the perils of the seas, for this will happen from use and decay in the most favourable weather and under the most fortunate circumstances. Damage or loss of this sort, therefore, commonly belongs to the owner of the vessel to bear, and does not constitute the ground of any claim against the insurer, unless it takes place out of the common course of things, or appears to be the effect of the unusual and violent operation of a peril insured against" (*c*).

Meaning of "perils of the seas."

776. It is essential to bear in mind, in connection with this subject, that, as is stated in the Marine Insurance Act, 1906 (*d*), "the term 'perils of the seas' refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the winds and waves."

In case of cables and anchors.

Thus, if a cable be chafed by the rocks, or the fluke of an anchor broken off, in a place of usual anchorage and under no extraordinary circumstances of wind and weather, this is ordinary wear and tear of the voyage which falls on the owner alone, and for which the underwriter is not liable; if, on the other hand, the same thing were to occur in a place of unusual anchorage, or even in the usual anchorage ground

(*c*) Phillips, s. 1105.

(*d*) Schedule, I., rule 7.

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in a gale of extraordinary violence, the underwriter would be liable for the loss as caused by the perils of the sea (*e*).

In case of masts, spars and sails.

Where a mast is sprung or spars snapped by the direct action of the wind, the fact itself proves the violence to have been extraordinary, and the loss falls on the underwriter as caused by a peril of the sea (*f*); the result is the same if the ship in a heavy cross rolling sea pitch or lurch away her masts (*g*).

So, if sails are blown from the bolt-ropes, or split, by a squall coming on so suddenly that they could not be furled, this is a loss by the perils of the sea, and not by the ordinary wear and tear of the voyage (*h*), and the decision of our English Courts has been to the same effect when sails are split or masts carried away in consequence of crowding a press of sail to avoid an enemy or a lee shore (*i*).

On the other hand, if masts or spars are damaged, or sails torn, worn out, or carried away, in the ordinary service of the ship, this is undoubtedly only wear and tear, and does not fall upon the underwriter (*k*).

Technical wear and tear.

777. In view of the practical difficulty in determining whether the loss of a sail is, under particular circumstances,

(*e*) Benecke, Pr. of Indem. 456; Stevens on Average, 160; Phillips, Ins. s. 1105. Lowndes (Mar. Ins. s. 287) points out that, as articles of this kind are provided for the very purpose of resisting, and are necessarily subjected to, much constant ordinary strain, the former rule of practice was to treat a breakage as mere wear and tear, apart from exceptional cases. Latterly, however, there has been a tendency to relax this rule, owing to the compulsory tests imposed by the Board of Trade; the argument being, that a fracture sustained by an article which has passed the test must be *primâ facie* due to extraordinary circumstances. Cf. also Gow, Mar. Ins. 208—211.

(*f*) See Phillips, s. 1105.

(*g*) Stevens, 166.

(*h*) Benecke, Pr. of Indem. 454.

(*i*) Covington *v.* Roberts (1806), 2 B. & P. N. R. 378; Stevens on Average, 168. Even here, Benecke thinks that, except under extraordinary circumstances, this loss would not fall on the underwriters, "because the dangers in which these losses originate are occurrences which frequently take place, and which the vessel ought to be able to resist"; p. 455, *sed quære*.

(*k*) Benecke, Pr. of Indem. 451; Phillips, Ins. s. 1105.

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due to wear and tear rather than to extraordinary weather, and in order to avoid disputes as to the exact condition of a lost sail and the precise degree of a gale, a distinction has been established at Lloyd's, and has been included in the Rules of Practice of the Association of Average Adjusters, between literal and technical wear and tear. According to this usage, technical wear and tear—*i.e.*, "sails split by the wind or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent—are not charged to underwriters." And similarly, "rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding or contact, or by displacement through sea peril of the spars, channels, bulwarks, or rails" (*l*).

Damage caused by springing a leak, when wear and tear, and when average.

The damage caused by springing a leak is not a charge upon the underwriters, unless it be directly traceable to some fortuitous occurrence (*m*), as where the leak can be proved to have been caused by a heavy sea striking the vessel or by her being driven on a rock, &c.; where the leak arises from the unseaworthy state of the ship when she sailed, or from wear and tear or natural decay (*n*), and is only a consequence of that ordinary amount of straining to which she would unavoidably be exposed in the general and average course of the voyage insured, the underwriter is not liable (*o*).

(*l*) See McArthur, 110—113, 220—222, who notices other general rules relating to injuries to pumps, donkey-engines, and other parts of a vessel's machinery, which are followed in practice.

(*m*) The words in previous editions of this work were "traceable to the immediate and violent operation of some peril insured against." But in view of the decision in Hamilton *v.* Pandorf, *infra*, and of the definition of "perils of the seas" in the Mar. Ins. Act, 1906, *supra*, § 776, they are open to criticism.

(*n*) See per Lord Halsbury in Hamilton *v.* Pandorf (1887), 12 App. Cas. at p. 523. In Sassoon *v.* Western Ass. Co., [1912] A. C. 561, the same principle was applied in respect of damage to goods, due to water percolating through a leak caused by the rotten condition of a hulk on which they were stored.

(*o*) Fawcus *v.* Sarsfield (1856), 6 E. & B. 192; Dudgeon *v.* Pembroke (1877), L. R. 9 Q. B. 581; and Merchants' Trading Co. *v.* Universal Marine Ins. Co. (1870), 2 Asp. M. C. N. S. 431, there cited by Blackburn, J.

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Damage done to the hull of the ship, as by enemy's shot, by worms, rats, &c.

Damage done to the hull of the ship in the course of defending her against an enemy is not ordinary wear and tear of the voyage, at all events as regards a merchantman (*p*): nor is damage done by storm to the ship's upper works (*q*). But damage done to the hull of the ship by worms and rats is, generally speaking, regarded as falling within the ordinary wear and tear of the voyage and not on the underwriters (*r*).

Damage to copper sheathing.

With regard to copper sheathing, the right rule would seem to be that the underwriter ought to be responsible for all damage violently done to it by the direct operation of the perils of the sea, as where it is torn or scraped off by rocks in consequence of a storm; but not for any deterioration which, considering the age of the sheathing and the incidents of the voyage, can fairly be attributed to wear and tear (*s*).

These are a few instances of the application of this rule; but, after all, much must be left to the judgment of practical men in each case, subject to this guiding principle: that whenever the loss can, upon a fair review of all the circumstances, be imputed to the ordinary wear and tear of the voyage, the underwriter is exempt from liability.

Underwriter is not liable for loss

778. Upon the same ground, the underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured, or, as the phrase is, from its proper vice; as when fruit becomes rotten, or flour heats, or wine turns sour, not from external damage, but entirely from internal decomposition (*t*). Accordingly, where meat shipped at Hamburg became putrid through delay on the voyage occasioned by tempestuous weather, and was necessarily thrown into the sea, it was held to be no loss within the meaning of the policy (*u*). So, if spontaneous combustion is generated by the effervescence or other chemical change of the thing insured, arising from its having been put on board wet or otherwise damaged, the underwriter is not liable (*x*); but it lies upon him to show clearly that the fire really arose from this cause (*y*).

(*p*) Taylor *v.* Curtis (1816), 6 Taunt. 608; 2 Marshall, R. 309; Stevens on Average, 167, 168, *contra*. But see Benecke, Pr. of Indem. 456.

(*q*) Stevens on Average, 161; Benecke, Pr. of Indem. 454; 1 Phillips, Ins. s. 1105.

(*r*) As to worms, see Rohl *v.* Parr (1796), 1 Esp. 445; 1 Phillips, Ins. s. 1101; 3 Kent, Comm. 300, n. As to rats, Hunter *v.* Potts (1815), 4 Camp. 203; Laveroni *v.* Drury (1852), 8 Exch. 166. *Secus*, however, where the rats gnaw a hole which lets in sea-water, Hamilton *v.* Pandorf (1887), 12 App. Cas. 518.

(*s*) Phillips, s. 1505. It was for some time the practice of underwriters not to pay for damage done to the hull below the water-line, except where the ship had taken the ground or had come into contact with some substance other than water. But in Harrison *v.* The Universal Marine Ins. Co. (1862), 3 F. & F. 190, a special jury at the Guildhall found that the custom was not established. This led to the insertion of "The Metalling Clause." See McArthur, 308. In Cruikshank *v.* Maritime Ins. Co. (1886), cited in McArthur, p. 312, Cave, J., held that damage to the ship by the shifting of the cargo was damage done "by some substance other than water."

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arising from the proper vice of the thing insured.

Loss by spontaneous combustion.

The same rule applies to a case of loss of, or damage to, ship. Thus, where a vessel insured under a time policy sailed in an unseaworthy state, and, without encountering any more than ordinary marine risk was obliged, owing to the defective state in which she sailed, to put into a port for repair, the expenses of doing so were held to be irrecoverable, although there was no warranty of seaworthiness and although the owner was not aware of her defects (*z*).

Loss by ordinary leakage and breakage not covered by the policy.

779. Upon the same principle, the underwriter is never liable for that ordinary and inevitable amount of leakage and breakage to which wines, spirits, molasses, oil, earthenware, glass, and other liquid, or brittle, commodities are necessarily exposed in the usual course of even the most fortunate voyage.

(*t*) See the authorities collected 1 Emerigon, c. xii. s. ix. pp. 388—392; Mar. Ins. Act, 1906, s. 55 (2) (c), *ante*, § 775.

(*u*) Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206; approved in Pink *v.* Fleming (1890), 25 Q. B. D. 396.

(*x*) 1 Emerigon, c. xii. s. xviii. § 4, p. 430.

(*y*) Boyd *v.* Dubois (1811), 3 Camp. 133; Providence Washington Ins. Co. *v.* Adler (1885), 65 Maryland, 162.

(*z*) Fawcus *v.* Sarsfield (1856), 6 E. & B. 192. See also Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455 (C. A.), and contrast Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284, and Whittle *v.* Mountain, [1920] 1 K. B. 447. Cf. the Mar. Ins. Act, 1906, s. 39 (5).

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This is a rule universally established by the general law maritime, wherever the practice of marine insurance is known (*a*). Extraordinary leakage or breakage, however, caused by the violent pitching and labouring of the ship at sea is covered (*b*).

In our own country no fixed rule is laid down as to what shall be considered ordinary leakage and breakage on given articles on a given voyage.

In the United States, and generally on the continent of Europe, a certain percentage is fixed, varying upon different articles, and upon voyages of different length and duration, as the ordinary amount of leakage and breakage, for which the underwriter can in no case be liable.

Commixture no loss.

780. There may be a bursting of the wrappers, and a commixture of the contents, without any loss on that account such as the insurer would be liable for. Where cotton wool belonging to different owners was shipped in bales by the same vessel, and encountered such a tempest on the voyage that many of the bales were burst and the contents mingled, and the distinctive marks upon others of the bales were obliterated, it was held that the several owners became tenants in common of the mass, and were not deprived of their property in the whole, so as to entitle them to claim as for a total loss (*c*).

Mortality among animals.

781. Upon the same principle, under policies on living animals the underwriters are not liable for losses solely attributable to death from natural causes. As, for instance,

(*a*) For the general principle, see 1 Emerigon, c. xii. s. ix. p. 389, who collects the authorities. See also Code de Commerce, art. 355; Stevens on Average, 219; Mar. Ins. Act, 1906, s. 55 (2) (c), *ante*, § 775.

(*b*) In Crofts *v.* Marshall (1836), 7 C. & P. 597 (as to which see *ante*, § 72), an attempt was unsuccessfully made to defeat a claim by relying upon an alleged custom of Lloyd's by which such articles were always "free of average."

(*c*) Spence *v.* Union Marine Ins. Co. (1868), L. R. 3 C. P. 427. See the remarks on this case in Sandeman *v.* Tyzack & Branfoot SS. Co., [1913] A. C. 680, 687, 695, 698; and see Mar. Ins. Act, 1906, s. 56, sub-s. 5.

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if it be owing to any infectious disorder which might equally have seized them on land, or to some disease which, though probably in part occasioned by the confinement and other usual circumstances of the voyage, is yet not proximately caused by any extraordinary or immediate agency of the perils insured against, the underwriters are undoubtedly not liable for the loss.

Mortality of negro slaves. Death caused by suicide held not to be at the risk of the underwriter.

As long as negro slaves were universally regarded by the jurists of civilized and Christian Europe as mere live stock, it was gravely determined that self-inflicted death produced by the horror and despair of a fellow man, was a loss arising from the proper vice and inherent pravity of the thing insured, and as such was not to be at the charge of the underwriters (*d*).

Loss caused by throwing overboard negro slaves.

The Courts were even driven to the disgrace of listening to solemn arguments to prove the position (which they only evaded establishing as law by resorting to a technical point of pleading) that the loss occasioned by throwing overboard part of the human cargo of an overloaded slaver, in order to avoid a scarcity of water, was a loss for which the underwriters were liable as an ordinary peril of the sea (*e*).

Nay, Lord Mansfield himself had to undergo the melancholy degradation of applying all the subtlety of his great intellect in order to assist a special jury of London merchants in coming to the following conclusions in a case where "mortality by mutiny of slaves" was included amongst the perils insured against:—1. That all the slaves who were killed in the mutiny, or died of their wounds, were to be paid for. 2. That all those who died of their bruises which they had received in the mutiny, though accompanied by other causes, were to be paid for. 3. That all who had swallowed salt water or leaped into the sea, and hung upon

(*d*) Valin, Ordon. tit. vi. arts. 11, 15; Pothier, d'Assurance, No. 66; and see M. Estrangin, *ibid.*

(*e*) Gregson *v.* Gilbert (1783), 1 Park, 138; Marshall, Ins. 560.

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the sides of the ship without being otherwise bruised, or died of chagrin, were not to be paid for (*f*).

Death of slaves from scarcity of food and water on the passage.

In the last case upon this subject in our books, it was decided that where negro slaves died on the passage from scarcity of food caused by the extraordinary and unavoidable delay of the voyage, this was a case of natural death, for which the underwriters were not liable (*g*).

Happily, since the extinction of the African slave-trade in this country, and the numerous international treaties between our own and foreign governments for the suppression of the traffic, English underwriters can no longer have any immediate concern with insurances upon slaves. Several of the principles, however, established by these decisions are still applicable to insurances on live stock.

Cases of insurance on live stock, warranted free of mortality.

782. Thus, in a case where thirty mules, ten asses, and thirty oxen were insured "at and from Cork to Barbadoes and St. Vincent, warranted free of mortality and jettison," Lord Tenterden held, upon the authority of the case of Tatham *v.* Hodgson, just cited, that if the ship had been driven out of her course by perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and consequently the means of sustaining the life of the animals insured, then the words, "warranted free of mortality," introduced into the policy, would have protected the underwriters from liability for loss arising from such cause (*h*).

Where the perils of the sea have been a conducing cause of the loss, it is often a matter of great difficulty to settle the question of the underwriter's liability.

In the case just cited, where the underwriters expressly stipulated not to be liable for any loss caused by "mortality," it appeared that all the animals insured, except five mules and

(*f*) Jones *v.* Schmoll, cited 1 T. R. 130. The above is taken *verbatim* from the report.

(*g*) Tatham *v.* Hodgson (1796), 1 Park, 141; 6 T. R. 656.

(*h*) Per Lord Tenterden in Lawrence *v.* Aberdein (1821), 5 B. & Ald. 111; and cf. Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206.

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one ass, died on the voyage of severe bruises, lacerations, and injuries, arising from the violent pitching and rolling of the ship occasioned by a furious storm and the consequent agitation of the sea; Lord Tenterden and the rest of the judges of the King's Bench decided that this was a loss by the perils of the sea, for which the underwriters were liable, and further, though only with some doubt, that they were not protected by the warranty to be "free of mortality," for the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes (*i*).

And in a subsequent case of the same kind, where horses were insured from Liverpool to Jamaica with the same warranty to be "free of mortality and jettison," the horses, which had been in the first instance properly secured between decks, came, by the labouring of the vessel in a violent storm, first to break the slings by which they were supported, and then, having kicked down the partitions by which they were separated, and being unable to stand owing to the great rolling of the vessel, to kick and bruise each other so violently that thereby, and by the injuries received from the pitching of the vessel, they all died in the course of the storm. The Court felt bound by their former decision to hold, that the underwriters were liable as for a loss by the perils of the sea (*k*).

Loss by mortality is sometimes expressly included among the perils insured against (*l*).

Risk of loss not proximately caused by the perils insured against:

783. The underwriter is liable for no loss which is not proximately caused by the perils insured against (*m*). *Causa*

(*i*) Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.

(*k*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793. All the Court held that this case fell within that of Lawrence *v.* Aberdein, with which decision Abbott, C. J. (Lord Tenterden), Bayley, J., and Holroyd, J., expressed themselves perfectly satisfied, but Littledale, J., said he doubted whether he should have concurred with it.

(*l*) See Jacob *v.* Gaviller (1902), 7 Com. Cas. 116, as to the "walking ashore" clause; St. Paul Fire, &c. Co. *v.* Morice (1906), 11 Com. Cas. 153.

(*m*) Mar. Ins. Act, 1906, s. 55 (1), *ante*, § 775.

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Causa proxima non remota spectatur.

proxima non remota spectatur is a principle which is more rigorously applied to cases of marine insurance than to those of other liabilities. "In all cases," says Blackburn, J., "the law regards the proximate cause of the loss, and it would be difficult to find a better example of what Lord Bacon calls the infinity of the 'causes of causes, and their impulsion one on the other,' than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz., her being in distress and full of water, was that when she laboured in the rolling sea she made water; and the cause of her making water was that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss" (*n*).

Where a loss is due to a combination of causes, the question which is the proximate cause is not solved by the mere point of order in time (*o*). For "causation is not a chain, but a net. . . . The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have not destroyed or truly impaired it, and it may culminate in a result of which it still remains

(*n*) In Dudgeon *v.* Pembroke (1874), L. R. 9 Q. B. at p. 595; and see *S. C.* 2 App. Cas. 284.

(*o*) See Leyland Shipping Co. *v.* Norwich Union Fire Ins. Society, [1918] A. C. 350 at p. 363 (Lord Dunedin).

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the real efficient cause to which the event can be ascribed" (*p*).

Twofold operation of the rule.

784. The maxim as to *causa proxima* as applied in practice has a twofold operation—partly to limit and partly to enlarge the underwriter's responsibility. It acts in the latter mode in all those cases where it has been decided that the underwriter shall be liable for all losses that are proximately caused by the perils insured against, though they may be remotely occasioned by the acts or negligence of the assured or his agents (*q*).

Illustrations of the rule.

We shall have occasion elsewhere to discuss the two classes of cases just referred to; it will be sufficient here to mention a few illustrations of the rule, in as far as it tends to limit the underwriter's responsibility (*r*).

Thus, loss from sale of goods, to defray expenses of repairs in a port of distress, is not within the policy on goods (*s*); nor is a loss by bottomry on cargo for the purposes of the ship (*t*); nor is loss by fall of the market during the delay (*u*) in estimating average damage, or loss at public auction occasioned by suspicion of damage (*x*); nor is loss of freight occasioned by a prudent sale by the master of cargo on which

(*p*) *Ibid.* p. 369 (Lord Shaw). Passages in Lord Esher's judgment in Pink *v.* Fleming (1890), 25 Q. B. D. 396, to the effect that only the cause last in time can be looked to, cannot now be supported.

(*q*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 73, and the line of cases between that and Redman *v.* Wilson (1845), 14 M. & W. 476; Green *v.* Elmslie (1792), Peake, N. P. 212; Heyman *v.* Parish (1809), 2 Camp. 149; Arcangelo *v.* Thompson (1811), *ibid.* 620; Livie *v.* Janson (1810), 12 East, 648; Hahn *v.* Corbett (1824), 2 Bing. 205; Montoya *v.* London Ass. Co. (1851), 6 Ex. 451; 20 L. J. Ex. 254.

(*r*) A number of instances collected from the American reports will be found in Campbell's Ruling Cases, vol. xiv. pp. 293—296.

(*s*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; Sarquy *v.* Hobson (1823), 4 Bing. 131.

(*t*) Greer *v.* Poole (1880), 5 Q. B. D. 272.

(*u*) See the Mar. Ins. Act, 1906, s. 55, sub-s. 2 (b), which, however, only applies to policies on ship or goods. In freight policies a loss occasioned by delay may give rise to a valid claim. See Jackson *v.* Union Mar. Ins. Co. (1874), L. R. 10 C. P. 125; and *infra*, §§ 785, 786.

(*x*) Cator *v.* Great Western Ins. Co. of New York (1873), L. R. 8 C. P. 552; cf. Brown *v.* Fleming (1902), 7 Com. Cas. 245.

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freight could ultimately have been earned, within the policy on freight (*y*). So, loss of voyage caused by interdiction of commerce, blockade, or hostile possession of the port of destination, is not a risk within the policy on ship, being the effect of a peril acting not immediately, but circuitously, on the thing insured (*z*).

So, the wages and provisions of the crew during a delay for repairs, or detention by an embargo, are not a risk within the policy; though this is so, rather because these form part of the ordinary expenses of the voyage (*a*); and, perhaps even more clearly, because it is the ship that is the subject-matter of insurance, and it is damage to the ship, against which the underwriter on ship promises to indemnify the owner; and this does not necessarily include all damages sustained by the shipowner (*b*).

The following case is a good illustration of the application of the rule:—

A vessel loaded with hides and tobacco shipped a quantity of sea water, which rotted the hides but did not come directly into contact with the tobacco or the packages in which it was contained; the tobacco, however, was spoiled by the reek of the putrid hides. It was held, that in this case the perils of the sea were the proximate cause of the loss on the tobacco as well as on the hides (*c*).

Stringent application of the rule as to

785. The stringency, however, with which the rule is applied is well illustrated by several decisions, both old and

(*y*) Mordy *v.* Jones (1825), 4 B. & Cr. 394; Philpot *v.* Swann (1861), 11 C. B. N. S. 270.

(*z*) Hadkinson *v.* Robinson (1803), 3 B. & P. 388; Lubbock *v.* Rowcroft (1803), 5 Esp. 50; Nickels *v.* London & Prov. Ins. Co. (1900), 6 Com. Cas. 15; Kacianoff *v.* China Traders' Ins. Co., Ltd., [1913] 3 K. B. 407; [1914] 3 K. B. 1121 (C. A.). But a loss of voyage caused by a declaration of war may be the *causa proxima* of a loss of goods, or of freight: see *infra*, § 832.

(*a*) Fletcher *v.* Poole (1769), 1 Park, Ins. 115; Eden *v.* Poole (1785), *ibid.* 117; Robertson *v.* Ewer (1786), 1 T. R. 127. Lord Denman, however, puts these cases on the ground of *causa proxima non remota spectatur*. De Vaux *v.* Salvador (1836), 4 A. & E. 420.

(*b*) See *post*, § 835.

(*c*) Montoya *v.* London Ass. Co. (1851), 6 Exch. 451; 20 L. J. Exch. 254.

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recent, in connection with policies on freight, to the effect that where freight is lost to the shipowner in consequence, indeed, of perils of the sea, but between the peril and the loss there intervenes some act of volition or election on the part either of the shipowner or charterer to which the loss is more proximately due—the loss is to be attributed not to the peril of the sea, but to such act of volition or election (*d*). And this is so, even in a case where such act has amounted to nothing more than a prudent and necessary choice of the lesser of two evils.

proximate cause in cases where an act of volition or election has intervened between the peril insured against and the loss.

Thus in M'Carthy *v.* Abel (*e*), a shipowner, owing to perils insured against, properly abandoned ship and freight to the respective underwriters thereon, but the vessel was subsequently able to complete her voyage and earned freight, which the underwriters on ship and not the shipowner received. The latter then unsuccessfully attempted to recover the freight he had lost from his underwriters on freight; Lord Ellenborough pointing out that the loss was due not to perils insured against, but to the abandonment of the ship, "which abandonment was the act of the assured themselves, with which therefore, and the consequences thereof, the underwriters have no concern." And this view was subsequently confirmed in the House of Lords (*f*).

Loss of freight owing to abandonment of ship after constructive total loss.

The principle received further confirmation in the case of the Inman Steamship Company, Limited *v.* Bischoff. The "City of Paris" was chartered by her owners to the Board of Admiralty on monthly hire, the charterers agreeing to pay the freight during employment and efficient performance of the service, and the owners covenanting that the ship should be seaworthy during the continuance of the charter: provided that if at any time it should appear to the charterers that the

Loss of freight owing to exercise by charterers of special rights under charter-party.

(*d*) Some remarks, however, of Lord Selborne in Inman SS. Co. *v.* Bischoff (1882), 7 App. Cas. at p. 676, appear to conflict with this rule.

(*e*) (1804), 5 East, 388.

(*f*) In Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 334. And cf. Mordy *v.* Jones (1825), 4 B. & Cr. 394; Vlierboom *v.* Chapman (1844), 13 M. & W. 230; Philpot *v.* Swann (1861), 11 C. B. N. S. 270.

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ship had become inefficient, the latter should have the right of putting her out of pay, or of making such abatement by way of mulct out of the freight as they should adjudge fit. The owners effected a time policy against, *inter alia*, perils of the seas "on freight outstanding." During the time, the ship became inefficient through perils of the sea, and the charterers made an abatement out of the freight in accordance with their powers under the charter-party. The Court of Appeal held that, on the true construction of the charter-party, the freight was lost, not by the inefficiency of the vessel, and therefore not directly by perils of the seas, but owing to the exercise by the charterers of their discretionary power to make the abatement provided for in the charter-party (*g*). In the House of Lords, Lord Fitzgerald concurred in the opinion of the Court of Appeal, and the judgment was unanimously affirmed. But the other members of the House (*h*) were of opinion that the appeal should be dismissed on the ground that there had been no loss of freight, properly speaking, at all, and do not seem to have concurred in the view that the pecuniary damage suffered by the shipowner was not due to perils insured against (*i*).

Distinction where charter-party provides that freight shall, apart from election by charterers, automatically cease to be earned.

786. It was pointed out in this case that the result would probably have been different if there had been a stipulation in the charter-party that freight should automatically cease to be payable in the contingencies mentioned. And effect was subsequently given to this distinction in the two cases of The Alps and The Bedouin. In the former the vessel was subject to a time-charter, which contained a provision that

(*g*) (1881), 6 Q. B. D. 648.

(*h*) Lords Selborne, Blackburn, and Watson.

(*i*) Inman SS. Co., Ltd. *v.* Bischoff (1882), 7 App. Cas. 670. See particularly per Lord Selborne at p. 676, per Lord Blackburn at pp. 682, 683, 686, per Lord Watson at p. 690. Cf. Mercantile SS. Co. *v.* Tyser (1881), 7 Q. B. D. 73; and compare with these cases Jackson *v.* Union Marine Ins. Co. (1873), L. R. 8 C. P. 572; 10 C. P. 125; and In re Jamieson and The Newcastle Assoc., [1895] 2 Q. B. 90. See also Nickels *v.* London, &c. Ins. Co. (1900), 6 Com. Cas. 15; Manchester Liners, Ltd. *v.* British, &c. Ins. Co., Ltd. (1901), 7 Com. Cas. 26; Ruger *v.* Firemen's Fund Ins. Co. (1898), 90 Fed. R. 310.

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the hire should cease in the event of loss of time from want of repairs. The owner insured his chartered freight in a time policy against, *inter alia*, fire. A fire took place which necessitated repairs, whereby the hire of the vessel ceased for thirteen days. It was held that the underwriters were liable for the thirteen days' loss of freight so caused (*k*). In the latter case the time-charter contained a clause whereby the freight, which was payable monthly in advance, was to cease "in the event of loss of time by breakdown of engines or machinery so as to delay the progress of the steamer for twenty-four hours," and there was a time policy on the chartered freight. Perils insured against caused a breakdown of machinery, whereby the hire ceased for twenty-eight days. In an action on the policy, it was held by the Court of Appeal, approving The Alps, that inasmuch as the clause in the charter-party was put into operation by the immediate action of perils insured against, the underwriters were liable (*l*).

Time-charter clause.

787. In order to protect themselves against liability to pay for loss of freight, sustained under similar clauses to those above referred to, while a vessel is laid up, and also, as appears from the decision in Bensaude *v.* Thames and Mersey Marine Insurance Co., Limited (*m*), to protect themselves against liability to pay for loss of freight under a voyage charter which has been necessarily abandoned owing to delay frustrating the object of the adventure thereby contemplated (*n*), a clause known as the time-charter clause is often inserted by underwriters, by which the policy is "warranted free from

(*k*) The Alps, [1893] P. 109.

(*l*) The Bedouin, [1894] P. 1. Cf. Jackson *v.* Union Marine Ins. Co. (1873), L. R. 8 C. P. 572; 10 C. P. 125, which is distinguishable from Mercantile SS. Co. *v.* Tyser (*ubi supra*) just as The Alps and the Bedouin are from Inman SS. Co. *v.* Bischoff.

(*m*) [1897] A. C. 609. See also Turnbull & Co. *v.* Hull Underwriters' Assoc., [1900] 2 Q. B. 402.

(*n*) See Jackson *v.* Union Marine Ins. Co., *ubi supra*.

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any claim consequent on loss of time, whether arising from a peril of the sea or otherwise" (*o*).

Cancellation clause.

788. Similarly, in order to protect underwriters against claims by shipowners for loss of freight arising from the cancellation of the charter-party under which such freight was expected to be earned, a clause has sometimes been inserted in freight policies providing that "no claim arising from the cancelling of any charter" shall be allowed. It is doubtful, however, in view of the cases which we have already noticed, whether the underwriter requires the protection of such a clause where the cancellation has been due to the exercise by a charterer of an option given by an express clause in a charter-party; for it seems that in such a case, though the cancellation may have taken place in consequence of a peril insured against, yet the loss of freight is not directly due to any such peril, but to the exercise of the option (*p*).

On the other hand, in a case where a charter-party was, in fact, put an end to by the direct operation of a peril of the sea, apart from any agreement to that effect, it was held that there was no "cancellation," inasmuch as this term necessarily implied something done by agreement of the parties (*q*). In view of these decisions, it appears that the only case to which it is certain that this clause can apply is where a charter-party contains a clause for its own automatic cancellation in a certain event, *e.g.*, the non-arrival of the vessel by a named date—and the non-arrival of the vessel by such date, owing to perils insured against, of itself effects a cancellation, by virtue of the agreement in the charter-party.

(*o*) The words "or otherwise" appear to mean "or from other perils insured against." Turnbull *v.* Hull Underwriters' Assoc., *ubi supra*. The words "excluding all claims due to delay" in a policy on goods were held by Bailhache, J., in Russian Bank for Foreign Trade *v.* Excess Ins. Co., to be equivalent to this clause, [1918] 2 K. B. at p. 127; *S. C.* in C. A., [1919] 1 K. B. 39.

(*p*) See Mercantile SS. Co., Ltd. *v.* Tyser (1881), 7 Q. B. D. 73; Inman *v.* Bischoff (1882), 7 App. Cas. 670; but see *ante*, § 785.

(*q*) In re Jamieson and Newcastle SS. Freight Ins. Assoc., [1895] 2 Q. B. 90 (C. A.); Scottish Shire Line, Ltd. *v.* London and Provincial Mar. Ins. Co., Ltd., [1912] 3 K. B. at p. 69.

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The rule of *causa proxima* may prevent shipowner from recovering for loss of lump chartered freight.

789. The rule as to *causa proxima* must be very carefully considered in all cases where a claim is made for an alleged loss of lump chartered freight. Under most charter-parties such freight is wholly payable upon the arrival of the ship, even although she do not bring with her the whole of the agreed cargo; and this is probably so, even in cases where a loss of part of the cargo has been due to causes for which the shipowner is not excused (*r*). The mere fact that part of the cargo has been lost by perils of the sea entails no loss of lump chartered freight, where by the charter-party the whole of such freight is earned notwithstanding such loss. If in such a case the shipowner is unable to obtain his lump freight, his loss will be attributed to the cause which really prevents him from doing so.

Thus, in Williams *v.* Canton Insurance Office (*s*), the plaintiffs chartered the "Ramleh" for a voyage from the River Plate to Liverpool at the lump freight of 3,000*l.*, payable on delivery of the cargo in cash. The charter-party provided that the charterer's liability should cease upon shipment of the cargo, and gave the vessel a lien thereon for all freight—master to sign bills of lading at any rate of freight required by charterers, but not under chartered rates or difference to be settled in cash on signing bills of lading. The charterers fully loaded the ship with a general cargo, and the master signed bills of lading which, instead of reserving a general lien on each portion of the cargo for the whole lump freight, made the goods mentioned in each bill of lading deliverable to the consignees upon payment merely of the bill of lading freight in respect of such goods. The aggregate, however, of the bill of lading freights exceeded

(*r*) See Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99 (Exch. Ch.); Williams *v.* Canton Ins. Office, *infra*; Carver on Carriage, s. 350; and other cases there cited. In Harrowing SS. Co. *v.* Thomas, [1913] 2 K. B. 171, the lump sum freight was he'd by the Court of Appea to be payable though neither the ship, nor the whole of the cargo, ever arrived.

(*s*) [1901] A. C. 462, affirming the Court of Appeal (reported as Braukelow SS. Co. *v.* Canton Ins. Office), [1899] 2 Q. B. 178.

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the amount of the chartered freight. The plaintiffs effected an insurance with the defendants on "3,000*l*. freight chartered, or as if chartered, &c." In the course of the voyage part of the cargo was lost by perils of the sea, but the ship eventually arrived at Liverpool with the remainder of her cargo, which was worth more than the chartered freight.

Owing, however, to such loss of cargo, the sum collected by the plaintiffs in respect of the bill of lading freights upon the cargo delivered fell short of the chartered freight to the extent of 645*l*. In an action upon the policy to recover this deficiency, it was held by the House of Lords that the loss was due to no peril of the sea, inasmuch as, but for the form in which the plaintiffs had allowed the bills of lading to be framed, the whole of the chartered freight would, notwithstanding the peril of the sea which caused the loss of the cargo, have been receivable from the consignees (*t*).

Meaning of "consequences."

790. Policies frequently contain warranties by which underwriters are exempted from liabilities for the "consequences" of certain specified events, for example of hostilities. It is established that the rule as to proximate cause applies with equal stringency to these cases, and that the word "consequences" has regard only to the immediate and not the remote causes of a loss (*u*). This principle has been illustrated in a series of cases which have arisen on the construction of what is commonly known as the "f. c. s." clause, which are dealt with in subsequent sections of this work (*x*).

791. The difficulty of practically applying the rule as to *causa proxima* is well shown in two cases, wherein, upon

(*t*) As to the meaning of the words "as if chartered," see *ante*, § 233, note (*s*).

(*u*) Per Lord Halsbury in Andersen *v.* Marten, [1908] A. C. at p. 339.

(*x*) See sects. 905 and following. See also Pink *v.* Fleming (1890), 25 Q. B. D. 396 (C. A.) (meaning of "damages consequent on collision").

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states of facts almost identical, Lord Denman and Story, J., came to diametrically opposite conclusions.

A sum ordered to be paid by the owner of one ship to another for damages caused by collision is not recoverable as a loss by perils of the sea. De Vaux *v.* Salvador.

The facts of the English case were shortly these:—A ship in the Hooghly river came into collision with a steamer, and considerable damage was done to each; and, after arbitration, it was awarded that each vessel should bear half the joint expenses of the two. Under this award the ship had to pay a balance to the steamer, which the owner of the ship sought to recover from his underwriter as a particular average loss caused "by the perils of the sea." The Court of King's Bench, per Lord Denman, C. J., held that he could not recover, on the ground that the obligation to pay the sum in question was neither "a necessary nor a proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations" (*y*).

But was held to be recoverable in the United States.

In the American case, under very similar circumstances, Story, J., giving the judgment of the Supreme Court of Massachusetts, held the underwriters liable, on the ground that the damages so apportioned on the ship must be regarded as a direct and proximate effect of the collision, and this decision was confirmed by the Supreme Court of the United States (*z*).

"Collision clause."

792. In consequence of the decision in De Vaux *v.* Salvador, the authority of which in the English Courts is now established beyond dispute, it has become the custom for shipowners to protect themselves by what is commonly called the "collision" or "running down" clause, against payments

(*y*) De Vaux *v.* Salvador (1836), 4 A & E. 420.

(*z*) Peters *v.* Warren Ins. Co. (1838), 3 Sumner's Mass. R. 389; 14 Peters, S. C. R. 99. The only difference in the facts of the American and English cases is that the former was determined by judicial decree, the latter by arbitration; but Story, J., disclaims the notion that this can make any difference in principle between the two cases. Kent, C., approves of, but Phillips elaborately dissents from, the judgment of Story, J., and cites a later case—General Mut. Ins. Co. *v.* Sherwood (1852), 14 Howard's R. 352—in which the Supreme Court of the United States adopted the view of the English Court. Kent, Com. vol. iii. p. 301, n.; 1 Phillips, s. 1137a, and s. 1416. Arnould (2nd ed. p. 791) appears to have agreed with the view of Story, J.

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which they may become liable to make to others, in consequence of the negligence of their servants causing or contributing to a collision. This clause takes various forms, several of which are most carefully and elaborately discussed by McArthur (*a*). The following is the form of what is termed the "Liverpool clause":—

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of 8*l.* per ton on her registered tonnage, we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, calculated at the rate of 8*l.* per ton, or, if the value hereby declared amounts to a larger sum, then to such declared value; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid; provided also, that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury to individuals from any cause whatever."

An important feature of this particular form is the reference to the 8*l.* per ton, this being the sum to which, under the provisions of the Merchant Shipping Act, 1894(*b*), the shipowner can, in certain cases and by taking proper proceedings, limit his liability in respect of damage to property. The words are inserted in the interest of the underwriter, so as to insure to him the benefit of the statutory limitation,

(*a*) Pages 314 and following, and App. iii. For the Institute Clause, see *ante*, § 10, and Appendix B. hereto.

(*b*) Sect. 503, re-enacting s. 54 of the Merchant Shipping Act Amendment Act, 1862.

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even in cases where the shipowner may not be entitled thereto, and also, in a case where the declared value of the vessel in the policy is less than the amount of the limitation value, to confine his liability to the smaller proportion arrived at by a comparison of the underwriter's subscription with the latter and greater valuation (*c*).

It is not intended in this work to discuss in detail the distinctions effected by the several differences in wording of the clause under consideration. For such a discussion the reader is referred to the book of Mr. McArthur (*d*). But it is important to notice some points which, apart from special forms, arise upon the general tenor of the clause.

Extent of underwriter's liability under collision clause.

† **793.** One of the most important points which have actually been discussed in our Courts relates to the sum denoted by the expression "the sum which the insured becomes liable to pay, and shall pay." Where a collision takes place between two ships by which both sustain damage, and for which both are held to blame, there was until recently a hard-and-fast rule in Admiralty that the damages had to be added together and each vessel bore a half of the whole. Under the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), the liability to make good the damage or loss is now in proportion to the degree in which each vessel was in fault, with the proviso that where it is not possible to establish different degrees of fault, the liability is to be apportioned equally. Thus, where the old rule of equal division is applied, if the damage done to vessel A. amounts to 10,000*l.*, and to vessel B. 6,000*l.*, each vessel is debited with 8,000*l.*, being one-half of 16,000*l.* But it has been decided that in this case it is not correct to

Principle of single liability as distinct from cross liabilities.

(*c*) This point is most carefully worked out by McArthur, who, at p. 374 (App. iii.), gives the following illustration:—"Supposing that a ship of 1,000 tons register, having a maximum statutory liability of 8,000*l.*, and an insured value of 4,000*l.*, were to incur damages amounting to 4,000*l.*, the assured would recover under this clause only 1,500*l.*, being the proportion of 3,000*l.* (three-fourths of 4,000*l.*), which 4,000*l.*, the insured value, bears to 8,000*l.*, the value to be adopted as the basis for contribution."

(*d*) *Ubi supra.* See also Gow, Mar. Ins. c. xv., and Owen's Clauses.

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say that B. "becomes liable to pay" A. 5,000*l.*, with a cross liability on A. to pay B. 3,000*l.* There is but one liability, and that is a liability on B. to pay A. the difference, 2,000*l.* As between the two shipowners this may be a matter of importance only when one of them is insolvent, or when either or both of them succeed in limiting their liability to the statutory amount of 8*l.* per ton in accordance with the provisions of the Merchant Shipping Act (*e*). As between the shipowner, however, and his own underwriter, to the relations between whom the same principle applies (*f*), it will be found that in many cases its application makes a substantial difference to the disadvantage of the underwriter, and especially to that of the underwriter on the ship which has sustained damage to the smaller extent. Thus, suppose vessel A. to be damaged to the extent of 10,000*l.*, and vessel B. to that of 6,000*l.*, by a collision for which both are to blame; then, by the rule above mentioned, A owes B. nothing, and B. owes A. 2,000*l.* A.'s underwriters, therefore, pay 10,000*l.* to her owners on their ordinary policy, nothing in respect of the collision clause, and by subrogation receive the 2,000*l.* from B. B.'s underwriters pay B. 6,000*l.*, and also, under the collision clause, three-fourths of the 2,000*l.* which B. has had to pay A.; for the remaining 500*l.* B., unless otherwise protected, is uninsured. The result is that:—

A.'s underwriters pay . . .	£8,000
B.'s „ „ . . .	7,500
B. loses	500
	£16,000

(*e*) See The Stoomvart Maatschappy Nederland *v.* The P. & O. Steam Navig. Co. or The Khedive (1882), 7 App. Cas. 795; overruling Chapman *v.* Royal Netherlands Steam Navig. Co. (1879), 4 P. D. 157. It is interesting to note that simultaneously with the decision of the House of Lords in The Khedive, the Supreme Court of the United States came to a similar conclusion in The North Star (1882), 106 U. S. 17. See also The Scotland (1881), 105 U. S. 24.

(*f*) Cf. The London SS. Owners' Ins. Co. *v.* The Grampian SS. Co. (1889), 24 Q. B. D. 32, 663 (C. A.).

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Were the claims to be considered as cross-liabilities, apart from the principle established in The Khedive (*g*), the figures would work out as follows:—A.'s underwriter would pay 10,000*l.*, and would also pay three-fourths of half of B.'s damage, or 2,250*l.*, under the collison clause. Against this they would be entitled by subrogation to receive from B. 5,000*l.*, or half of A.'s damage. The balance of the half of B.'s damage, viz., 750*l.*, would fall on A. B.'s underwriters would pay 6,000*l.*, and would also pay three-fourths of half of A.'s damage, or 3,750*l.*, under the collision clause; and against this they would likewise be entitled by subrogation to receive from A. 3,000*l.*, or half of B.'s damage. The balance of the half of A.'s damage (1,250*l.*) would, according to this method of computation, fall on B. The result is that—

A.'s underwriters would pay . .	£7,250
A. would be unprotected for . .	750
B.'s underwriters would pay . .	6,750
B. would be unprotected for . .	1,250
	£16,000

794. For further examples of how the principle of a single liability works out in different cases—showing, too how settlements are complicated by limitations of liability, and by claims of cargo-owners in addition to those of ship—the reader is referred to the Appendix in Mr. McArthur's work, where the matter is dealt with. It has been thought necessary thus shortly to discuss the point in this work, especially in view of a clause which is now often inserted in policies, and is, in fact, incorporated with the Institute Clauses—both time and voyage—providing that, unless liability is limited, "claims shall be settled on the principle of cross-liabilities, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly

"Cross Liabilities" Clause.

(*g*) (1882), 7 App. Cas. 795.

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allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

What is a collision?

795. It will be noticed that, in order to bring the collision clause into operation, there must be a collision between the ship insured and some other ship or vessel (*h*), and that the only damages insured against are (in the ordinary forms of the clause) sums payable to the owners of the latter vessel in consequence thereof. The shipowner is therefore not protected against liability due to his vessel running into a dock-wall, breakwater, pontoon, or anything that is not another ship (*i*); nor, even where there has been a collision between his ship and another ship, is he indemnified in respect to any damages which he may in consequence thereof be compelled to pay to any third person (*k*). But when there has once

(*h*) It has been held, however, by the House of Lords that a collision between A.'s tug and B. is a collision between A. and B. within the meaning of the R. D. C. The Niobe, [1891] A. C. 401. See Western Transit Co. *v.* Brown (1907), 152 Fed. R. 476. So also where a vessel struck upon the anchor of another vessel, this was held to be a collision with the latter. Margetts *v.* Ocean Corp., [1901] 2 K. B. 792. But *secus*, where a steamer fell foul of nets attached to, but a mile distant from, a fishing vessel: Bennett SS. Co., Ltd. *v.* Hull Mutual Steamship Protecting Society, Ltd., [1913] 3 K. B. 372; [1914] 3 K. B. 57 (C. A.). In Burnham *v.* China Mutual Ins. Co. (1905), 189 Mass. R. 200, the Supreme Court of Massachusetts held that striking a sunken vessel, the cost of repairing which would have exceeded her repaired value, was not a "collision with another vessel," but with a wreck. Cf. Chandler *v.* Blogg, [1898] 1 Q. B. 32. See, further, as to the meaning of "collision," *post*, § 826.

(*i*) This risk is, however, often expressly included. See The Munroe, [1893] P. 248; Union Mar. Ins. Co. *v.* Borwick, [1895] 2 Q. B. 279. See also Newtown Creek Towing Co. *v.* Aetna Ins. Co. (1900), 163 N. Y. 114.

(*k*) This liability is, however, covered by the Institute Clause, which provides for payments made not merely to the owners of the other ship or her cargo, but "to any other person or persons." This Institute Clause, however, did not provide for the case of two vessels belonging to the same owner coming into collision. In such a case, ship A. having been damaged by ship B. owing to the fault of the latter, though entitled to recover from her own underwriters for the actual damage sustained, would not have been able to recover her demurrage, because the common owner could not sue himself. The underwriter on B. therefore escaped liability, B. not having had to pay damages to any third person. Cases of this nature are met by the Sister Ship Clause, now one of the Institute Clauses, which provides that, "should the vessel hereby insured come into collision with

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been a collision within the meaning of the clause, he is protected against all damages, direct or consequential, occasioned thereby, which the owners of the other vessel or of her cargo may be entitled to recover from him. If, for example, in consequence of a collision between vessels A. and B., for which A. is solely to blame, B. makes payments to a third party, for the reimbursement of which A. is responsible, A. may, under this clause, include these payments in his account against his underwriters. Similarly, if in consequence of such a collision B. is forced ashore, or into collision with some other body, the damages thereby occasioned to B. and payable by A. are recoverable under the clause by A. from his underwriters (*l*). The Institute Clauses, however, contain a proviso, which may apply to cases of this nature, protecting the underwriters against liabilities "for removal of obstruction under statutory powers (*m*), for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury."

Limited protection afforded by collision clause.

796. From the above discussion it will be apparent that the running down clause does not apply to every collision which may occasion damages to the shipowner, but that there may frequently be heads of damage which are totally uninsured against; and it will further be remembered that in no case

or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured."

(*l*) See Fenwick *v.* Merchants' Mar. Ins. Co., [1914] 3 K. B. 827; [1915] 3 K. B. 290. For further instances, see McArthur, 2nd ed. p. 322. Where the underwriters were only liable to reimburse payments made by the assured "in respect of injury to such other ship or vessel itself," it was held by the Court of Appeal, reversing Mathew, J., that the owners of vessel D., which was solely to blame for sinking vessel V., were not entitled to recover from their underwriters a sum which they had been compelled to pay the owners of V., being the expenses which the owners of V. had been compelled to pay River Commissioners for removing the wreck. Burger *v.* Indemnity Mutual Mar. Ins. Co., [1900] 2 Q. B. 348.

(*m*) See The North Britain, [1894] P. 77; Tatham *v.* Burr, [1898] A. C. 382; Chapman *v.* Fisher (1904), 20 Times L. R. 319.

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does it purport to insure against more than three-fourths of the damage sustained. The remainder of the liability, formerly known as "uninsurable," it was the practice and the policy of English underwriters to refuse to cover (*n*), with the object, apparently, of ensuring that the shipowner should be substantially interested in securing the safety of his vessel. And this practice is still adhered to in the ordinary Lloyd's policies, and in those of the principal insurance companies. But in more recent years, in view of the increasing value of the interests exposed to risk in a marine adventure, shipowners have found it necessary to secure for themselves further protection. Such necessity is, no doubt, partly accountable for the formation and development of certain classes of the modern clubs, or mutual insurance associations, which undertake special risks not covered by ordinary policies. It is sometimes made an express stipulation by the rules of clubs of this class that vessels entered shall be deemed to be fully insured in an ordinary policy on ship with the running-down clause attached, and it is provided that no protection is afforded except in respect of losses which are not covered by such a policy. In recent years underwriters have by degrees somewhat enlarged the scope of their insurances (*o*), and eventually a "full protection policy" was introduced by certain Liverpool insurance companies, "which was in effect a Lloyd's policy on the hull of a vessel without the collision clause, but with clauses added dealing with *all* the important liabilities of the shipowner." This form of policy goes far towards giving shipowners the "full protection" which they desire (*p*).

Methods of securing complete protection.

"Full protection policy."

797. Notwithstanding the large business now done by the clubs, and the introduction of full protection policies, Lloyd's

(*n*) Gow, Mar. Ins. 245.

(*o*) *E.g.*, a "four-fourths" running-down clause has in a few cases been agreed to. Gow, Mar. Ins. 255.

(*p*) See Gow, Mar. Ins. 255, of which work and Mr. McArthur's the editors have made frequent use, especially in the present context. To these the reader is referred for further information.

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and some of the principal companies have made attempts to keep the shipowner uninsured in respect of some portion, at least, of his risks and liabilities by the insertion, for instance, of a clause whereby the shipowner is made to warrant that he remains to a stipulated extent uninsured elsewhere. A breach of such a warranty would, of course, avoid the policy *in toto*. The question has arisen in our Courts whether this warranty is broken by effecting an insurance against the margin of liabilities so reserved by what is known as an "honour policy" which, though legally void, is in practice treated as binding. This question was answered in the affirmative by Kennedy, J., but the Court of Appeal left the point open (*q*). Another similar question has been raised as to whether a breach of the warranty is committed when a shipowner effects a further valid insurance which in form undoubtedly transgresses the stipulated margin, with the object, however, not of securing further cover, but only of protecting himself against the anticipated insolvency of the original underwriters. It was decided by Mathew, J., that under such circumstances an owner is justified in taking out additional policies, and commits no breach of his warranty by so doing (*r*). The policy valuation is binding for the purposes of this warranty. Where, therefore, a vessel was valued in the policy at 3,750*l.*, and it was agreed that the assured should keep one-fifth uninsured, the shipowner was not allowed to prove that her real value was 5,000*l.*, and that not having insured beyond 4,000*l.*, he had committed no breach of his undertaking (*s*).

Warranty to remain partially uninsured.

(*q*) Roddick *v.* Indemnity Mutual Marine Ins. Co., Ltd., [1895] 1 Q. B. 836; [1895] 2 Q. B. 380; *ante*, § 637. See also Thames & Mersey Mar. Ins. Co. *v.* "Gunford" Ship Co., [1911] A. C. at p. 538, per Lord Alverstone, C. J. A similar point has frequently been raised in America on fire policies, where it has been generally held that such a warranty is not broken unless the subsequent insurance is valid. See Hubbard *v.* Hartford Fire Ins. Co. (1871), 33 Iowa, 325, and cases there cited; Thomas *v.* Builders' Fire Ins. Co. (1875), 119 Mass. 121.

(*r*) General Ins. Co. of Trieste *v.* Cory, [1897] 1 Q. B. 335.

(*s*) Muirhead *v.* Forth and North Sea, &c. Assoc., [1894] A. C. at p. 79.

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Effect of negligence of the assured or his agents. Where the ship is seaworthy and properly equipped at the outset, the underwriter will be liable for all loss proximately caused by perils insured against, though remotely occasioned by the negligence of the master or crew.

798. It is an established principle in this country, to which effect is given in sect. 55 of the Marine Insurance Act, 1906 (*t*), that, supposing the vessel, crew and equipments to have been originally sufficient, and a captain to have been provided of competent skill, the underwriter is liable for any loss proximately caused by the perils insured against, although it may have been remotely occasioned by the negligence or misconduct (not amounting to barratry) of the captain or crew, whether such negligence or misconduct consist in omitting some act which ought to be done, or doing an act which ought not to be done, in the course of the navigation (*u*). The law is the same in the United States (*x*).

A Russian ship, which was seaworthy at the outset of the risk, was compelled to winter in a port in the Gulf of Finland under the charge of the mate, and was, owing to his negligence in not extinguishing a fire which he had lighted in her cabin, burnt while he was absent on board another vessel: the Court held that, as the loss of the ship was proximately caused by fire (one of the perils insured against) the underwriters were liable, though it was remotely occasioned by the negligence of the mate (*y*).

The Court came to the same conclusion in a case where sugars were lost in the course of being conveyed from the ship to the shore, according to the usage of the West Indian trade, in a sloop adequately manned for the purpose, which was drifted on the rocks in consequence of the seamen in charge of her all going to sleep, in gross neglect of their duty (*z*).

(*t*) *Ante*, § 775.

(*u*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 73; Walker *v.* Maitland (1821), 5 B. & Ald. 171; Bishop *v.* Pentland (1827), 7 B. & Cr. 219; Holdsworth *v.* Wise (1828), *ibid.* 794; Shore *v.* Bentall (1828), *ibid.* 798, n.; Phillips *v.* Headlam (1831), 2 B. & Ad. 380; Dixon *v.* Sadler (1839), 5 M. & W. 405; 8 M. & W. 895; Redman *v.* Wilson (1845), 14 M. & W. 476; Trinder & Co. *v.* Thames & Mersey Mar. Ins. Co., [1898] 2 Q. B. 114.

(*x*) See Phillips, Ins. s. 1049; 3 Kent, Com. 304, 306.

(*y*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 72.

(*z*) Walker *v.* Maitland (1821), 5 B. & Ald. 171.

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A ship, which was obliged, owing to her being a sharp-built vessel, to be lashed to a harbour pier, fell over when the tide left her, and was stove in and stranded in consequence of the gross negligence of the mate in not procuring a rope of sufficient strength for the purpose: the Court, on the same principle, held the underwriters liable (*a*).

A ship insured on an entire voyage out and home, having been seaworthy at the outset, was lost on her passage home by the perils of the sea; the underwriters were held not to be discharged by the captain's negligence and misconduct in sailing with her on this homeward passage in such a state of leakiness as to be obliged to be pumped out by the crew every two hours (*b*).

The master of a vessel which had sailed from Rotterdam to Sunderland in a seaworthy state, on her arriving off a point about four miles from Sunderland, negligently and improperly (but not barratrously) heaved overboard so much of her ballast that the vessel was by a sudden squall driven on her beam ends, sunk and totally lost: the Court held that, as this loss was proximately caused by the perils of the seas, the assured might recover, though it was remotely occasioned by the improper act of the master (*c*).

A ship engaged in the African teak trade, and insured on a voyage out and home, had been seaworthy at the commencement of the risk, but at Sierra Leone had been so unskilfully loaded by the native lumpers that on commencing her voyage home she was found unable to keep the sea, and was run ashore in order to prevent her sinking in the Sierra Leone river: the Court, upon the same principle as in previous decisions, held the underwriters liable for this loss (*d*).

(*a*) Bishop *v.* Pentland (1827), 7 B. & Cr. 219.

(*b*) Holdsworth *v.* Wise (1828), 7 B. & Cr. 794; Shore *v.* Bentall (1828), *ibid.* 798, *in notis*.

(*c*) Dixon *v.* Sadler (1839), 5 M. & W. 405; affirmed (in error), 8 M. & W. 895.

(*d*) Redman *v.* Wilson (1845), 14 M. & W. 476. See also Hodgson *v.* Malcolm (1806), 2 B. & P. N. R. 336; Carruthers *v.* Sydebotham (1815), 4 M. & S. 77.

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So, too, damage to cargo by sea-water occasioned, whilst the vessel was loading in port, by the negligence of the crew in leaving open some cocks or valves in the machinery, was held to be a loss by perils insured against, and to be recoverable from underwriters notwithstanding such negligence (*e*).

And negligence, even of the assured himself, will not preclude him from recovery.

799. It may be inferred from the language of sect. 55 (2) (a) of the Marine Insurance Act, 1906 (*f*), although it is not expressly so provided therein, that, even where the peril occasioning the loss has been due to the negligence (not amounting to wilful misconduct) of the assured themselves, the underwriter will not, on account of such negligence, be relieved from liability. It was so decided by the Court of Appeal before the passing of the Act of 1906 (*g*). The action was brought by the owners of the "Gainsborough" for a total loss of freight. The loss of freight was due to a stranding; the stranding was due to the negligence of the master. The master was also a part-owner; and the main question in the case was whether or not his claim was barred by his own negligence. It was held that there was no warranty by a part-owner that he would not personally be guilty of negligent navigation during the voyage covered by the policy, and that nothing short of *dolus* or wilful misconduct would disqualify him from recovering. "The risk undertaken by an underwriter upon a policy covering perils of the sea," said A., L. Smith, L. J., "is that if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and, in my judgment, it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew, or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured" (*h*).

(*e*) Davidson *v.* Burnand (1868), L. R. 4 C. P. 117.
(*f*) *Ante*, § 775.
(*g*) Trinder & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114.
(*h*) [1898] 2 Q. B. at p. 124. As to non-recovery according to the law of the United States, for a loss caused by the wilful act of the master, as agent of the assured, see Standard Marine Ins. Co. *v.* Nome Beach Co. (1904), 133 Fed. R. 636.

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If the master, crew or ship, were originally deficient, this is matter of defence under the plea of unseaworthiness.

Loss caused by wilfully sending the ship to sea and keeping her there unseaworthy, is a defence even under a time policy.

Of course, if it can be shown, in the case of a voyage policy, that the master when appointed was wholly incompetent (*i*), that the crew was insufficient (*k*), or the ship in any way unseaworthy at the outset of the risk, this is matter of defence, of which the underwriters may avail themselves under a plea of unseaworthiness.

Even under a time policy, after it had been established that there is no implied warranty of seaworthiness (*l*), it was held, that a plea that the vessel was wrongfully and wilfully sent to sea unseaworthy, and kept there unseaworthy and without a proper master and crew, whereby she was lost, was a good defence to an action on the policy (*m*); and it is now expressly provided by the Marine Insurance Act (*n*) that though in a time policy there is no implied warranty of seaworthiness, yet "where with the privity of the assured the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." The question in such a case is whether unseaworthiness is a cause, *i.e.*, a proximate cause, of the loss; it need not be the sole cause (*o*). Independently of the statute, and the decisions on which it was based, it is always open to the underwriter to show that the loss arose, not from any peril insured against, but directly owing to the unseaworthy condition in which the vessel sailed (*p*).

Duty to avert or minimise a loss.

799a. So far it seems clear that the insurer is liable for any loss caused proximately by a peril insured against,

(*i*) Tait *v.* Levi (1811), 14 East, 481; see also Gregson *v.* Gilbert (1783), 3 Dougl. 232; 1 Park on Ins. 138.
(*k*) Forshaw *v.* Chabert (1821), 3 Brod. & B. 158.
(*l*) Gibson *v.* Small (1854), 4 H. L. Cas. 353.
(*m*) Thompson *v.* Hopper (1856), 6 E. & B. 172, 937. Cf. Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284, and observations thereon by Scrutton, L.J., in Whittle *v.* Mountain, *infra*.
(*n*) Sect. 59, sub-s. 5.
(*o*) Thomas & Son Shipping Co. Ltd. *v.* London & Provincial Ins. Co., Ltd. (1913), 29 T. L. R. 736; 30 T. L. R. 595 (C. A.); *ante*, § 697.
(*p*) Fawcus *v.* Sarsfield (1856), 6 E. & B. 192; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455; Sassoon *v.* Western Ass. Co., [1912] A. C. 561; Whittle *v.* Mountain, [1920] 1 K. B. 447.

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unless it has been brought about by the wilful misconduct of the assured himself. It is necessary, however, to consider sect. 78 of the Marine Insurance Act, 1906, which, after enumerating the expenses recoverable under the suing and labouring clause, provides in sub-sect. 4 that "it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss."

The existence of such a duty has been judicially recognized both in this country and in the United States (*q*); and Arnould, writing in 1848, stated that it had long been settled that it was the clear duty of the assured to labour for the recovery and restitution of detained or damaged property (*r*). There seems, however, to be no case in which it was necessary to decide that the assured owes such a duty in the strict legal sense of the term to the insurer, or what are the legal consequences of a breach thereof, though the judgment of the Privy Council in Currie *v.* Bombay Insurance Co. is partly based on there having been a breach of this duty which prevented the assured from recovering on his policy (*s*).

(*q*) See Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 72, 81, 84; Columbian Ins. Co. *v.* Ashby (1830), 4 Peters, Sup. Ct. R. 139, 143. See also Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535, 544; and Meyer *v.* Ralli (1876), 1 C. P. D. 358, 368, 371; but the duty of the master mentioned in the two last-mentioned cases seems to be one owing rather to the owners of the cargo than to the insurers. In Kidston *v.* Empire Ins. Co., in the Exchequer Chamber (1867), L. R. 2 C. P. at p. 365, Kelly, C. B., delivering the judgment of the Court, said that, although not unreasonable, it had never been held to be law in this country that if the owner of freight fails to earn it by his own default, he should be disentitled to recover it against the insurer.

(*r*) Arnould, 1st ed. vol. i. p. 35; see also vol. ii. p. 1190. See *ante*, § 22, *post*, § 1218. Arnould cites Mitchell *v.* Edie (1718), 1 T. R. 608, which does not seem to be in point. See also McArthur, p. 263.

(*s*) The policy was on a cargo of timber, against total loss only, and the ship having gone aground and become a wreck, the master, without taking any steps to save the cargo, gave notice of abandonment to the insurers thereof, and sold ship and cargo in one lot. Part of the cargo was subsequently saved. The Judicial Committee were of opinion that there was no time between the grounding of the ship and the sale, at which the assured were entitled to treat the cargo as having been totally lost (L. R. 3 P. C. at p. 82). The total loss, if it can be said to have occurred, was therefore the result not of a peril insured against, but of an unjustifiable sale. Their Lordships, however, also said (p. 81): "Assuming for the moment that the cargo was in such a condition at this time (*i.e.*, shortly before the sale) that it might be regarded as totally lost, if previously a portion of it, at least, might have been saved by the exertions of the captain acting for the assured, and he chose not to make the slightest attempt to save it, how can the assured recover from the underwriters a loss which was made total by their own negligence? This, in itself, would be an answer to the claim of a total loss upon the policy on the timber." They further said (p. 82): "This omission of the captain to take any steps towards saving the cargo, at a time when it was probable that his endeavours would be successful, in their Lordships' judgment, precludes the assured from recovering for a total loss of the cargo into whatever condition it might have been brought afterwards."

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If the effect of the provision under discussion is that the assured cannot recover for a loss proximately caused by a peril insured against, on the ground of an omission on his part (not amounting to wilful misconduct), or on the part of his agent, to take some step to avert the loss, it limits the operation of sect. 55 of the Marine Insurance Act, 1906, and seems to conflict to some extent with the principle on which the decision in Trinder *v.* Thames and Mersey Insurance Co. (*t*) is founded (*u*).

800. Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there can be no doubt that the underwriters would be thereby discharged.

Where the loss is not proximately caused by perils of the sea, but is directly referable to the negligence or misconduct (not amounting to barratry) of the agents of the assured, the underwriter will be discharged from his liability.

Thus—to take a case recorded by Emerigon as having actually occurred at the first breaking out of the great plague of Marseilles in 1720—where the master of a ship, part of whose crew had died of the plague on the voyage, sailed into that city with a false bill of health, in consequence of which his ship was ordered to be burnt, this misconduct was held to discharge the underwriters (*x*).

(*t*) [1898] 2 Q. B. 114.

(*u*) In Gaunt *v.* British & Foreign Ins. Co., Ltd., [1920] 1 K. B. 903, at p. 917, Atkin, L.J., expressed disagreement with this suggestion. "I think," said the learned Lord Justice, "that the only effect of that subsection (s. 78, sub-s. 4) is to impose a duty to sue and labour."

(*x*) 1 Emerigon, c. xii. s. 13, p. 429.

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The following English case seems to have proceeded on the same ground:—A ship having been driven ashore near the harbour of St. Thomas (West Indies) was afterwards got off very little injured, and might have been repaired but for the negligence of the agents of the assured in the island, who allowed her to be condemned and broken up after two very hasty and imperfect surveys; Lord Tenterden told the jury that the underwriters would not be liable for the total loss by condemnation and sale, if, in their opinion, such loss had been brought about by the negligence or misconduct of the agents of the assured (*y*).

Loss directly referable to the acts or negligence of the assured

801. *A fortiori,* where the loss is not proximately caused by a peril insured against, but is directly referable to the act of the assured himself, the underwriter will not be liable (*z*).

(*y*) Tanner *v.* Bennett (1825), Ryan & Mood. 182. See, as to the *S. P.*, Bradford *v.* Levy (1825), 2 C. & P. 137.

(*z*) Mar. Ins. Act, 1906, s. 55, *ante*, § 775; Bell *v.* Carstairs (1811), 14 East, 374, has been cited in support of this obvious proposition. The facts in that case were that a neutral American ship was captured by a French privateer, and was afterwards with her cargo condemned by a French Court as prize, upon the express ground that the ship was not furnished with the documents which, according to the treaty between France and the United States, were necessary to prove her American nationality. The plaintiffs, who owned ship, freight and cargo, thereupon brought an action on English policies of insurance, averring a loss by capture. The principal arguments used on behalf of the underwriter were, first, that there was an implied warranty in every policy that a vessel should be properly documented, and secondly, that the loss was due to the negligence of the owners in failing to supply proper documents. Effect was given in some way to the latter contention, and the case was decided in favour of the underwriter, but it is not clear precisely on what ground. There are expressions in the judgment of the Court delivered by Lord Ellenborough which suggest that the *ratio decidendi* of the case was that the loss was due to the condemnation, and not the capture, of the vessel, and that neither the condemnation itself, nor its cause (*i.e.*, the want of necessary documents), was a peril insured against. But it is more likely that the Court simply considered that the assured ought not to be allowed to recover for a loss occasioned by his own act or default. It is otherwise difficult to understand the care taken to distinguish the case from Dawson *v.* Atty (1806), 7 East, 367, where, under similar circumstances, a loss of cargo was held to be a loss by capture, and the cargo owner, having no duty to supply documents, and so having been guilty of no negligence or breach of duty in not supplying them, was allowed to recover.

The following passage, cited from the judgment of Collins, L.J., in Trinder & Co. *v.* Thames & Mersey Marine Ins. Co., [1898] 2 Q. B. at p. 128, shows the views taken in earlier editions of this work, as well as those of other authorities:—

"The cases based on the absence of documents may be rested on two grounds, assuming that the act of the assured fell short of *dolus*, which is not clear—(a) That in the case of insurance against capture there is an implied contract that the ship shall be properly documented. It is put on this ground by Phillips, s. 745, and by Arnould, p. 668, 5th ed. (b) That capture insured against, being not the mere detention for the purpose of inspection of documents, but the taking 'with intent to deprive the owner of all dominion or right of property over the thing taken' (Arnould, p. 748, 5th ed., citing Emerigon, p. 428), 'the want of documents may be regarded as the proximate cause of the loss.' Willes, J., in Thompson *v.* Hopper, explains these cases on this ground. Referring to Bell *v.* Carstairs, he says:—'The loss was the immediate and direct result of the want of proper papers, and it was the duty of the owner of the ship, by the law which authorized its capture, if not by the general maritime law (see Roccus), to be provided with those papers, and the want of them was the direct, immediate and only cause of the loss.'"

Notwithstanding these weighty expressions of opinion, the editors venture to submit that there is great difficulty in following the fine distinction between loss by capture and loss by condemnation. As soon as the vessel was captured by the privateer (whose object was to obtain her condemnation by a Prize Court), it is submitted that there was a total loss by capture. The subsequent condemnation was not necessary to constitute a total loss, but only transformed what was already a constructive total loss into a total loss in respect of which no notice of abandonment need be given. Another way of arriving at the same result is suggested by the judgments of Channell, J., and Lord Halsbury, in Andersen *v.* Marten, [1907] 2 K. B. at pp. 254, 255; [1908] A. C. at p. 341. It is also to be noticed that the passage cited by Collins, L.J., from the 5th edition of this work was in the 2nd edition (p. 832, see this edition, § 829) made subject to the qualification that an intent to deprive the owner of his rights of property, though necessary to constitute a "capture" proper, was not requisite to constitute a "taking at sea."

In this context there were cited in former editions of this work (2nd ed. p. 798; 6th ed. p. 732) the two convoy cases of Carstairs *v.* Allnutt (1813), 3 Camp. 497, and Metcalfe *v.* Parry (1814), 4 Camp. 123, as illustrating the principle that an underwriter is discharged whenever it can be shown that the loss was in any way brought about by a violation of the law to which the assured was privy. It appears, however, that the cases have nothing to do with any such principle. The only point discussed was whether or not there had under particular circumstances been an infringement of the Convoy Acts. If there had, and the assured was privy thereto, the policy was by the express provisions of the Acts—and apart from any principle at present under consideration—*ipso facto* avoided. See 38 Geo. 3, c. 76; 43 Geo. 3, c. 57.

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himself is not at the risk of the underwriters.

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thereby convert it into a total loss under a policy which is "free from average" (*a*). And, for a similar reason, the underwriter is not liable for losses occasioned by bad stowage (*b*).

Goods carried on deck.

In accordance with a well-recognized usage, the loss of goods carried on deck, that being considered an improper and unsafe place to carry them, is not recoverable under a general policy on goods, unless they are so carried by virtue of a general usage of trade, with which the underwriter must be presumed to have been familiar (*c*). In practice, they are often expressly covered by what is known as an "in and over" clause.

"In and over" clause.

Statutory limitation of owner's responsibility.

802. The extent of the shipowner's responsibility for damage caused to goods, or to another ship, by the acts of the master or mariners is, under the common law of England, limited only by the full amount of the loss or damage sustained (*d*).

With a view to encouraging the shipping interest, our legislature has at different times passed various Acts in order to limit this responsibility (*e*). The Act at present in force is the Merchant Shipping Act, 1894, which provides as follows:—

The owner (*f*) of a British sea-going ship or any share therein shall not be liable to make good to any extent what-

(*a*) Meyer *v.* Ralli (1876), 1 C. P. D. 358.

(*b*) See Emerigon, c. xii. ss. 2, 4, 5. Bad stowage is expressly excepted, even in a "full protection policy."

(*c*) See Mar. Ins. Act, 1906, Schedule I. rule 17, *ante*, §§ 222, 225; Ross *v.* Thwaite (1776), 1 Park, Ins. 23; Backhouse *v.* Ripley (1802), *ibid.* 24; Da Costa *v.* Edmunds (1815), 4 Camp. 142; Gould *v.* Oliver (1837) 4 Bing. N. C. 134; Milward *v.* Hibbert (1842), 3 Q. B. 120.

(*d*) Maclachlan on Shipping, 5th ed. 126 *et seq.*

(*e*) As to the motives of the legislature, see the preamble of 7 Geo. 2, c. 15; the remarks of Lord Tenterden in Gale *v.* Laurie (1826), 5 B. & Cr. 163; and of Parke, B., in Brown *v.* Wilkinson (1847), 16 L. J. Exch. 36.

(*f*) "Owner" in this and the following sections includes any charterer to whom the ship is demised: Merchant Shipping Act, 1906, s. 71, overruling the decision in The Hopper No. 66, [1907] P. 254, which was afterwards reversed by the House of Lords, *sub nom.* Sir John Jackson, Ltd. *v.* Owners of SS. Blanche, [1908] A. C. 126.

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ever any loss or damage happening without his actual fault or privity in the following cases, namely:—

(1.) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

(2.) Where any gold, silver, diamonds, watches, jewels or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof (*g*).

And by sect. 503 of the same (*h*) Act: The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say),

(a) Where any loss of life or personal injury is caused to any person being carried in the ship;

(b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

(c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

(d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship,

be liable to damages beyond the following amounts (that is

(*g*) Merchant Shipping Act, 1894, s. 502.

(*h*) This section has been extended and applied to all cases where (without the actual fault or privity of the owners) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship. Merchant Shipping (Liability of Shipowners and Others) Act, 1900.

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to say): (i.) In respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, to an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and (ii.) in respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage; and then follow provisions for the ascertainment of the tonnage of vessels, British and foreign, which were amended by sect. 69 of the Merchant Shipping Act, 1906.

These important provisions limit claims made by owners of foreign as well as British ships, and apply to occurrences happening outside of British jurisdiction (*i*).

Insurances under the Merchant Shipping Act.

Sect. 506 of the same Act provides for the legality of insurance against the happening without the owner's actual fault or privity of any of the events in respect of which his liability is so limited, and such insurances are specially exempted from the requirements of the Stamp Act (*k*). They have given rise to the Shipowners' Protection Association or Clubs.

Loss by the acts of the Government of the assured.

803. There are two classes of cases in which loss may be occasioned by the public authoritative acts of the Government of the assured: those in which the assured and underwriter are both subjects of the same state, and those in which they are subjects of different states.

In the former class of cases it may now be taken as settled law that the underwriter is liable for all loss occasioned by the public acts of the home Government in detaining, arresting or laying an embargo on the ship either in the home or a foreign port for any other cause than a violation of law,

(*i*) The Amalia (1863), 32 L. J. Adm. 191.
(*k*) Stamp Act, 1891, s. 93, sub-s. (i).

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and it is immaterial whether the acts of the home Government are legal or illegal (*l*).

In the latter class the nature of the conclusion justified by law will differ according as there is war or peace between the two powers. We have already seen that an insurance on enemy's property is illegal (*m*); we may add that a policy, legal when made, may become invalid by what is tantamount to a declaration of hostilities between the Government of the assured and that of the insurer (*n*).

Even as regards time of peace, the principle was laid down, and for a long time tenaciously adhered to by Lord Ellenborough, "that in all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own Government; and on that account a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a British subject in a British court of justice as he would be if such act had been done immediately and individually by such foreign subject himself" (*o*). And, applying this principle in a case that came before him, where an embargo had been laid upon native shipping during a time of peace, and in no hostile spirit to any foreign power, Lord Ellenborough held that the assured must be identified with his Government and the underwriter therefore discharged (*p*).

(*l*) Sanday *v.* British and Foreign Mar. Ins. Co., [1915] 2 K. B. 781; [1916] 1 A. C. 650. See especially the judgment of Bailhache, J., where the early authorities are closely examined. Page *v.* Thompson (1804), at N. P., Park, Ins. 175; Green *v.* Young (1702), 2 Lord Raym. 840; *S. C.*, 2 Salk. 444; see also the *dicta* of Lord Alvanley in Touteng *v.* Hubbard (1802), 3 B. & P. 302; 3 Kent, Com. 291.
(*m*) *Ante*, § 753.
(*n*) Touteng *v.* Hubbard (1802), 3 B. & P. 291; Aubert *v.* Gray (1862), 3 B. & S. 163; 32 L. J. Q. B. 50. As to what constitutes an outbreak of hostilities, see Driefontein Consolidated Mines, &c. *v.* Janson, [1900] 2 Q. B. 339; *S. C.*, in C. A., [1901] 2 K. B. 419; and *sub nom.* Janson *v.* Driefontein, &c. in the House of Lords, [1902] A. C. 484.
(*o*) Per Lord Ellenborough in Conway *v.* Gray (1809), 10 East, 545.
(*p*) Conway *v.* Gray (1809), 10 East, 536; Conway *v.* Forbes (1809), *ibid.*; Maury *v.* Shedden (1809), *ibid.*

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No little confusion followed this generalization of a very restricted rule (*q*). The right rule of law was declared by a Court of Error in Bazett *v.* Meyer (*r*), and would have rested there but for the case of Campbell *v.* Innes (*s*). The question was again raised in more recent times, and, it is to be hoped, finally set at rest by the decision of the Exchequer Chamber affirming that of the Queen's Bench, that the assured is not to be identified with the acts of his own Government unless the existence of hostilities between it and the Government of the insurer renders any such contract of indemnity incompatible with that highest law—the *salus populi*—under the insurer's Government (*t*).

In the United States.

In the United States the whole question has come before the consideration of the Supreme Court, and it has there been held, agreeably to the declared principle of the decisions by the English Exchequer Chamber in Bazett *v.* Meyer and Aubert *v.* Gray, that a subject is not to be deemed a party to the peaceful acts of his own Government, so as thereby to deprive him of remedy on a policy effected with foreign underwriters in respect of losses caused by such acts (*u*).

Loss of voyage by interdiction of commerce, or blockade or embargo. Such loss of voyage is not a risk covered by English policies in the common form.

804. In the law maritime received on the Continent of Europe, the compulsory abandonment of the voyage, occasioned by the interdiction of commerce with the port of destination after the commencement of the risk, or by its hostile occupation, embargo, or blockade, is considered to be a risk covered by the policy, and recoverable either as caused by "a restraint of princes," or under the words "compulsory change of voyage."

(*q*) Mennett *v.* Bonham (1812), 15 East, 477; Flindt *v.* Crokatt (1812), *ibid.* 522; Flindt *v.* Scott (1812), *ibid.* 525; Simeon *v.* Bazett (1813), 2 M. & S. 94; Campbell *v.* Innes (1821), 4 B. & Ald. 423.

(*r*) 5 Taunt. 824, 829; and see Flindt *v.* Scott (1812), *ibid.* 674.

(*s*) 4 B. & Ald. 423.

(*t*) Aubert *v.* Gray (1862), 3 B. & S. 163, 169; 32 L. J. Q. B. 50. See Janson *v.* Driefontein, &c., *ubi supra*.

(*u*) Ocean Ins. Co. *v.* Francis (1828), 2 Wend. S. C. R. 64, cited 3 Kent, Com. 292.

Sect. 804.

In this country, however, it has been repeatedly decided, and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amounts to a risk for which English underwriters are answerable under the common form of policy, either as an "arrest, restraint, and detention," or in any other way whatever (*x*).

The principle on which these decisions rest is the maxim *Causa proxima non remota spectatur:* "the cause of loss must be a peril acting upon the subject insured, immediately and not circuitously."

Loss of voyage by fear of confiscation.

805. A cargo of pilchards was insured "free of average," by an English ship from the coast of Cornwall to Naples. On her voyage, while sailing under convoy, intelligence was received that all the ports of Naples were shut against English vessels; upon which the commodore of the convoy ordered this ship, amongst others, into Port Mahon, in Minorca, where her cargo was surveyed and sold for a very small sum. The assured, who had abandoned, claimed a total loss; but the Court of Common Pleas held that the underwriters were not liable, on the ground, as stated by Lord Alvanley, that "where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby

(*x*) Hadkinson *v.* Robinson (1803), 3 B. & P. 388; Lubbock *v.* Rowcroft (1803), 5 Esp. 50; Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 454; Forster *v.* Christie (1809), 11 East, 205; cf. Miller *v.* Law Accident Ins. Co., *infra*, § 807. In cases of this type it has been said that the voyage might have been continued without any illegality; and that the adventure came to an end, not owing to any restraint of princes, but owing to the reluctance of the master to put his cargo into a position of peril. The decisions are therefore said to be distinguishable from, and consistent with, that of the House of Lords in British and Foreign Marine Ins. Co. *v.* Sanday, [1916] 1 A. C. 650. See Becker, Gray & Co. *v.* London Ass. Co., [1918] A. C. 101. It should be observed, however, that in Hadkinson *v.* Robinson there was an actual closure of the port of destination to the vessel carrying the cargo insured, and not a mere apprehension.

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the object of the voyage is defeated—such circumstances do not amount to a peril operating to the total destruction of the thing insured."

"The doctrine (that the assured might abandon in respect of a loss of voyage) is only applicable," said his Lordship, "to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting upon the subject insured immediately, and not circuitously as in the present case" (*y*).

Loss of voyage by blockade, fear of capture, &c.

806. This decision has been implicitly followed by the English Courts in all subsequent cases of the same kind.

Thus, where, in an insurance on goods bound to Messina, the ship having arrived at Port Mahon found that Messina was in the hands of or blockaded by the French, and the assured on goods consequently gave notice of abandonment, and went for a total loss—Lord Ellenborough, on the above grounds, held that he could not recover (*z*).

So, where under a policy on goods from London to Revel, the ship, which had passed the Sound and was sailing under convoy towards Revel, was turned back by the commodore on receiving intelligence that an embargo was laid on all British ships in Russian ports, and afterwards, finding the intelligence confirmed, wholly gave up her voyage and sailed back for England with the convoy, but foundered at sea on the passage: Lord Ellenborough, on this state of facts, held that the assured could not recover (*a*).

So, where a British ship bound for St. Petersburg was detained in the Baltic by the commander of the British convoy there, from apprehension of Russian embargo, until

(*y*) Hadkinson *v.* Robinson (1803), 3 B. & P. 388. See also McSwiney *v.* The Roy. Exch. Ass. Co. (1850), 14 Q. B. 646; Halhead *v.* Young (1856), 6 E. & B. 312; Chope *v.* Reynolds (1859), 28 L. J. C. P. 194; Nickels *v.* London & Prov. Ins. Co. (1900), 6 Com. Cas. 15.

(*z*) Lubbock *v.* Rowcroft (1803), 5 Esp. 50.

(*a*) Blackenhagen *v.* London Ass. Co. (1808), 1 Camp. 454. The loss in this case was laid in one count "by capture," in another "by perils of the seas." See also Parkin *v.* Tunno (1809), 2 Camp. 59; 11 East, 22.

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the embargo actually was laid on, and the further prosecution of the adventure became impossible and the voyage was lost, although if the ship had been suffered to proceed without detention by the convoy she might, in fact, have saved the embargo: Lord Ellenborough and the Court held, as in the last case, that the underwriters on cargo were not liable to the assured, who had duly abandoned, for a total loss (*b*).

The plaintiffs, who were Russian subjects, insured a cargo of salt beef with the defendants from San Francisco to Vladivostok against (*inter alia*) capture. During the currency of the policy war broke out between Russia and Japan, and the Japanese fleet in the Pacific was stopping and capturing vessels and was also blockading Vladivostok. The plaintiff, under the circumstances, gave notice of abandonment and discharged the cargo at San Francisco, and brought an action claiming for a constructive total loss. The Court of Appeal, affirming Pickford, J., held that although the plaintiff had every reasonable ground for anticipating that if the vessel set out for Vladivostok she would be captured, and her cargo condemned and lost, yet that inasmuch as the peril insured against had never begun to operate, the loss could not have been occasioned thereby (*c*).

This doctrine has recently been affirmed in the House of Lords. The plaintiffs, a firm of British merchants, shipped goods in time of peace on a German ship for carriage from Calcutta to Hamburg, and insured them with the defendants against the usual perils, including men-of-war, enemies, and restraints of princes. While the goods were at sea, war broke out between Great Britain and Germany, and the master thereupon put into Messina, then a neutral port, to avoid the risk of capture by British or allied warships, and with the intention of suspending the further prosecution of the voyage until after the termination of the war, and the voyage

(*b*) Forster *v.* Christie (1809), 11 East, 205.

(*c*) Kacianoff *v.* China Traders' Ins. Co., Ltd., [1913] 3 K. B. 407; [1914] 3 K. B. 1121.

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was thereupon abandoned. It was agreed that any German steamer proceeding at this time through the Mediterranean on a voyage to Hamburg would have been in peril of capture by the allied fleets. It was held that there was a real distinction between a loss by perils insured against and a loss by successfully avoiding them, between a loss by capture and a loss by the fear of capture, and that the loss in question fell under the latter head, and was therefore not recoverable under the policy (*d*).

In our law, then, the position is clearly established that an interdiction of commerce with the port of destination by means of a blockade or embargo, or possession of the port by an enemy, is not a peril within the policy (*e*). It is also established that a loss of voyage due merely to the apprehension of a forcible interruption operates in no sense as a loss of cargo.

But detention of goods may amount to a constructive total loss.

807. The cases noticed above must be distinguished from cases of the type of Rodocanachi *v.* Elliott. In that case the goods had actually found their way inside Paris when the German Army invested the city, and prevented them being forwarded to their ultimate destination. Under these circumstances the assured, who had given notice of abandonment at a time when the detention appeared likely to last for an indefinite time, and brought his action while such detention was still lasting, was held entitled to recover for a constructive total loss of the goods, though they had before trial reached their destination undamaged (*f*).

Prohibition of discharge may cause constructive total loss.

Again, where a vessel arriving at Buenos Ayres with a shipment of cattle was ordered by the Argentine Ministry to leave the port without landing them, on the ground that they were suffering from disease, so that it became necessary

(*d*) Becker, Gray & Co. *v.* London Ass. Co., [1915] 3 K. B. 410; [1916] 2 K. B. 156; 1918] A. C. 101.

(*e*) So Arnould, 2nd ed. p. 811. But it is at least doubtful whether anything more is established than what is stated in the next sentence. See *infra*, §§ 832a *et seq.*

(*f*) Rodocanachi *v.* Elliott (1873-4), L. R. 8 C. P. 649; 9 C. P. 518.

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to tranship them and take them to Monte Video where they were sold at a considerable loss, the Court of Appeal held that there had been a restraint of princes or people within the policy (*g*). The distinction drawn by the Court between this case and the class of cases of which Hadkinson *v.* Robinson is an example, is that in the latter class the *causa proxima* of the abandonment of the voyage was the voluntary act of the master, whereas here the Argentine Government had actually intervened, and if force was not actually used it was only because the master submitted to the orders of the administration (*h*).

Another class of cases which must be distinguished from those already noticed is that of which The Knight of St. Michael (*i*) is a type. A cargo of coals was in danger of spontaneous combustion, though no part was ever actually on fire. Barnes, J., held that inasmuch as there was an actual existing peril, a loss of freight due to the necessary discharge and sale of cargo at an intermediate port was either a loss by fire, or was covered by the general words in the policy.

Operation of restraint in contracts of carriage.

Moreover, these cases do not apply to charter-parties or bills of lading (*k*). This is not because any different meaning is given to the words "restraint of princes" in contracts of carriage and of marine insurance, but because the object of the contracts is different. A restraint may well operate so as to prevent a shipowner from arriving with his ship at a given port, or may excuse non-delivery of cargo under a contract of carriage, without at the same time causing any loss of cargo recoverable under a contract of insurance (*l*).

Law in United States.

808. As to the law in the United States on this subject, Phillips, after a thorough review of the authorities, states as

(*g*) Miller *v.* Law Accident Ins. Co., [1903] 1 K. B. 712 (C. A.). This case and Rodocanachi's were expressly dealt with by Lord Sumner in Becker, Gray *v.* London Ass. Co., [1918] A. C. at p. 115.

(*h*) See per Stirling and Mathew, L. JJ., [1903] 1 K. B. 720, 721.

(*i*) [1898] P. 30. Cf. Kacianoff *v.* China Traders' Ins. Co., Ltd., [1913] 3 K. B. 407; [1914] 3 K. B. 1121.

(*k*) Cf. Geipel *v.* Smith (1872), L. R. 7 Q. B. 404. See hereon, *infra*, § 832a.

(*l*) See per Lord Sumner in Becker Gray's Case, [1918] A. C. at p. 114.

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the better doctrine, that where, after the risk had begun, the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also, that an assured on the cargo has a right to abandon (*m*). And the law there is apparently the same when the loss of the voyage is occasioned by a just fear of capture, when the danger thereof is imminent, as well as when it is apparently remediless and morally certain (*n*).

Protection afforded in England by proper policies on freight or profits.

Although loss thus occasioned is in general not recoverable under the common printed form of English policies, parties may by written clauses protect themselves against it; as, for instance, by stipulating that the ship, if turned away from the port of destination, shall be at liberty, without prejudice to the insurance, to make the nearest friendly port; or the risk of compulsory abandonment of the voyage to the port of destination by reason of blockade, embargo, or enemy's occupation, might be inserted as a specific risk, in addition to those ordinarily insured against (*o*).

Under most circumstances the interest which really suffers by a loss of voyage appears to be freight or profits; and such is probably the proper subject to insure against risks of this nature.

Losses due to violation of foreign revenue laws.

809. Unless the policy contains an express exception against the risks of illicit trade, the underwriter is liable for any loss that may arise from the attempted violation of the revenue laws of foreign states (*p*); but this is so, only in so

(*m*) 1 Phillips, s. 1115; 3 Kent, Com. 292.
(*n*) 3 Kent, Com. 294.
(*o*) See Naylor *v.* Taylor (1829), 9 B. & Cr. 718.
(*p*) 2 Emerigon, c. xiii. s. 51, pp. 30 *et seq.*; Planché *v.* Fletcher (1779), 1 Dougl. 251; Lever *v.* Fletcher (1780), 1 Marshall, Ins. 45; see also 1 Phillips, Ins. ss. 595–599.

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far as he is proved, or must in fairness be presumed, to have been cognizant at the time of underwriting the policy of the intention of violating them.

Thus, if the subject insured be specifically described in the policy, and be an article, the import or export of which is notoriously prohibited by the trade laws of the country to or from whose port it is insured, the underwriter is liable for the loss caused by its seizure or forfeiture.

Thus, where a policy was effected in France, "on silk stuffs," from Spain to a French port, the exportation of such goods being notoriously prohibited by the revenue laws of Spain, the underwriter was held liable for loss occasioned by their seizure in Spain (*q*).

Risk aggravated by subsequent events.

810. It is a general principle which applies to all risks assumed by underwriters, that they continue liable for all losses by the perils insured against, although those perils are greatly enhanced by events that the assured could not prevent.

Thus, if capture is one of the perils insured against, and after the policy be made the risk of capture is greatly increased by the breaking out of war, it is clear insurance law that the underwriter, nevertheless, continues liable, for the risk of the declaration of war is considered to be one of the perils he assumes (*r*). But if the policy has thereby become an insurance upon enemy's property, it is in consequence rendered invalid.

Insurance on one subject, loss on another.

811. As a general principle the underwriter on one subject of insurance has nothing to do with losses, charges or contributions imposed upon it by reason or on account of another.

Thus the underwriter on goods has nothing to do with freight; all that he insures being the safe arrival of the goods. Hence it is a well-established principle in the law

(*q*) 2 Valin, tit. vi. art. 49, and the opinion of Emerigon there given.
(*r*) Planché *v.* Fletcher (1779), 1 Dougl. 251.

Sect. 811. of Marine Insurance that, though sea-damaged goods, if they arrive in specie or in bulk, pay the same freight as though they arrived sound, the underwriter on goods cannot be charged with the detriment the merchant thus sustains by having to pay undiminished freight on a diminished value(*s*); nor can he be charged with any *pro ratâ* freight the merchant may have to pay the shipowner (*t*). But he may be charged under certain circumstances with the increased freight which the merchant is obliged to pay the shipowner in cases of transhipment, when the freight by the substituted exceeds that by the original ship (*u*).

On the same principle the underwriter on goods cannot be called on to make good loss incurred by a forced sale of the goods for the repair of ship (*x*), or loss by fall of the market during delay in estimating an average damage, or loss at public auction occasioned by suspicion of damage (*y*), nor the underwriter on the ship to make good expenses incurred by the detention of the goods (*z*).

If, indeed, the same casualty that destroys or damages one subject of insurance thereby also causes a total or partial loss upon another, the underwriters on the latter subject of insurance are chargeable for the loss thus caused. Thus, the perils of the seas that destroy or swallow up ship and goods give a direct claim to a total loss against the underwriters on freight or profits, the earning of which has been rendered impossible by the direct effect of the casualty (*a*).

(*s*) Benecke, Pr. of Indemnity, c. i. As to insurances by means of policies on "contingency freight" against the loss resulting from the payment of full freight on damaged goods, see *ante*, § 232.

(*t*) Baillie v. Moudigliani (1785), Park, Ins. 116.

(*u*) See Shipton *v.* Thornton (1838), 9 A. & E. 336, 337; Kidston *v.* Empire Marine Ins. Co. (1867), L. R. 1 C. P. 535; 2 C. P. 357.

(*x*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; Sarquy *v.* Hobson (1823), 4 Bing. 131.

(*y*) Cator *v.* Gt. Western Ins. Co. of New York (1873), L. R. 8 C. P. 552. Cf. Brown *v.* Fleming (1902), 7 Com. Cas. 245.

(*z*) Bradford *v.* Levy (1825), Ry. & Mood. 331.

(*a*) Cf. Montoya *v.* London Ass. Co. (1851), 6 Ex. 451; with which compare Field SS. Co. *v.* Burr, [1898] 1 Q. B. 821; [1899] 1 Q. B. 579 (C. A.).

CHAPTER II.

LOSSES BY THE PERILS INSURED AGAINST.

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812. The clause in our English policies enumerating the "adventures and perils" against loss by which the underwriters undertake to indemnify the assured, is as follows:—

> "Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

Loss by the perils of the seas.

Of all the causes of loss enumerated in our common policies, the most frequent and important are those comprised under the term "Perils of the Seas."

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Meaning of "perils of the seas."

Much difficulty has been felt in defining this expression. The words obviously embrace all kinds of marine casualties, such as shipwreck, foundering, stranding, &c.; as also every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves (*a*), as distinct from that included in the ordinary wear and tear of the voyage or directly referable to the acts and negligence of the assured as its proximate cause. And the limitation suggested by the word "violent," which Arnould used, cannot, in view of later authorities, be supported. It is enough that damage be done by the fortuitous action of the sea. For instance, where cargo was damaged by the incursion of sea-water through a hole in a pipe gnawed by rats, the House of Lords held this to be a loss by a peril of the seas (*b*). It is perhaps easier to arrive at a true understanding of the term by suggesting rather what it does not embrace than what it does. It is clear, for instance, that no casualty can be included which is not due to a peril. Furthermore, the peril must be "of the seas." There may be a peril which is not a peril of the seas (*c*), and there may be damage caused by the sea without any peril. These points are well brought out and illustrated by Lord Herschell:—"I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the

(*a*) See per Lush, J., in Merchants' Trading Co. *v.* Universal Mar. Ins Co. (1870), cited in L. R. 9 Q. B. at p. 596.

(*b*) Hamilton *v.* Pandorf (1887), 12 App. Cas. 518. Similarly, damage caused by the influx of sea-water by reason of the opening of a wrong valve is due to a peril of the seas: Blackburn *v.* Liverpool, &c. Steam Navigation Co., [1902] 1 K. B. 290. These are both cases of exceptions in contracts of affreightment, but both in the former case, and in The Xantho, *infra*, the House of Lords held that the words "perils of the seas" ought to receive the same construction whether occurring in a contract of carriage or in one of marine insurance. So in Sassoon *v.* Western Ass. Co., [1912] A. C. 561, the Privy Council held that the words had the same meaning when used in a policy on goods as when used in a policy on ship.

(*c*) Thus the bursting of the air chamber of a donkey-engine owing to an excessive pressure of water is not due to a peril of the seas, though it occur at sea: Thames & Mersey Mar. Ins. Co. *v.* Hamilton, Fraser & Co. (1887), 12 App. Cas. 484.

insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure (*d*). The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think that is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category" (*e*).

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Similarly, in Hamilton, Fraser & Co. *v.* Pandorf & Co., Lord Halsbury, L. C., said:—"I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the

(*d*) See Popham *v.* St. Petersburg Ins. Co. (1904), 10 Com. Cas. 31, where Walton, J., held that an accidental and unexpected obstruction by ice, which was dangerous to navigation, was a peril of the seas, and Whittle *v.* Mountain, [1920] 1 K. B. 447, where it was held that the influx of water through leaky seams above the water line occasioned by a breast wave caused by towing the vessel was a peril of the seas, though the water was smooth and the towage was properly performed. The case is at present under appeal to the House of Lords.

(*e*) Per Lord Herschell in The Xantho (1887), 12 App. Cas. at p. 509; cf. Sassoon *v.* Western Ass. Co., [1912] A. C. 561. See also Ajum Goolam Hossen and Others *v.* Union Mar. Ins. Co., Ltd., [1901] A. C. 362, for a case where the assured on ship recovered for a total loss, although the loss did not appear to be traceable to any violence of wind or wave, or to any unusual circumstance.

Sect. 812. destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas" (*f*). And, in the same case, Lord Bramwell said:—"An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behaviour or ill-condition. But that is met by the argument, that if so, striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence" (*g*).

In accordance with these judgments, rule 7 of the Rules for Construction of Policy in the First Schedule of the Marine Insurance Act, 1906, declares that "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves."

813. We proceed to consider the different cases of loss proximately caused by perils of the sea.

Foundering at sea.

Foundering at sea, when proximately caused by the fury of storms and tempests (*h*), is an obvious case of loss by the perils of the sea. The only difficulty is, the proof of the loss in cases where the ship founders with all on board, or after the crew have left and lost sight of her.

Presumptive proof.

It is expressly provided by sect. 58 of the Marine Insurance Act, 1906, that "Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed" (*i*). The period of time after which this pre-

(*f*) (1887), 12 App. Cas. at p. 524.

(*g*) (1887), 12 App. Cas. at p. 527. Cf. also the judgments in Thames & Mersey Marine Ins. Co., Ltd. *v.* Hamilton, Fraser & Co. (1887), 12 App. Cas. 484.

(*h*) See, however, n. (*e*), *ante*.

(*i*) It is also presumed that the cause of loss is foundering at sea: see Houstman *v.* Thornton; Koster *v.* Reed, *infra*; and the judgment of Bailhache, J., in Munro, Brice & Co. *v.* War Risks Assn., [1918] 2 K. B. 78, which, however, on the facts was overruled by the Court of Appeal in a later action brought on the same policy; Munro, Brice & Co. *v.* Marten, [1920] 3 K. B 94.

sumption shall take effect is positively fixed for voyages of different length and duration by the laws of many Continental states. Sect. 813.

By the French Code de Commerce it is a period of six months for ordinary and one year for distant voyages; and with regard to time policies, it is declared that the loss in such cases shall be presumed to have taken place within the limits of the risk (*k*). The result of this last provision is, that in the case of a missing ship the loss, in the modern law of France, is presumed to have happened immediately after the last news. Thus, if a ship be insured for three months, and, not being heard of, a further insurance is then made for a year, and the vessel is never heard of, in that case the first insurer pays the loss (*l*).

No fixed periods in English law.

814. In our law no fixed periods are established, after which a ship not heard of shall be deemed to have perished at sea; but each case is left to depend on its own circumstances and the judgment of practical men.

Instances.

Thus, a ship insured "from North Carolina to London" had not been heard of for four years after she sailed, when the action was brought. This was held sufficient presumptive proof of an averment in the declaration that the loss had happened "by her sinking at sea" (*m*). A ship insured from Havannah to Flanders, a voyage the average length of which was seven weeks, had not been anywhere heard of for nine months when the action was brought; this was held sufficient proof of foundering at sea (*n*).

In order, however, to lay a foundation for any presumption of this kind, it must be proved that the ship, when she left

(*k*) Code de Com. arts. 375, 376.

(*l*) 4 Boulay-Paty, Droit Mar. 252 *et seq*. In our law there is no presumption as to the date of the loss: see *ante*, § 442.

(*m*) Green *v.* Browne (1744), 2 Strange, 1199. See also Newby *v.* Read (1763), 1 Marshall, Ins. 388; Munro, Brice & Co. *v.* War Risks Ass., [1918] 2 K. B. 78. For the reason of the presumption see Moore *v.* Evans, [1918] A. C. at pp. 193, 194, per Lord Atkinson.

(*n*) Houstman *v.* Thornton (1816), Holt, N. P. 242.

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the port of departure, was really bound for and sailed on the voyage insured (*o*). It is not, however, requisite, in order to support the presumption when once founded, to call witnesses from the foreign outports to prove the fact that the ship has never been heard of there (*p*).

If it be proved that the ship sailed for a given port, the fact of her never having arrived there after the lapse of a reasonable time, will be sufficient *primâ facie* evidence of a loss by the perils of the seas; and even although the crew may have been saved, it will not, in the first instance, be necessary to call any of them to corroborate, by direct evidence, the presumption thus raised, nor to show that plaintiff could not procure their attendance, especially in the case of a foreign ship (*q*).

Shipwreck.

815. Shipwreck, when caused by the ship's being driven ashore, or on rocks and shoals in the mid-sea, by violence of the winds and waves (*r*), is also a clear case of loss by perils of the seas. As regards its effect upon the ship, and also the right of the assured to recover as for a total loss, it is of different kinds.

Different kinds of shipwreck.

A ship may either be wrecked in pieces—*i.e.*, so shattered and dislocated as to become a mere congeries of planks, or to have her materials floating about on the waves, having lost all the form and construction of a ship. This is a clear case of total loss, without notice of abandonment (*s*).

Or the ship may yet be so shattered and injured as to be irreparable for the purpose of navigating the seas again, except at a cost greater than her worth when repaired: in

(*o*) Cohen *v.* Hinckley (1809), 2 Camp. 51; Koster *v.* Innes (1825), Ry. & Mood. 333.

(*p*) Twemlow *v.* Oswin (1809), 2 Camp. 85. In this case the only witness called was the clerk of the owners, who swore the ship had never been heard of since she sailed: see *post*, § 1283.

(*q*) Koster *v.* Reed (1826), 6 B. & Cr. 19.

(*r*) As to these words, however, cf. § 812, *ante*.

(*s*) Cf. Mar. Ins. Act, 1906, s. 57 (1).

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such case also the loss is considered total, at all events, on giving notice of abandonment (*t*).

Or again, the ship, though much broken and shattered, may still retain her form as a ship, and be capable of being repaired for a sum less than her value when repaired; in which case the assured will be entitled to recover as for a total loss if he gives, and the underwriters accept, notice of abandonment, otherwise only for an average loss.

All these cases alike fall within losses by "perils of the seas."

Stranding.

816. Loss by "stranding" is a loss by perils of the seas, for which the underwriter is liable, unless it falls within the range of any of those principles by which his responsibility is limited. If, indeed, the ship takes the ground in the usual course of the voyage, and without the intervention of any extraordinary casualty, that is mere wear and tear; there must be something fortuitous, accidental, and not necessarily arising from the ordinary course of the voyage, to make the underwriters liable.

Stranding, where a loss by the perils of the seas, and where wear and tear of the voyage.

A transport in government service took the ground in Boulogne harbour on the ebbing of the tide, and the bottom being hard and uneven, a cracking sound was heard in the ship as from something breaking. On the return of the tide there was a considerable swell in the harbour; the ship struck the ground hard several times, and in the morning eighteen of her knees were found to be broken: this was held to be a loss by perils of the sea (*u*).

In this instance there was a *casus fortuitus*, viz., the ground swell setting into the harbour. But in a case where nothing fortuitous or unexpected occurred, but the ship, in the ordinary course of her voyage, floated when the tide was in,

(*t*) Mar. Ins. Act, 1906, s. 60.

(*u*) Fletcher *v.* Inglis (1819), 2 B. & Ald. 315. This case was decided on the ground that the swell which set into the harbour was a *casus fortuitus*. Per Maule, J., in Magnus *v.* Buttemer, *infra*. Otherwise the case seems very doubtful, the circumstances being the ordinary circumstances of such a harbour.

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and took the ground when the tide was low, and in consequence became hogged or strained all over, it was held by the Court of Common Pleas that this did not constitute a loss by perils of the seas, there having been no accident (*x*).

No loss by perils of the seas, unless ship is water-borne.

817. A loss by perils of the seas can only take place when the ship may fairly be said to be on the seas; at all events, to the extent of being water-borne. Where a ship was damaged owing to her being blown over by a violent gust of wind in a graving dock, after having discharged her outward cargo at her port of delivery, and in which there were only from two to three feet of water when the loss happened, this was held not to be a loss by the "perils of the seas," as alleged in the declaration, though the Court admitted that it would be recoverable within the general clause, "other perils and misfortunes," under a count specially describing the cause of loss (*y*).

It is on this principle that the two following cases seem to have proceeded, in both of which the ship, at the time of the casualty, was under repairs, and, though water-reached, was not water-borne.

A ship whilst being hove down for repairs was found incapable of bearing the strain, and was therefore hauled up on the beach, where she bilged. Lord Kenyon held this not to be a loss by perils of the seas (*z*). So where a ship was hove down on a beach to be cleaned, within the tide-way, and the tide, when it rose, knocked away the shores which supported the ship, in consequence of which she fell over, and damaged her side planking, Mansfield, C. J., and the Court of Common Pleas, held that this loss, though caused by the tide, yet, as it happened on land and when the ship was not water-borne, was not a loss by the perils of the seas (*a*).

(*x*) Magnus *v.* Buttemer (1852), 11 C. B. 876; 21 L. J. C. P. 119.

(*y*) Phillips *v.* Barber (1821), 5 B. & Ald. 161.

(*z*) Rowcroft *v.* Dunmore (1801), cited 3 Taunt. 228.

(*a*) Thompson *v.* Whitmore (1810), 3 Taunt. 227.

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The stranding must have been the proximate cause of the loss.

818. In order to sustain the allegation that the loss was by perils of the seas, or by any other perils insured against, it must be shown that such perils were the proximate cause of the loss.

We have already seen that English law applies this rule with greater strictness to cases of marine insurance than to other cases (*b*). We have also seen how difficult it very often is to determine, among competing contributory causes ending in the loss of, or damage to, the subject-matter of insurance, what the proximate cause of such loss or damage really was.

Whatever difficulty may attend the discriminating of what was the operative, efficient, proximate cause of the loss in any particular case, the necessity as well as importance of making the discrimination is brought into prominence frequently by the use of express warranties.

Ship stranded, and then captured, held a loss by capture.

819. Where a ship, insured "against capture only," was driven by stress of weather on the enemy's coast, and there, without having received any material damage by the stranding, was captured by the enemy, this was held to be a loss, not by the perils of the sea, but by capture, and therefore recoverable under the policy (*c*).

A loss by stranding once constituted remains so, notwithstanding subsequent chance rescue.

820. On the other hand, where the loss by perils of the sea is itself total, it is not deprived of that character by the chance rescue of part from destruction, and appropriation thereof by an enemy.

Thus, where in an insurance on goods "warranted free from capture and seizure," on a voyage "from London to Maracaybo," the ship, when within a few miles of Maracaybo, was driven on a sand bank and totally disabled, and while in that situation the goods, which would otherwise have been entirely destroyed by the sea, were seized as prize by the

(*b*) *Ante*, § 783.

(*c*) Green *v.* Elmslie (1792), Peake, N. P. 212. "Had the ship been driven on any other coast but that of an enemy," said Lord Kenyon, "she would have been in perfect safety." See also Livie *v.* Janson (1810), 12 East, 684.

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Spanish royalists, who had shortly before taken possession of the town and port, Best, C. J., and the rest of the Court of Common Pleas, held this to be a loss by perils of the seas; for the perils of the seas were here the main conducing cause of loss, the ship having been by their agency reduced to a total wreck, while the goods must have been, by the same agency, wholly destroyed had not the enemy appropriated them (*d*).

Similarly a loss by capture is not affected by a subsequent shipwreck.

Conversely, on the same principle, where there has been a total loss by capture, and the ship is afterwards destroyed by a peril of the seas, it is the capture, and not the peril of the sea, which as between the shipowner and his insurers is the cause of the loss. During the late Russo-Japanese war, a ship, insured by a policy with a warranty against capture and seizure, was captured by a Japanese cruiser, and while in the possession of a prize crew encountered such heavy weather, that she was beached and became a total loss. She was subsequently condemned by a Japanese Prize Court on account of the carriage of contraband cargo. The Court of Appeal held that the assured could not recover for a loss by a peril of the seas. The true view of the facts, said Cozens-Hardy, M. R., adopting the language of Channell, J., was that the owner lost his ship by capture, and the Japanese captors afterwards lost their prize by shipwreck. The judgment of the Court of Appeal was affirmed by the House of Lords (*e*).

In Ionides *v.* Universal Marine Association, the facts so far as they are material to the point at present before us, were as follow: 6,500 bags of coffee were insured from Rio Janeiro to New York, warranted free from capture, &c., and from all consequences of hostilities, &c. The ship, being Federal, went ashore near Cape Hatteras, while that and the adjoining country were in possession of the Confederate forces during

(*d*) Hahn *v.* Corbett (1824), 2 Bing. 205. The principle of this case is adopted in the United States. See 3 Kent, Com. 302.

(*e*) Andersen *v.* Marten, [1907] 2 K. B. 248; [1908] 1 K. B. 601 (C. A.), [1908] A. C. 334.

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the American Civil War. The vessel stranded during a breeze amidst a heavy surge about midnight. As to 120 bags, which were safely landed, no question arose. But 1,000 more bags might have been saved, but for the interference of some Confederate officers who had come on board and taken possession of the ship. Subsequently the vessel perished with her cargo by the action of the waves. It was held that the 1,000 bags additional that might have been landed but for the intervention of the soldiers, were lost in consequence of hostilities within the meaning of the exceptive warranty; and that the rest of the cargo, together with the ship, was a total loss by perils of the sea from the moment of stranding (*f*).

Further instances of the rule as to proximate cause.

821. Upon the same principle that *causa proxima non remota spectatur*, it has been held that the loss on goods sold to defray the expenses of repairing a disabled ship in a port of distress is not recoverable as a loss by perils of the seas (*g*); and on similar grounds it has also been decided in this country that the loss caused by having to pay to another ship, in pursuance of the award of an arbitrator abroad, half the damages done by a collision is not a loss by perils of the seas (*h*).

If the perils of the seas have been the proximate cause of loss, the assured will not, as we have seen, be precluded from recovering under a count for loss by the perils of the seas, merely because the negligence, unskilfulness, or misconduct of the master and mariners has been the remote occasion of such loss (*i*).

(*f*) Ionides *v.* The Universal Marine Ins. Assoc. (1863), 14 C. B. N. S. 259; 32 L. J. C. P. 170. As to *causa proxima*, a number of cases from the American reports are collected in Campbell's Ruling Cases, vol. xiv. pp. 293—296.

(*g*) Powell *v.* Gudgeon (1816), 5 M. &. S. 431; *S. P.*, Sarquy *v.* Hobson (1823), 4 Bing. 131.

(*h*) De Vaux *v.* Salvador (1836), 4 A. & E. 420. See *contra* in the United States, Peters *v.* Warren Ins. Co. (1838), 3 Sumner, R. 389; 3 Kent, Com. 302, n.

(*i*) Mar. Ins. Act, 1906, s. 55, *ante*, § 775.

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Losses partly due to barratry, and partly to peril of the sea.

Even where the loss is remotely occasioned by barratry, still, if it be proximately caused by the perils of the seas, it will be recoverable under a count alleging it to be so caused: thus Lord Ellenborough held that, supposing the facts to have proved that the captain, having wilfully sailed in a foul wind, afterwards barratrously cut the ship's cable, and let her drift on the rocks, whereby she was lost, this would have entitled the assured to recover under a count alleging a loss by the perils of the seas (*k*).

822. Of course, in order to enable the plaintiff to recover under such a count, the proximate cause of loss must appear to have been a peril of the sea; he cannot under such count recover for a loss merely and wholly barratrous, as for a fraudulent sale or the like (*l*).

Combination of causes.

The true rule is, that where the immediate and proximate cause of loss is the sea acting on the subject of insurance, the assured may recover under a count for loss by perils of the seas, notwithstanding previous barratry, which may have led to the loss, *i.e.*, without which it would not have happened (*m*).

Where a ship was by mistake taken in tow by a British man-of-war, and was obliged, in order to keep up with her, to carry a press of sail in a gale of wind and a heavy sea, by which she shipped a quantity of water and damaged her cargo, Lord Ellenborough held this to be a loss by perils of the sea; though it might also have been alleged to be by arrest or detention (*n*). Indeed, it is clear that there may, under certain circumstances, be more than one *causa proxima* of a loss. Thus, in Reischer *v.* Borwick, the "Rosa" was insured, not against perils of the sea, but only against damage from collision with any object. She ran against a

There may be more than one proximate cause.

(*k*) Heyman *v.* Parish (1809), 2 Camp. 149; *infra*, § 859.

(*l*) See § 859, *infra*.

(*m*) See the observations of Gibbs C. J., in Everth *v.* Hannam (1815), 2 Marsh. R. 74; *S. C.*, in 6 Taunt. 375; and *per curiam* in Blyth *v.* Shepherd (1842), 9 M. & W. 763; Davidson *v.* Burnand (1868), L. R. 4 C. P. 117.

(*n*) Hagedorn *v.* Whitmore (1816), 1 Stark. 157.

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snag in the river, and, the collision causing a leak, was anchored while the leak was temporarily repaired and the vessel put out of immediate danger. A tug was then sent to tow the "Rosa" to the nearest dock for repairs, but the effect of the motion through the water was to re-open the leak, so that the vessel began to sink and was run aground and abandoned. The Court of Appeal held that the loss was proximately though not exclusively caused by the collision, that both collision and perils of the sea were proximate causes of the sinking of the vessel, and that the underwriters were therefore liable (*o*).

Train of causation.

So in Leyland Shipping Co. *v.* Norwich Union Fire Insurance Society (*p*), a vessel was insured against perils of the sea, but the policy was warranted free from all consequences of hostilities. She was torpedoed by a German submarine when about 25 miles from Havre, but was brought into harbour where she remained for two days, taking the ground at each ebb tide but floating again with the flood. Finally, her bulkheads giving way, she crumpled up and sank and became a total loss. In an action on the policy the plaintiffs contended that the torpedoing could not be regarded as the proximate cause of the loss, owing to the intervention of a new cause, viz., the grounding and the breaking of her back by the consequent straining. It was held, however, that the train of causation from the act of hostility to the loss was unbroken and that the defendants were therefore protected by the warranty. It appears to have been agreed in this case that, but for the warranty, the plaintiffs could have recovered as for a loss by perils of the seas.

Damage occasioned to mast, spars, sails, or rigging by carrying a press of canvas to escape an enemy or lee shore, would no doubt be recoverable as a loss by perils of the seas (*q*).

(*o*) Reischer *v.* Borwick, [1894] 2 Q. B. 548; approved in Leyland Shipping Co. *v.* Norwich Union Fire Ins. Society, *infra*.

(*p*) [1917] 1 K. B. 873; [1918] A. C. 350.

(*q*) Covington *v.* Roberts (1806), 2 B. & P. N. R. 378.

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A ship loaded with hides and tobacco, whilst on her voyage, encountered bad weather and shipped much sea-water, whereby the hides were wetted and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with or directly damaged by sea-water, but the tobacco was damaged by the fœtid odour proceeding from the putrid hides. This was held to be a loss by perils of the seas (*r*).

But the words "perils of the seas," do not comprise all casualties happening to ship or goods at sea.

823. But the words, "perils of the seas," only extend to cover losses really caused by sea damage or the violence of the elements, *ex marinæ tempestatis discrimine;* they do not embrace all losses happening upon the seas, which may or may not be comprehended under the general sweeping words at the end of the clause enumerating the risks insured against, viz., "all other perils, losses or misfortunes which have or shall come to the hurt, detriment or damage of the said goods and merchandises, ship or any part thereof."

Loss caused by being fired into at sea.

Thus, damage sustained by a ship from the fire of another vessel of the same nation mistaking her for an enemy is not, it seems, recoverable as caused by a peril of the sea (*s*); and the damage caused to a merchantman by the fire of the enemy would, it is apprehended, stand on the same ground (*t*), though both, as we shall presently see, are included in the general words, and would be recoverable under a count correctly specifying the cause of loss (*u*).

Loss on live stock may be by perils

824. It is sometimes, as we have seen in the case of insurances on live stock, a very nice question to draw the

(*r*) Montoya *v.* London Ass. Co. (1851), 6 Exch. 451; 20 L. J. Exch. 254.

(*s*) Cullen *v.* Butler (1816), 5 M. & S. 461. The rule as above stated is no doubt correct. But inasmuch as in Cullen *v.* Butler the plaintiff's ship was actually sunk, the opinion of the Court is open to the criticism of Lord Herschell in The Xantho (1887), 12 App. Cas. at p. 509.

(*t*) Taylor *v.* Curtis (1816), 6 Taunt. 608; 2 Marsh. R. 309.

(*u*) Cf. Thames Mersey Marine Co., Ltd. *v.* Hamilton, Fraser & Co. (1887), 12 App. Cas. 484.

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line between loss caused by their mortality (*i.e.*, natural death) and by perils of the sea.

of the seas, or may be by mortality.

It seems that if living animals be deliberately thrown overboard to save the rest, in consequence of a scarcity of provisions occasioned by the gross ignorance of the captain in mistaking his course, and thus protracting the voyage, this will not be properly described as a loss by the perils of the sea (*x*). So, if they were to perish for want of food, owing to the unavoidable prolongation of the voyage, in consequence of bad and stormy weather, without fault of the captain and crew, this would be a loss by mortality, and not by perils of the sea (*y*).

On the other hand, when a cargo of live stock was so bruised and lacerated by the violent rolling and pitching of the ship in a storm that the animals died shortly afterwards on board, in consequence of the injuries thus received, this was held to be a loss by perils of the sea (*z*); and the Court came to the same conclusion where several horses—having, in consequence of the labouring of the vessel in a violent storm, broken down the slings that supported and the partitions that separated them—kicked each other so severely that they died, in the course of the storm, of the injuries thus received (*a*).

Perils of the seas contrasted with natural causes, or wear and tear.

825. Where, however, the loss is not proximately caused by the agency of the winds and waves, but is merely the natural result of the contemplated action of sea-water on the subject of insurance, or of the ordinary wear and tear of the voyage, it is not recoverable as a peril of the seas, nor indeed under the policy at all.

Thus, where the expense of laying down an insufficiently

(*x*) Gregson *v.* Gilbert (1783), 3 Dougl. 232; Marshall, Ins. 493.

(*y*) Tatham *v.* Hodgson (1796), 6 T. R. 656; and per Lord Tenterden, 5 B. & Ald. 111. Cf. Taylor *v.* Dunbar (1869), L. R. 4 C. P. 206, where carcases became putrid owing to delay occasioned by storm and tempest; and Pink *v.* Fleming (1890), 25 Q. B. D. 396; where fruit went bad partly owing to delay due to a collision.

(*z*) Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.

(*a*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793; *S. C.*, 5 Dowl. & Ryl. 641.

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insulated electric cable is lost through the chemical action of the salt water upon the wire, it is not a loss by perils of the sea (*b*). Nor is destruction of the ship's bottom by worms such a loss, at all events in seas where worms ordinarily assail the bottoms of ships; for the loss in such cases comes within the usual wear and tear of the voyage (*c*). Besides, the assured in such seas ought to take care and secure the ship by copper sheathing against this kind of damage: if, however, he has done so, it is suggested by Phillips, and apparently with much reason, that in cases where the copper sheathing is torn off by the violent action of the perils insured against, in consequence of which the ship's bottom is worm-eaten, the underwriters ought to be liable (*d*).

Damage by worms.

Damage by rats.

On the same ground the damage done to the ship by rats eating holes in the ship's bottom was held by Lord Ellenborough not to be within the perils insured against by the common form of policy (*e*).

Loss by collision.

826. Loss by collision is, generally speaking, a loss by the perils of the sea. It is nevertheless not uncommon at the present day, especially in cases of re-insurance, to find this risk expressly insured against. Sometimes the insurance is against "collision" merely, which term probably implies the coming into contact of two things, both of which are navigable (*f*). Sometimes, however, the clause is wider, so

(*b*) Paterson *v.* Harris (1861), 1 B. & S. 336; 30 L. J. Q. B. 354.

(*c*) Rohl *v.* Parr (1796), 1 Esp. 445. Per Lord Halsbury, L. C., Hamilton *v.* Pandorf (1887), 12 App. Cas. 518, 524. So in United States, Martin *v.* Salem Ins. Co. (1807), 2 Mass. R. 429; Hazard *v.* New England Ins. Co. (1834), 8 Peters, S. C. R. 557.

(*d*) 1 Phillips, s. 1101; approved by Chancellor Kent, Com. vol. iii. p. 300, n.

(*e*) Hunter *v.* Potts (1815), 4 Camp. 203; but see Laveroni *v.* Drury (1852), 8 Exch. 166. *Aliter* where damage is caused by incursion of sea-water through a hole gnawed by rats, Hamilton, Fraser & Co. *v.* Pandorf & Co. (1887), 12 App. Cas. 518. Cf. Sassoon *v.* Western Ass. Co., [1912] A. C. 561 (P. C.).

(*f*) See Chandler *v.* Blogg (1897), 3 Com. Cas. 18, per Bigham, J.; Richardson *v.* Burrows (1880), cited Lowndes, Ins. 2nd ed. p. 199, per Lord Coleridge, C. J. In Newton Creek Towing Co. *v.* Aetna Ins. Co. (1900), 163

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as to include the risk of striking against, not merely floating or navigable objects, but also structures such as harbours, wharves, piers and the like, or obstructions such as ice or wreck (*g*).

827. Upon the subject of collision between two ships, the law of the Courts of Admiralty as it affects the rights and liabilities of owners and masters was thus laid down by Lord Stowell:—

"There are four possibilities under which a loss of this sort may occur.

"1st. It may happen without blame being imputable to either party; as where a loss is occasioned by a storm, or by any other *vis major:* in that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree.

"2ndly. A misfortune of this kind may arise when both parties are to blame, where there has been a want of due diligence and skill on both sides; in such a case the rule of law is that the loss must be apportioned between them as having been occasioned by the fault of both.

"3rdly. It may happen by the misconduct of the suffering party alone; and then the rule is that the sufferer must bear his own burden.

"4thly. It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other" (*h*).

N. Y. Rep. 114, the Court held that collision included an impact with a floating or foreign body by chance or accident, but did not cover an injury caused by a deliberate attempt to force a vessel through a field of ice. For the meaning of "collision with another vessel," see *ante*, § 795.

(*g*) See The Munroe, [1893] P. 248; Union Mar. Ins. Co. *v.* Borwick, [1895] 2 Q. B. 279.

(*h*) In the Woodrop-Sims (1815), 2 Dod. Adm. R. 85. In the first, third and fourth cases the law of France is the same as in this country; but where

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827a. In all these cases it cannot be doubted that loss or damage caused by collision is to be made good by the underwriters as a loss by a peril of the sea: Thus it was decided by Lord Kenyon that damage caused by one ship running foul of another without fault on either side, was a loss "by perils of the seas" within the exception of such losses in a charter-party (*i*). Again, where the loss was occasioned by another ship running down the ship insured owing to the gross negligence of the crew of the other vessel, this was held a loss by perils of the seas for which the underwriters were liable under a count so charging it (*k*).

Where the collision is either owing entirely to the master and crew of the insured ship, or where both ships are to blame, there is no direct decision on the point. It seems clear, however, that in both these cases also there is a loss by a peril of the sea (*l*), and the fact that the loss has been caused by the negligence or even misconduct of the master or crew will not avail the underwriter (*m*).

We have seen, however, that when both ships are to blame and the sum of the damage sustained by both ships is divided, then any excess over the loss sustained by the insured ship, which becomes payable to the owners of the other ship, is held not to be recoverable from the underwriter as a loss by perils of the sea (*n*).

there is a doubt which vessel is in fault, the damage is apportioned equally between the two ships: see Code de Commerce, art. 407. This rule of Continental jurisprudence is discussed by Maclachlan (Merchant Shipping, 5th ed. 337—341). The liability of the underwriter is discussed by Emerigon, c. xii. s. 14. See also Boulay-Paty, Comment. on Emerigon, vol. 1, p. 418.

(*i*) Buller *v.* Fisher (1800), 3 Esp. 67.

(*k*) Smith *v.* Scott (1811), 4 Taunt. 126.

(*l*) See the judgments in The Xantho (1887), 12 App. Cas. 503.

(*m*) Mar. Ins. Act, 1906, s. 55, sub-s. 2 (a). Marshall conceives that where the injury caused by a collision is imputable to the wilful misconduct of the master or mariners of the insured ship, there is a loss by barratry: 2 Ins. 495.

(*n*) De Vaux *v.* Salvador (1836), 4 A. & E. 420. See *ante*, § 791, and observations on the Collision Clause, *ante*, § 792 *et seq.*

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Loss by fire.

828. Loss by fire, when caused by lightning or the enemy, is clearly a charge upon the underwriter, under the word "Fire" in our common form of policy (*o*).

Accidental fire is a peril insured against.

So, if the ship be burnt under justifiable circumstances, as to prevent capture (*p*), or from an apprehension of contagious disease (*q*), the underwriter is liable.

So, where ship is burnt to prevent hostile capture, &c.

If the fire be occasioned by spontaneous combustion or by the damaged state of the goods, the underwriters are not liable (*r*); but if other goods in the same hold, not contributing to the cause of loss, or the ship herself, be burnt in consequence, the underwriters, it seems, are liable; and so they would be for loss of the cargo in case the ignition should turn out to be the consequence of sea damage received after shipment (*s*).

Spontaneous combustion.

Fire occasioned by the negligence of the master and crew is a peril insured against.

It was for a long time a vexed question whether the underwriters, under a policy in the common form, were liable for a loss proximately caused by fire, but remotely occasioned by the negligence of the master and crew or other agents of the assured. This question in our law is now, as we have already seen, decidedly settled in the affirmative (*t*). And, after some fluctuation in the decisions, the law in the United States seems now to be settled in the same way (*u*).

(*o*) 1 Emerigon, c. xii. s. 17, p. 428.

(*p*) Gordon *v.* Rimmington (1807), 1 Camp. 123. Emerigon agrees, and cites Valin and Pothier to the same effect, provided the crew make their escape. 1 Emerigon, c. xii. s. 17.

(*q*) 1 Emerigon, c. xii. s. 17, p. 429. This is doubted by Maclachlan in the 6th edition of this work, p. 760, n.; and Mr. Gow (Mar. Ins. p. 102) points out that the only reported case, namely, the French decision in the Grand Saint Antoine in 1725, is against this view.

(*r*) Boyd *v.* Dubois (1811), 3 Camp. 133. In America, Providence Washington Ins. Co. *v.* Adler (1885), 65 Maryland, 162; 1 Emerigon, 430.

(*s*) Cf. Montoya *v.* London Ass. Co. (1851), 6 Exch. 451.

(*t*) Busk *v.* Royal Exch. Ass. Co. (1818), 2 B. & Ald. 73. Cf. Trinder & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114; Mar. Ins. Act, 1906, s. 55, sub-s. 2 (a).

(*u*) By the cases of Patapsco Ins. Co. *v.* Coulter (1830), 3 Peters, S. C. R. 222; Columbia Ins. Co. *v.* Laurence (1836), 10 *ibid.* 517; Waters *v.* Merchants' Ins. Co. (1837), 11 *ibid.* 213; 3 Kent, Com. 303, 304.

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Of course, where the form of the policy, as is, or was, not unusual on the Continent, excludes the risk of the negligence of the master and crew, or the barratry of the master (which word barratry, as there understood, extends not only to the wilful and fraudulent, but also to the negligent, acts of the master), loss by fire so occasioned is not chargeable on the underwriters (*b*).

Loss on rigging, &c., accidentally burnt on a bank saul, where it was generally stowed in the Canton River by the usage of the Chinese trade, was held to be a loss by fire under the common form of policy (*c*).

Losses *ejusdem generis* with fire so as to be covered by the general words.

It appears that there may be a loss by fire, or at least a loss *ejusdem generis*, and covered by the general words in the policy, even where no fire has actually broken out; for instance, where the loss is due to steps taken in anticipation of, and in order to prevent, a fire, which but for such steps would have broken out and itself caused such a loss (*d*). A loss by explosion of steam is not within the general words (*e*).

Capture and seizure, or "takings at sea."

829. Capture, properly so called, is a taking by the enemy as prize (*f*), in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken (*g*). "Capture" by

(*b*) Emerigon, vol. i. pp. 428, 429. The general subject of this section is well and succinctly discussed by Boulay-Paty, who, however, draws all his learning from the vast stores of Emerigon. See Droit Mar. tom. iv. pp. 20—23.

(*c*) Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341.

(*d*) The Knight of St. Michael, [1898] P. 30.

(*e*) See Hamilton *v.* Thames & Mersey Co. (1886), 17 Q. B. D. 195; 12 App. Cas. 484; disapproving West India Telegraph Co. *v.* Home Ins. Co. (1880), 6 Q. B. D. 51.

(*f*) Mr. Gow (Mar. Ins. p. 111) points out that "prize" should be "prise," being the Latin "prensus," through the French "prise," and not "pretium," through the French "prix."

(*g*) 1 Emerigon, c. xii. s. 18, pp. 432 *et seq.*; Andersen *v.* Marten, [1907] 2 K. B. at p. 253; [1908] 1 K. B. 601; [1908] A. C. 334.

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itself probably means belligerent capture only (*h*). Seizure, however, includes other seizures, such as one by revenue or sanitary officers of a foreign state (*i*).

What capture properly is.

The arrest, or carrying in for adjudication, of neutral ships by belligerent cruisers, though not properly called capture in cases where there is no intent to deprive the owner of his property in the ship, yet falls within the meaning of the words "takings at sea" as one of the perils insured against: and the loss thence arising would be recoverable under a count alleging loss by capture.

Capture, lawful or unlawful.

Capture is deemed lawful when made by a declared enemy lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise. But its legality or illegality does not affect the liability of the underwriter; whether lawful or unlawful, he is equally liable (*k*). Thus, where the policy was on goods "warranted free of capture or seizure," and the proof was that the ship, a British vessel, had been fired into and sunk by the Russians before the declaration of hostilities between Great Britain and Russia, and the crew were detained for some time: the Court, being of opinion, on the whole of the facts, that the object of the Russians was to detain the ship, held that except for the warranty the underwriters would have been liable, but that the warranty protected them (*l*). So, the seizure of the ship by certain mutinous Coolie passengers has been held to be within a similar warranty (*m*), and a piratical seizure of the vessel was held to be a loss within the meaning of the policy (*n*). A British merchantman, when on the coast of Africa, was seized by a British cruiser and carried to St. Helena, where the ship

(*h*) Capture by rebels may be sufficient. Mauran *v.* Insurance Co. (1837), 6 Wall. 1.

(*i*) Cory *v.* Burr (1883), 8 App. Cas. 393; Miller *v.* Law Accident Ins. Co., [1903] 1 K. B. 712; St. Paul Fire and Mar. Ins. Co. *v.* Morice (1906), 11 Com. Cas. 153; cf. Robinson Gold Mining Co. *v.* Alliance Ins. Co., [1904] A. C. 359; and see *post*, § 905.

(*k*) Per Lord Mansfield in Goss *v.* Withers (1758), 2 Burr. 683, 694.

(*l*) Powell *v.* Hyde (1855), 5 E. & B. 607.

(*m*) Kleinwort *v.* Shepard (1859), 1 E. & E. 447; 28 L. J. Q. B. 147.

(*n*) Dean *v.* Hornby (1854), 3 E. & B. 180; 23 L. J. Q. B. 129.

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and cargo were condemned as being engaged in the slave trade. This was a mistake in fact, for the decision was on that ground reversed by the Privy Council, and restitution ordered. Yet it was held to be a loss within the policy as a "taking at sea" (*o*).

Whenever capture is the proximate cause of loss, the assured may recover, as on a loss by capture.

Whenever capture is the proximate cause of loss the assured may recover as on a loss "by capture," though other causes may have been contributory thereto. Thus, even where the capture was concerted between the master of the ship insured and the captor, Lord Ellenborough held that the assured might recover as on a loss by capture, though he might also have recovered on a count for barratry (*p*). So, where a ship was driven ashore, with only slight damage, on a hostile coast and there captured, this was held to be a loss by capture, and not by perils of the seas (*q*).

Loss by danger of capture.

830. It is possible to conceive circumstances in which underwriters may be liable as for a loss by capture though no capture may have actually taken place. For example, where a voyage is properly abandoned by the master owing to the certainty of capture if it were continued, there may be a loss of cargo or freight recoverable either under the special, or at least under the general words in the policy (*r*).

Capture is, generally speaking, a

As we shall see more at large hereafter in treating of abandonment, capture is *primâ facie* a case of total loss, which

(*o*) Lozano *v.* Janson (1859), 2 E. & E. 160; 28 L. J. Q. B. 337; and see Sanday & Co. *v.* British and Foreign Mar. Ins. Co., [1915] 2 K. B. at p. 787.

(*p*) Arcangelo *v.* Thompson (1811), 2 Camp. 620. Of course, the assured must not have been privy to such loss: Australasian Ins. Co. *v.* Jackson (1875), *coram* P. C., 33 L. T. N. S. 286; Wilson *v.* Rankin (1865), 34 L. J. Q. B. 62.

(*q*) Green *v.* Elmslie (1792), Peake, N. P. 212; see also *S. P.*, Livie *v.* Janson (1810), 12 East, 648. Cf. Andersen *v.* Marten, [1907] 2 K. B. 248; [1908] 1 K. B. 601; [1908] A. C. 334.

(*r*) This principle was acted upon in The Knight of St. Michael, [1898] P. 30, but held to be inapplicable to the facts of the case in Kacianoff *v.* China Traders' Ins. Co., Ltd., [1913] 3 K. B. 407; [1914] 3 K. B. 1121 (C. A.); and also in Becker, Gray & Co. *v.* London Ass. Corp., [1918] A. C. 101.

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constructive total loss.

gives the assured an immediate right to give notice of abandonment. If the underwriter accept the abandonment, the rights of the parties are thereby fixed; but if not, the right of the assured to recover for a total loss depends (unless the law has been altered by the Marine Insurance Act, 1906) (*s*) upon the point whether the ship be restored before action brought: if it be, then the assured will recover in proportion to the actual damage done; if not, then the whole sum insured (*t*).

It has long, however, been the established rule of our law maritime that the property is not changed by capture in favour of a vendee or re-captor, so as to bar the original owner, till there has been a regular sentence of condemnation (*u*), and the condemnation, in order to be legal, must be pronounced by a Prize Court of the government of the captor, sitting either in the country of the captor or of his ally. The Prize Court of an ally cannot condemn; nor can a Prize Court of the captor lawfully act as such in a neutral territory (*x*); but the Prize Court of a captor sitting in the country of his own sovereign, or of an ally, has lawful jurisdiction over prizes carried into neutral ports, and remaining there at the time of passing sentence (*y*).

What is requisite to make condemnation valid.

Apart from all questions as to abandonment, which will be considered elsewhere, the underwriter is liable for any damage the ship may have actually sustained, and also for all necessary expenses, such as salvage, &c., which the assured has been put to for the recovery of his property; for instance, for a sum of money paid by the neutral assured to belligerent

(*s*) See *post*, § 1097a.

(*t*) Ruys *v.* Royal Exch. Ass. Corp., [1897] 2 Q. B. 135. See, however, *post*, § 1097a.

(*u*) See 2 Marshall, Ins. 803, where all the earlier authorities are collected; and Andersen *v.* Marten, *ubi supra*. The effect of condemnation, however, is to make the change of property relate back to the time of capture: *S. C.*, [1907] 2 K. B. at p. 255, per Channell, J.; and [1908] A. C. at p. 341, per Lord Halsbury.

(*x*) See *ante*, § 676.

(*y*) See *ante*, § 677.

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captors as a compromise made *bonâ fide* to prevent the ship from being condemned as prize (*z*).

Ransom.

831. Formerly it was a common practice to ransom British ships when captured by the enemy, by delivering to the captor what was called a ransom bill (*a*). The Legislature, in 1781, wholly abolished this practice by declaring all ransom by British subjects of ships or goods taken by the enemy as prize to be illegal (*b*). Money paid for such a purpose, therefore, was held not to be recoverable from underwriters, whether the condemnation was legal or illegal (*c*).

Risk of British capture cannot be insured against by British underwriters.

We have seen elsewhere (*d*) that the risk of British capture is not covered by policies effected during war-time with British underwriters on enemy's property (*e*), and that the same rule applies to a policy effected before the commencement of hostilities (*f*), although the action be not brought till after their termination (*g*).

"A policy," says Lord Ellenborough, "containing an insurance against British capture, *eo nomine*, would be illegal and void on the face of it: and an insurance, producing indirectly the same effects, by the application afterwards of the general terms of the policy to the particular event of British capture which has since happened, must, on principle,

(*z*) Berens *v.* Rucker (1761), 1 W. Bl. 313.

(*a*) For the general law maritime as to ransom, see 1 Emerigon, c. xii. s. 21, pp. 463—480. For the law of France on the subject, see Code de Commerce, arts. 395, 396.

(*b*) The first Ransom Act is the 22 Geo. 3, c. 25. This Act, however, and others of a similar character were repealed by the Naval Prize Acts Repeal Act, 1864. The Naval Prize Act, 1864, gives power to His Majesty in Council to make regulations on the subject. The present position seems to be that ransom is not illegal, except it be in contravention of such regulations.

(*c*) Havelock *v.* Rockwood (1799), 8 T. R. 268; Parsons *v.* Scott (1810), 2 Taunt. 363.

(*d*) *Ante*, §§ 85, 86.

(*e*) Kellner *v.* Le Mesurier (1803), 4 East, 396; Brandon *v.* Curling (1803), *ibid.* 410.

(*f*) Furtado *v.* Rodgers (1802), 3 B. & P. 191.

(*g*) Gamba *v.* Le Mesurier (1803), 4 East, 407.

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be equally illegal" (*h*). And the general decision of the Court was, that no peril, the subject of insurance, can be covered under the general terms, "capture," "detention of princes," or the like, which could not, consistently with law, be specifically insured against in direct and express terms.

Prizes made after peace concluded.

As the hostilities of a general maritime war, carried on in many different parts of the globe at once, cannot be supposed to come to an end immediately on the conclusion of peace, it was the general custom to insert into treaties stipulations specifying periods, varying according to distance, after which all prizes made should be restored (*i*). If, however, it could be shown that the captor was, in fact, aware of the peace being proclaimed when he made the prize, such prize, though made before the expiration of the time limited in the treaty, was to be restored (*k*). In this country it was determined, in the time of Lord Hardwicke, that where a ship was seized after a cessation of arms and the signing of preliminary articles of peace, this was not to be deemed a capture, but only an arrest of princes (*l*).

Loss by arrests, &c.

832. By the terms of our common policies, the underwriter is answerable for all losses occasioned by "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever."

By rule 10 of the "Rules for Construction of Policy" in Schedule I. of the Marine Insurance Act, 1906, these words are declared to refer to "political or executive acts," and do not include a "loss caused by riot or ordinary judicial process" (*m*). So, by the word "people" is meant, not mobs or

"People."

(*h*) 4 East, 402.

(*i*) 1 Emerigon, c. xii. s. 19, p. 452.

(*k*) *Ibid.*

(*l*) Spencer *v.* Franco (1736), Beawes, 316, cited by Lord Mansfield in Hamilton *v.* Mendes (1761), 2 Burr. 1211. But as to this case, see note by Marshall (Insurance, 517). Cf., too, The Eliza Ann (1813), 1 Dods. Ad. R. 244.

(*m*) See Finlay *v.* Liverpool and Great Western SS. Co. (1870), 23 L. T. N. S. 251; Sanday & Co. *v.* British and Foreign Mar. Ins. Co., [1915] 2 K. B. 781; [1916] 1 A. C. 650.

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multitudes of men, but the ruling power of the country, whatever that may be (*n*).

Arrest as distinct from capture.

There does not appear to be any authority, statutory or other, for any distinction in meaning between the three words "arrests," "restraints," and "detainments." Arnould, however, did discuss the distinction between arrest, &c., and capture. An "arrest," he said, takes place whenever the government of the country to which a ship belongs, or any other friendly power, with the object, not of prize (for then it would be a capture), but with a design to restore the ship and goods, or pay the value of them to their owners, seizes the ship and goods for State purposes, either in port or at sea. In this, he continued, lies the grand distinction between arrest and capture, the former being a mere temporary detention, the latter a forcible taking in time of war with a view to appropriation as prize (*o*).

Hence, he said (*p*), the detention of ships in port after declaration of war against the country to which they belong, or by way of reprisals, rather resembles a capture than an arrest. So where a neutral ship is arrested at sea by a belligerent cruiser, and, under suspicion of having enemy's goods on board, is carried for search and adjudication into a hostile port; as the result may be the condemnation of ship and cargo, but more especially as the act is done in time of war and as a warlike measure, this is rather to be esteemed a capture than a simple arrest, and accordingly is *primâ facie* a ground of abandonment.

However this may be, and assuming that the exception of restraint of princes only applies to restraints imposed by the home or a friendly government and does not necessarily require a state of war at all for its operation, yet it is obvious that the exception acquires greater importance on any outbreak of

(*n*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

(*o*) 2nd ed. p. 836, citing Roccus, not. 6; and 1 Emerigon, c. xii. s. 30, p. 527.

(*p*) 2nd ed. p. 837, citing 1 Emerigon, c. xii. s. 30, p. 527; and 2 Marshall, Ins. 509, 510; Barker *v.* Blakes (1808), 9 East, 283.

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war, and especially of a war in which this country is engaged. The recent European war and also those between China and Japan, Greece and Turkey, Russia and Japan, and between France and Germany have given rise to a series of decisions which it is now necessary to examine in some detail. It is not clear that all these decisions are consistent with each other, or that the attempts to reconcile the earlier decisions with those of more recent date have been entirely successful.

"Restraint of princes" has the same meaning in contracts of carriage as in policies of insurance.

832a. The construction of the words "restraint of princes" must be the same whether they are found in charter-parties or bills of lading or in policies of marine insurance. "It is important," said Lord Sumner (*q*), "that the same word should mean the same thing when used in a mercantile contract. Perils of the seas do not mean one thing in a bill of lading and something else in a policy: restraints of princes do not bear a different interpretation in the one or in the other, but this is not the question. Restraints of princes may excuse non-delivery of cargo under a contract of carriage, and yet not cause a loss of cargo, recoverable under a contract of insurance. It is settled now that mere apprehension that a restraint of princes will come into operation is not the same thing as its existence or available for either purpose. There is also authority for saying (*r*) that if restraint of princes is in being and reasonably likely in the long run to prevent performance of a contract if its further performance is proceeded with, any further performance is forthwith excused, although the direct operation of the restraint has not yet occurred. This is because the contract of carriage, truly construed, so stipulates. It has no bearing upon the question whether a refusal of further performance, though excusable, is the effect of the carrier's exercise of judgment or the effect of the restraint of princes."

(*q*) In Becker, Gray & Co. *v.* London Ass. Corp., [1918] A. C. at p. 114. See also per Lord Reading, C.J., in Sanday *v.* British and Foreign Mar. Ins. Co., [1915] 2 K. B. at p. 801.

(*r*) Nobel's Explosives Co. *v.* Jenkins & Co., [1896] 2 Q. B. 326.

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It seems to follow, therefore, that so long as it is merely a question what is the meaning of the expression "restraints of princes" the decisions in charter-party cases are as relevant as those in cases of marine insurance. But when, as in all cases of marine insurance, there is a further question to be considered, namely, whether the loss was directly due to the peril insured against, this question would properly be answered sometimes in the negative, although the same words occurring in a contract of carriage would under the same circumstances relieve a party thereto from any further obligation of performing his contract.

"Restraint of princes" in contracts of carriage.

This being so, it may be well in the first instance shortly to refer to the cases dealing with the exception of "restraints of princes" in contracts of carriage.

Atkinson *v.* Ritchie.

Apprehension of embargo.

832b. In Atkinson *v.* Ritchie (*s*) a charter-party provided that a British ship should load a cargo of hemp at St. Petersburg and therewith proceed to London. The master, however, sailed away from St. Petersburg when only about half a cargo had been taken on board, acting under a reasonable and well-grounded apprehension that a hostile embargo was about to be laid on British ships by the Russian Government. In fact, however, the master's information was inaccurate, and the embargo was not laid on till six weeks later. In answer to a claim by the charterer for breach of contract the master set up the exception of restraints of princes. Lord Ellenborough, however, in delivering the opinion of the Court of King's Bench said that the restraint meant must be an actual and operative one, and not a merely expected and contingent one, as this at most only was, and the defendant was held liable in damages.

Geipel *v.* Smith.

Actual blockade.

In Geipel *v.* Smith (*t*) a British vessel was chartered to load coals and proceed to Hamburg. Before anything had been done by either party in furtherance of the contract war broke out between France and Germany, and the French

(*s*) (1809), 10 East, 530.
(*t*) (1872), L. R. 7 Q. B. 404.

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established an effective blockade of Hamburg. It was held by the Court of Queen's Bench that the blockade constituted a restraint of princes which was not likely to be removed within a reasonable time, and therefore formed an insuperable obstacle to the performance of the contract *in toto*. "The shipowners," said Blackburn, J., "could not fulfil their contract by delivering the cargo, without running the blockade. I am unable to see why this was not a restraint of princes; it was clearly a restraint by the then Emperor of France preventing the cargo from being carried on to Hamburg."

Nobel's Explosives Co. *v.* Jenkins.

Actual restraint, though not physical.

In Nobel's Explosives Co. *v.* Jenkins (*u*) the plaintiffs shipped dynamite—contraband of war—on the defendant's ship for carriage from London to Yokohama under a bill of lading excepting restraints of princes. The ship arrived at Hong Kong on the day when war was declared between China and Japan. The master landed the dynamite at Hong Kong and subsequently sailed with the rest of the cargo to Yokohama, where she arrived safely. If she had sailed from Hong Kong with the dynamite on board she would in all probability have been stopped by Chinese war vessels, of which there were several about the port, and the goods would have been confiscated. It was held by Mathew, J., that the delivery of the goods at Yokohama was prevented by restraint of princes, and that the exception applied although there had been no direct action upon the goods. "It was said," continued the learned judge, "that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of Geipel *v.* Smith (*x*) and Rodocanachi *v.* Elliott (*y*). The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be

(*u*) [1896] 2 Q. B. 326.
(*x*) *Ubi supra.*
(*y*) L. R. 9 C. P. 518; see *ante*, § 807.

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landed (*z*). The analogy of a restraint by a blockade or embargo seems to me sufficiently close."

Embiricos *v.* Sydney Reid & Co.

832c. In Embiricos *v.* Sydney Reid & Co. (*a*), the plaintiffs, owners of the Greek ship "Andriana," chartered her to go to a port in the sea of Azoff, there load a cargo of grain and carry it to a port in the United Kingdom—"restraint of princes" being one of the excepted perils. On the 1st October, 1912, the "Andriana" arrived at Temrieuk, in the Sea of Azoff and began loading, but discontinued owing to the seizure by the Turks of Greek ships—war between Greece and Turkey being then imminent, and the Dardanelles being already closed to Greek vessels. On the 18th October war was declared and on the 21st October the defendants took up the position that they were entitled to treat the charter-party as at an end. The war came to an end in September, 1913, and the ship then left the Black Sea. The plaintiffs claimed damages for breach of the charter-party, and contended that inasmuch as there was no restraint of princes at the port of loading, the defendants could not be excused by the exception from continuing to load the ship. The learned judge, Scrutton, J., held, following Geipel *v.* Smith and Nobel's Explosives Co. *v.* Jenkins, that inasmuch as there was no reasonable probability that Turkey would allow Greek ships to pass through the Dardanelles again during the war, an excepted peril, namely, restraint of princes, had prevented the shipowners from carrying out the charter, and that the charterers, therefore, had committed no breach of contract in refusing to prosecute an adventure which on the 21st October seemed hopelessly destroyed.

Tamplin SS. Co. *v.* Anglo-Mexican, &c. Co., Ltd. Restraint by requisition.

In Tamplin SS. Co. *v.* Anglo-Mexican Petroleum Products Co., Ltd. (*b*) a time charter-party made in 1912 had put the plaintiffs' tank steamship at the disposal of the defendants for a period of five years, subject *inter alia* to

(*z*) *Sic* in report, but it should obviously be "should *not* be landed."
(*a*) [1914] 3 K. B. 45.
(*b*) [1915] 3 K. B. 668; [1916] 1 K. B. 485; [1916] 2 A. C. 397.

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arrests and restraints of princes. In February, 1915, the steamer was requisitioned by the Admiralty for the transport of troops at a rate largely in excess of that payable under the charter-party. The owners contended that the requisition put an end to, or suspended, the charter-party, and this point, which was the only one dealt with in the Courts, was finally decided against the owners in the House of Lords, with some difference of opinion. In the Court of Appeal (*c*), however, and in the House of Lords (*d*) it was considered to be quite clear that the requisition of the steamer by the Government was a restraint of princes. The only question was whether this particular restraint annulled the contract.

Mitsui *v.* Watts.

832d. In Mitsui & Co., Ltd. *v.* Watts, Watts & Co., Ltd. (*e*), the defendants had agreed by a charter-party dated 5th June, 1914, to provide a steamer to go to Marioupol in the Sea of Azoff and there load a cargo of sulphate of ammonia for carriage to Japan. On the 1st of September, the defendants declined to provide a steamer for reasons which were untenable. War had, however, in fact broken out between this country and Germany on the 4th of August, and war with Turkey was anticipated. On the 26th of September the Dardanelles were closed by the Turkish Government, and on the 5th of November war between Great Britain and Turkey was declared. The plaintiffs brought their action for damages for breach of the charter-party; the defendants relied on "restraint of princes." It was held in all the Courts that the defendants were liable, as there had been no actual restraint of princes, but nothing more than a reasonable apprehension that the Dardanelles would be closed before the steamer could pass through on her way to Japan. The case was distinguished from Geipel *v.* Smith (*f*) on the ground that in that case there was an

Apprehension of restraint.

(*c*) Lord Cozens-Hardy, M.R., Bankes and Warrington, L.JJ.
(*d*) See especially per Lord Parker, at p. 426.
(*e*) [1916] 2 K. B. 826; [1917] A. C. 227.
(*f*) (1874), L. R. 7 Q. B. 404.

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existing blockade of the port to which the vessel was bound, and it was agreed that in a case where it was certain that owing to an excepted peril the adventure could not be successfully completed, it would not be necessary for a party to take preliminary steps which were doomed to failure. Lord Dunedin said, "Restraint of princes, to fall within the words of the exception, must be an existing fact and not a mere apprehension. This was held long ago by Lord Ellenborough in Atkinson (*g*). The more recent cases cited by the appellants, such as Geipel (*h*) and Nobel's Explosives (*i*), do not in any way touch that proposition. They only show that it may be possible to invoke the exception when a reasonable man in face of an existing restraint, though it does not affect him at the moment, will do so if he continue the adventure." And likewise Lord Sumner: "The words 'restraint of princes' do not in my opinion extend to the apprehension of restraint. The reasonable apprehension of a prudent man and the inutility of doing something which cannot lead to any good result are considerations material in deciding at what distance of time or over what area an existing restraint of princes may be deemed operative so as to restrain, but restraints in themselves they are not."

Furness Withy *v.* Rederiaktiebolaget Banco.

Restraint by prohibition of foreign government.

In Furness, Withy & Co. *v.* Rederiaktiebolaget Banco (*k*) the defendants were the owners of a Swedish ship, and were themselves Swedish subjects resident in Sweden, as also was her master. They chartered the ship to the plaintiffs in 1916 for trading between certain ports, all outside Sweden, subject to restraints of princes. The plaintiffs wanted to send the ship from Cardiff to Genoa with coals; the defendants refused to allow this, because of Swedish emergency legislation under which the ship was prohibited from carrying goods for freight between ports outside Sweden, under penalties of imprisonment of her owners and master.

(*g*) Atkinson *v.* Ritchie, *ante*, § 832b.
(*h*) Geipel *v.* Smith, *ante*, § 832b.
(*i*) Nobel's Explosives Co. *v.* Jenkins, *ante*, § 832b.
(*k*) [1917] 2 K. B. 873.

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It was held by Bailhache, J., that the defendants were entitled to set up Swedish prohibition as a restraint of princes in answer to the plaintiffs' claim for damages for breach of an English contract, even although the ship was outside Swedish waters and therefore could not be physically restrained by the Swedish Government. The learned judge, following passages in the judgments in Rodocanachi *v.* Elliott (*l*) and in Sanday's case (*m*), held that "a prohibition may amount to a restraint of princes although the restraint can only operate upon the persons having the custody of the subject-matter and not upon the subject-matter itself; and that where the law of a foreign State prohibits the performance of a contract, such as a charter-party, and renders the owner or master of a ship liable to fine or imprisonment if he disobeys that law, you have a case of restraint of princes provided the owner or master are subject to the jurisdiction of the foreign State either by being physically within its territory or by being subjects of that State." The learned judge, however, proceeded to express a doubt whether this was not carrying the meaning of the exception further than it had ever been carried before.

"Restraints of princes" in insurance policies.

832e. We have now noticed briefly the principal cases on "restraints, &c. of princes" where the words have appeared as an exception in contracts of carriage. The words as constituting a peril insured against in marine insurance policies must now be considered.

Difficulty of reconciling cases.

First there are the cases of which Hadkinson *v.* Robinson and Kacianoff's and Becker Gray's cases are types, where although there was a blockade, or something very like it, or a fear of capture, yet it has been held that the loss of voyage and consequent loss of cargo have been due not directly to any restraint of princes but rather to the election of the assured to take a less dangerous instead of a more dangerous course,

(*l*) (1873-4), L. R. 8 C. P. 649; 9 C. P. 518.
(*m*) [1915] 2 K. B. 751; [1916] 1 A. C. 650.

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owing to a possibly well-founded apprehension of risk in case he continued the insured adventure. These cases have been sufficiently referred to already (*n*), and the principle on which they are based is beyond dispute.

Whether, and how, they are reconcileable with cases like Geipel *v.* Smith, Nobel's Explosives Co. *v.* Jenkins, and Embiricos *v.* Sydney Reid & Co. (*nn*)—all cases on contracts of carriage, none of which went to the House of Lords though they have been discussed there without disapproval—is a matter which gives rise to serious reflection.

Rodocanachi *v.* Elliott.

The case of Rodocanachi *v.* Elliott has been already noticed (*o*). It was decided in that case that there might be a loss by detention, &c., although the detaining authority had never succeeded in obtaining physical possession of the goods. It was sufficient if they were by forcible means enclosed within a limited area from which they could not escape.

Miller *v.* Law Accident Ins. Co.

Force not necessary.

The case of Miller *v.* Law Accident Insurance Co. (*p*) has also been already noticed. In this case it was definitely established that in order to constitute a restraint of princes no manifestation of force was necessary. It is enough, in order to constitute a restraint of princes, for a State to make an order—whether by general law or by decree or otherwise—which it has power to enforce, frustrating the voyage and so causing a loss of the goods. "I do not see," said Vaughan Williams, L. J., "much difference between a restraint by a blockading force and a restraint arising under the operation of a sanitary law." "If actual force was not used," said Mathew, L. J., "it was because there was no opposition. The master submitted to the orders of the administration. The result to the assured was the same as if force had been used" (*q*).

(*n*) §§ 805, 806.
(*nn*) *Ante*, §§ 832b, 832c.
(*o*) § 807.
(*p*) [1903] 1 K. B. 712; *supra*, § 807.
(*q*) See also Mansell *v.* Hoade (1903), 20 Times L. R. 150; St. Paul Fire and Mar. Ins. Co. *v.* Morice (1906), 11 Com. Cas. 153. And in Van Laun *v.* Thames & Mersey Mar. Ins. Co. (28th March, 1903) (reported in House of Lords, [1917] 2 K. B. 48n., but otherwise unreported). Kennedy, J., held that the slaughter of cattle by order of the local authorities at Shanghai was a loss by "arrests, &c.," or at any rate a loss *ejusdem generis;* and his judgment was affirmed on this point (9th Nov. 1903) by the C. A.
(*r*) [1915] 2 K. B. 781; [1916] 1 A. C. 650.
(*s*) Lord Reading, C.J., and Bray, J., Swinfen Eady, L.J., dissenting.

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Sanday *v.* British & Foreign Ins. Co.

Mere illegality may constitute restraint of princes.

832f. In Sanday & Co. *v.* British and Foreign Marine Insurance Co. (*r*), the principles involved in the decisions in Rodocanachi *v.* Elliott and Miller *v.* Law Accident Society were further developed. It was there held for the first time that a restraint of princes might be created simply owing to the occurrence of events making it illegal at common law for the subject from whom obedience to that law was due, and on whom it could be enforced, to continue the adventure on which he was engaged at the time of the occurrence of the events. The plaintiffs were British merchants who had shipped linseed on two British ships for carriage to Hamburg. They insured their goods with the defendants under policies which included restraints of princes in the perils insured against. War between Great Britain and Germany broke out while the goods were at sea, so that by the common law of the land prohibiting trading with the enemy the further prosecution of the voyages became illegal. The ships discharged their cargoes in the United Kingdom, and the plaintiffs gave notice of abandonment. The Court of Appeal (*s*), affirming Bailhache, J., held that a restraint did not necessarily involve the actual exercise of any physical force—it was enough if the act was prohibited and the State could enforce the prohibition; also that the act of the British Government in declaring war was a "political act" making it illegal and therefore impossible to continue the voyage, and that this constituted a restraint of princes. The same view was taken in the House of Lords. "Force is in reserve behind every State command," said Earl Loreburn. "The possible infliction of penalties for disobedience," said Lord Atkinson, "is a restraint." It was further held, in answer to an argument advanced on behalf of the underwriters, that the opera-

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tion of the common law could not be separated from the act of the sovereign and treated as intervening between that act and the abandonment of the voyage, and that the declaration of war was the proximate cause of the loss.

Sanday's case distinguished.

Sanday's case was distinguished in Becker, Gray & Co. *v.* London Assurance Corporation (*t*). In the latter case the adventure was lost owing to the act of the German captain of the ship. It was not lost owing to any illegality in continuing the voyage or any other restraint of princes. This case is a decision not on the meaning of restraint of princes, but on the application of the rule as to proximate cause. If there was any restraint of princes, it did not cause the loss in respect of which the action was brought.

Sanday's case followed.

Sanday's case was followed by Atkin, J., in Associated Oil Carriers, Ltd. *v.* Union Insurance Society of Canton, Ltd. (*u*), and applied to a claim for loss of freight. A German firm had chartered the plaintiffs' ship and ordered her to go to Kustendji, a Roumanian port, and there load a cargo. The vessel proceeded as far as Gibraltar, where in consequence of the outbreak of war on 4th August, 1914, she remained awaiting orders, but on 11th August the plaintiffs abandoned the voyage which it had become illegal for them, as British subjects, to perform. They had insured the freight against war risks with the defendants. It was held that there was a total loss of freight by restraint of princes.

The decision in Sanday's case appears to have come as a surprise to underwriters, involving them in a risk of a political nature which they had hardly contemplated. A clause known as the "Frustration Clause" has, therefore, been framed with the object of excluding it. The clause is now commonly inserted in insurances of cargo which do not exclude war risks, and is one of the Institute Cargo Clauses, 1920, and is also included in the body of a Lloyd's policy (*x*). In its present

(*t*) [1915] 3 K. B. 410; [1916] 2 K. B. 156; [1918] A. C. 101. See *ante*, § 806.

(*u*) [1917] 2 K. B. 184.

(*x*) See *ante*, § 10. It runs: "Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure, caused by arrests, restraints or detainments of kings, princes or people."

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form, however, it seems that the clause would have a much wider effect. For instance, it would be a good answer to such a claim as was successfully made in Miller *v.* Law Accident Society (*xx*), and perhaps also to that so made in Rodocanachi *v.* Elliott (*xx*).

Embargoes.

833. Embargoes are obvious cases of arrests, restraints, and detainments of princes. An embargo is an order of Government (generally, but not always, issued in contemplation of hostilities) prohibiting the departure of ships or goods from some or all of the ports within its dominions (*y*).

Whether laid upon the property of subjects, or of aliens.

An embargo laid by a foreign Government upon the ships or goods of any other than its own subjects entitles the assured at once to give notice of abandonment, and, if the embargo continues down to the time of action brought, to recover as for a total loss. Thus, where a neutral ship and stores, insured "at and from" an enemy's port, were there detained, before sailing, by an embargo laid on by the enemy in the port of loading, and continuing down to the time of action brought, the assured recovered as for a total loss under a count alleging the loss to be by "arrest and restraint of princes" (*z*).

This also is the law of our Courts in case of embargo by a foreign Government laid upon the ships of its own subjects, being at the time at peace with this country. A cargo insured in this country, but belonging to a Spanish subject, and loaded on board a Spanish ship, was detained and unloaded at Corunna by the Spanish Government for the purpose of converting the ship into a transport of war during the hostilities of Spain with Morocco, and the cargo was thereby

(*xx*) *Ante*, § 832e.

(*y*) 1 Emerigon, c. xii. s. 30, p. 526. As to the effect of a subsequent declaration of war upon an embargo, see The Herstelder (1799), 1 C. Rob. 114; The Boedes Lust (1804), 5 C. Rob. 233; Driefontein *v.* Janson, [1900] 2 Q. B. at p. 344.

(*z*) Rotch *v.* Edie (1795), 6 T. R. 413.

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damaged. This was held by the Exchequer Chamber to be a loss for which the underwriters were liable (*a*).

834. There appears to be no doubt that if a British ship be arrested or seized by the British Government from any state necessity, or detained in port by a British laid embargo, this is a loss for which the underwriters are liable as a detention within the meaning of the policy (*b*). Such, accordingly, seems to have been the opinion of our Courts in a case where a British ship was seized by the British Government and converted into a fire-ship (*c*), and in another where such ship was seized and taken in tow by a British man-of-war (*d*).

Foreign law.

In fact, there seems no ground of distinction in this respect, as far as concerns the liability of the underwriters, between an arrest or embargo by the home and by a foreign Government. Accordingly, the French Code of Commerce has decreed that "arrest by the home Government after the commencement of the voyage" is a ground of abandonment (*e*).

Wages and provisions during detention by embargo.

835. An arrest, detention, or embargo does not necessarily, like a capture, break up the voyage under the charter-party, or at once put an end to a contract of affreightment (*f*). On the contrary, the voyage is still supposed to be proceeding on its former terms, the period of detention being considered as a portion of it. Hence, wages and provisions of the crew during

(*a*) Aubert *v.* Gray (1862), 3 B. & S. 163, 169; 32 L. J. Q. B. 50; overruling Conway *v.* Gray, &c. (1809), 10 East, 536; and Campbell *v.* Innes (1821), 4 B. & Ald. 423. See Simeon *v.* Bazett (1813), 2 M. & S. 94; and Bazett *v.* Meyer (1814) (*S. C.*, in error), 5 Taunt. 824; and *ante*, § 803; see Janson *v.* Driefontein, [1902] A. C. 484.

(*b*) *Dictum* of Lord Alvanley in Touteng *v.* Hubbard (1802), 3 B. & P. 302. As to requisitioning, see Tamplin SS. Co. *v.* Anglo-Mexican Petroleum Products Co., Ltd., [1915] 3 K. B. 668; [1916] 1 K. B. 485; [1916] 2 A. C. 397; and *supra*, § 832 (c).

(*c*) Green *v.* Young (1702), 2 Lord Raym. 840; 2 Salk. 444.

(*d*) Hagedorn *v.* Whitmore (1816), 1 Stark. 157.

(*e*) Arts. 369, 370. See also 4 Boulay-Paty, Droit Mar. 36—44, 237—240; Estrangin on Pothier, No. 59, pp. 94, 95.

(*f*) See Tamplin SS. Co. *v.* Anglo-Mexican Petroleum Products Co., Ltd., [1919] 3 K. B. 668; [1916] 1 K. B. 485; [1916] 2 A. C. 397, where, however, the dispute was between owner and time charterer, and no question of expenses or of insurer's liability arose.

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a detention by embargo are not chargeable by our law upon the underwriter on ship, as they form part of those ordinary and usual expenses of the navigation which fall exclusively upon the shipowner, and for which he is remunerated out of the freight (*g*). The principle is, that the shipowner, in consideration of the freight, owes the services of the crew to the freighter during the whole voyage, and consequently also during the time of detention, which is considered to make part thereof (*h*).

Conclusions.

835a. The following propositions, therefore, appear to be now established by the authorities:

1. That the words "arrests, &c." of princes have the same meaning in policies of insurance as in contracts of carriage.

2. That a mere apprehension of a restraint is not a restraint, but

3. That in order to constitute a restraint force need not be physically present.

4. That a declaration of war is a political act which by bringing into effect the common law forbidding trading with the enemy under penalties constitutes a restraint of princes.

5. That the law of a foreign State may similarly amount to a restraint of princes.

6. That an assured under a British policy may recover for a restraint imposed by the British Government (*i*).

(*g*) Eden *v.* Poole (1785), 1 Park, 117; 2 Marshall, Ins. 730; Robertson *v.* Ewer (1786), 1 T. R. 127; Sharp *v.* Gladstone (1805), 7 East, 32, *in notis*. As to the reasons, however, here assigned for this rule, see Field SS. Co. *v.* Burr, [1899] 1 Q. B. at p. 590, where Collins, L. J., after citing authorities, says that all that underwriters on ship insure against is damage to ship, and that expenses occasioned by detention or delay are damages suffered by the shipowner, but not by the ship. So, Hutchins *v.* Royal Exchange Ass. Corp., [1911] 2 K. B. 398; Polurrian SS. Co. *v.* Young (1913), 19 Com. Cas. 143; affirmed in C. A., [1915] 1 K. B 922, where, however, this point was not dealt with.

(*h*) Benecke, Pr. of Indem. 462; Pothier, Des Charte-Parties, No. 85, cited 1 Emerigon, 529.

(*i*) *Ante*, § 803.

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7. That it is sufficient to constitute a restraint of princes if either the restraint can be physically enforced upon the subject-matter thereof or if the person against whom the restraint is directed can be punished for disobedience thereof.

Loss by pirates, rovers and thieves.

836. Amongst the perils which the underwriters avowedly take upon themselves in our common printed forms of policy are those of "pirates, rovers and thieves." First, of pirates and rovers.

Pirates.

Loss thus incurred was formerly included in our maritime law amongst the general perils of the seas (*k*), and probably would still be held to be so; though, as piracy is one of the enumerated perils, the point is of less importance.

The question What is Piracy? was discussed in the case of Republic of Bolivia *v.* Indemnity Mutual Marine Assurance Company, Limited (*l*). Provisions and stores had been shipped by the Bolivian Government at a place at the mouth of the Amazon, for carriage to a place more than 1,000 miles inland, upon a tributary of a tributary of that river. The goods were intended for Bolivian troops engaged in establishing the authority of the Government, but were seized near their destination by certain Brazilian malcontents who had fitted out an expedition which ascended the Amazon in armed vessels for the purpose of resisting the Bolivian troops and establishing an independent republic. The goods were insured for the voyage by a marine policy in the usual form covering (*inter alia*) pirates and all other perils and containting the clause "warranted free of capture, seizure and detention . . . . piracy excepted, and also from all consequences of riots, civil commotions (*m*), hostilities, or warlike operations, whether before or after declaration of war."

(*k*) 2 Roll. Abr. 248, pl. 10; Cumberbatch, 56, cited 1 Park, Ins. 137; 3 Kent, Com. 302, n.

(*l*) [1909] 1 K. B. 785.

(*m*) A civil commotion is "an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is usurped power," per Lord Mansfield in Langdale *v.* Mason (1780), reported in 2 Park on Ins. 965. See also London and Manchester Plate-Glass Co., Ltd. *v.* Heath, [1913] 3 K. B. 411.

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It was held by the Court of Appeal, affirming Pickford, J., that the word "pirates" in a policy meant persons plundering indiscriminately for their own ends, and not persons simply operating, even illegally and criminally, against the property of a particular state for a public political end, and therefore that there had been no loss through "pirates" within the meaning of the policy. It was further held, having regard to the terms of the warranty clause, that it was impossible for the plaintiffs to rely on the general words so as to recover for the loss as being *ejusdem generis* with piracy. It was piracy only, and not risks like piracy, that was excluded from the warranty. There was a difference of opinion in the Court of Appeal as to whether piracy could be committed except upon the high seas.

Loss on goods by a mob boarding the ship, is a loss by pirates.

The term "pirates" has been held to include passengers who mutiny and rioters who attack the ship from the shore (*n*). Thus, where a meal mob on the coast of Ireland violently boarded a corn-laden ship, took the government of her from the captain and crew, ran her on a reef of rocks, and then forced the captain to sell the corn at a low price, Lord Kenyon held that this was a loss by pirates (*o*).

So, loss by crew.

So, too, it seems that under the risk of pirates and rovers the underwriters are liable for a mutinous seizure and carrying away of the ship by the crew (*p*).

Where certain coolie emigrants on a voyage from Canton to Callao piratically and feloniously murdered the captain and part of the crew, and forcibly carried away the ship and the rest of the crew, it was held that this was an act of piracy, or, at all events, an act, *ejusdem generis*, covered by the policy (*q*).

(*n*) Rules for Construction of Policy in Sched. I. to Mar. Ins. Act, 1906: r. 8.

(*o*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

(*p*) Brown *v.* Smith (1813), 1 Dow, 349. In Dixon *v.* Reid (1822), 5 B. & Ald. 597, such loss was laid as loss by barratry, which seems the true mode of alleging it.

(*q*) Naylor *v.* Palmer (1853), 8 Exch. 739; affirmed in error (1854), 10 Exch. 382; 22 L. J. Ex. 329; 23 L. J. Ex. 323. See Kleinwort *v.*

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Thieves.

837. Secondly, as to thieves, it is provided by the Rules for Construction of Policy (*r*) that the term "does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers."

Distinction between simple theft and robbery.

The theft that is insured against in the policy means that which is accompanied by violence (*latrocinium*), and not simple theft (*furtum*); it being an old and elementary rule of the law of insurance that *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes the master might have prevented by the exercise of due vigilance, and the loss arising from which he consequently ought to bear (*s*).

Robbery, accompanied by violence, and committed by strangers, not by the crew, is a loss for which the underwriters on the ship or goods are liable as a loss by rovers or thieves under the policy, the maxim being, that *latrocinium fatale damnum seu casus fortuitus est* (*t*).

In the United States.

It has been decided by Chancellor Walworth, in the State of New York, that, under the general word "thieves," in the common form of policy, the assured on ship or goods may recover even for a simple theft committed on the voyage by persons belonging to the ship (*u*). Chancellor Kent, however, in a note, rich with his usual variety of learning and pregnant

Shepard (1859), 28 L. J. Q. B. 147; 1 E. & E. 447, where similar facts were held to be within a warranty—free from capture and seizure.

(*r*) Mar. Ins. Act, 1906, Sched. I. r. 9.

(*s*) See all the learning on this subject collected and lucidly arranged by Emerigon, c. xii. s. 29, "Vol des effets assurés," vol. i. p. 524. The corresponding section in the seventh edition of this work contains a criticism by the editors of this rule and of the reasons upon which it is based. In view of the Act of 1906 it does not seem sufficiently useful to repeat their criticism in this edition.

(*t*) Roccus, No. 43, cited by Emerigon, c. xii. s. 29. So held in English law, Harford *v.* Maynard (1785), before Lord Mansfield, cited 1 Park, Ins. 36.

(*u*) Atlantic Ins. Co. *v.* Storrow (1835), 5 Paige, 293; affirmed in Bryan *v.* American Ins. Co., *ibid.* p. 842, in the Superior Court, and also (in error) in the Supreme Court of New York. Kent, Com. vol. iii. p. 303, n. (*a*).

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accuracy of expression, shows that this doctrine not only overrules all the old authorities and text-books, but is of very questionable policy when applied to the owner of the ship (*x*).

In order to obviate all doubt as to the construction of the word "thieves," some American policies, instead of "pirates, rovers, and thieves," contain the words "pirates and assailing thieves."

Plunder by wreckers.

If shipwrecked goods are plundered by wreckers on shore, this was held by Emerigon and Pothier, and has been decided in this country, to be a loss for which the assured on goods may recover under a count for loss by perils of the sea (*y*).

Loss by barratry.

Meaning of "barratry" in English law.

838. "Barratry of masters and mariners" being one of the perils insured against, the first question is as to the meaning attached to the word "barratry." Guided by the etymology of the word, which seems ultimately to have been derived from the Catalan barat (*z*), and proximately from the Italian barratria (*a*), in both of which languages it conveyed the notion of fraud or trick, our judges for a long time seem to have considered that fraud, or criminal knavery, on the part of the master as against the owners, with a view to benefit himself at their expense, was an essential ingredient in barratry as insured against in English policies (*b*).

(*x*) 3 Kent, Com. 303, n. (*a*). The learned editor, however, of the 12th edition of Kent's Commentaries (1873) seems to accept the decisions in Storrow's and Bryan's cases as establishing the American law on this point. Parsons, vol. i. p. 564 (ed. 1868), agrees that the weight of American authority would make the insurers liable for loss by simple larceny without violence, and Phillips, s. 1106, takes the same view.

(*y*) 1 Emerigon, c. xii. s. 29, citing Pothier, d'Assurance, No. 55; Bondrett *v.* Hentigg (1816), Holt, N. P. 149.

(*z*) 1 Emerigon, c. xii. s. 3, p. 365.

(*a*) Per Lord Mansfield in Vallejo *v.* Wheeler (1774), 1 Cowp. 154.

(*b*) Thus, in the earliest English case on the subject (Knight *v.* Cambridge (1724), 1 Str. 581 (cited 8 East, 135)), the Court considered fraud to be the substantial matter constituting barratry. So, Lee, C. J., said: "To make barratry it must be something of a criminal nature." Stamma *v.* Brown (1743), 2 Str. 1173. "Barratry," said Lord Mansfield, "must partake of something criminal, and must be committed against the owner by the master and mariners." Nutt *v.* Bourdieu (1786), 1 T. R. 330. "Whatever is by the master a cheat,

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Lord Ellenborough, however, in an elaborate decision, reviewing all the authorities, established the position that trick or knavery in the sense of an imposition practised upon the owners by the master, with a view to promote his own benefit at their expense, was not essential to constitute barratry in our law; but that any wilful act of known criminality or gross malversation, even though not intended for the owners' prejudice, nay, even though intended for their benefit, would yet, if in fact it operated to their prejudice, by causing the loss or seizure of the ship, be barratry in the master (*c*). His Lordship after stating that "a fraudulent breach of duty by the master in respect of his owners, or in other words a breach of duty in respect of his owners with a criminal intention or *ex maleficio*, is barratry," lays it down that it is equally so "whether the act of the master be induced by motives of advantage to himself, malice to the owners, or a disregard to those laws which it was his duty to obey, and which (or it would not be barratry) his owners relied upon his observing."

Definition of barratry.

839. Barratry, then, in English law comprehends not only every species of fraud and knavery covinously committed by the master with the intention of benefiting himself at the expense of his owners, but every wilful act on his part of known illegality, gross malversation, or criminal negligence, by whatever motive induced, whereby the owners or the charterers of the ship (in cases where the latter are considered owners *pro tempore*) are, in fact, damnified (*d*). And it is

a fraud, a cozening, or a trick is barratry." Vallejo *v.* Wheeler (1774), 1 Cowp. 154. "Barratry," says Aston, J., in the case last cited, "comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured." *Ibid.* 155. See also the *dicta* of Willes, J., in Lockyer *v.* Offley (1786), 1 T. R. 252.

(*c*) Earle *v.* Rowcroft (1806), 8 East, 126; Heyman *v.* Parish (1809), 2 Camp. 149.

(*d*) The tersest and (perhaps) best definition of barratry is that given by Lord Hardwicke in Lewen *v.* Swasso (Postlethwaite's Dict. 147, tit. Assurance), viz., that it is "an act of wrong done by the master against the ship and goods."

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now declared in one of the Rules for Construction of the Policy that the term "includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer" (*e*).

Proof of intent to injure or defraud owners.

With regard, indeed, to the proof of criminal intent necessary to constitute barratry there is an obvious distinction, arising from the different nature of the acts relied upon as barratrous.

Where the act of alleged barratry is in itself manifestly unlawful or criminally negligent, as in the case of illegal trading with the enemy, or cutting the ship's cable so as to let her drift on the rocks, no proof need be given, in order to show the act barratrous, of the master's having acted with a fraudulent intent to injure his owners; nay, even if it can be shown, as in the case of trading with the enemy, that it was done with a view to the owners' benefit, yet, if it was against, or not in consequence of, his instructions, it will still be barratry.

On the other hand, where the act itself, as in cases of deviation, is not, on the face of it, criminal or fraudulent, proof must be given of a fraudulent or criminal intent on the part of the master, either secretly to benefit himself or to injure his owners before such act can be adjudged barratrous (*f*).

Losses arising from the ignorance or mistake of the captain, however gross, are not losses by barratry,

840. It must also be carefully borne in mind that, in the absence of fraud, nothing but acts of known criminality, gross malversation, or the like (*g*) can amount to barratry; loss arising from the ignorance or incompetence of the captain, from a mistake as to the meaning of his instructions, or misapprehension of the best mode of carrying them

(*e*) Mar. Ins. Act, 1906, Sched. I. r. 11. This does not profess to be an exhaustive definition.

(*f*) See the concluding observations of Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 139.

(*g*) Arnould (2nd ed. p. 845) added, "or negligence so gross as to be clearly fraudulent and criminal," but "in the absence of fraud," it is not quite clear what he meant.

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unless he acted against his better judgment.

into effect, can never amount to barratry. The master, in fact, before he can be proved to have acted barratrously, must be shown to have acted against his better judgment; if he merely acted up to the best of his judgment, however bad, this is not barratry (*h*).

Thus, where the captain of a sea-damaged ship before survey broke up her ceiling and end-bows with crow-bars and thereby injured her, but no proof was given of his having been actuated by any criminal intent in so doing, Lord Ellenborough said: "To constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands, there is a whole ocean between you and barratry" (*i*).

No act can be barratry in the master to which the owners are consenting parties.

Another principle, clearly flowing from the true notion of barratry as a criminal act committed by the master against the interest of the owners (whether fraudulently or not), is that no act can be barratrous to which the owners can in any way be shown to have been consenting parties; for no man can take advantage of his own wrong (*k*).

Cases of loss by barratry.

841. Having thus indicated the leading principles by which to determine whether a loss is barratrous or not, we will proceed to examine what has been held in practice to amount to barratry.

Sailing out of port without paying port dues, or in breach of an embargo.

In the earliest case it was decided that sailing out of port without paying port dues, whereby the ship and goods were subjected to forfeiture, was barratry (*l*); so sailing out of port without leave in breach of an embargo, in consequence

(*h*) Phyn *v.* Royal Exch. Ass. Co. (1798), 7 T. R. 505; Todd *v.* Ritchie (1816), 1 Stark. 240; Bottomley *v.* Bovill (1826), 5 B. & Cr. 510.

(*i*) Per Lord Ellenborough in Todd *v.* Ritchie (1816), 1 Stark. 240.

(*k*) See Stamma *v.* Brown (1743), 2 Str. 1173; Pipon *v.* Cope (1808), 1 Camp. 434. Yet by a part-owner, acting as master, against his innocent co-owner, barratry is possible. Jones *v.* Nicholson (1854), 10 Exch. 28; Small *v.* U. K. Marine Ins. Assoc., [1897] 2 Q. B. 42, 311 (C. A.). See also *post*, § 856.

(*l*) Knight *v.* Cambridge (1724), as cited by Lee, C. J., in Stamma *v.* Brown (1743), 2 Str. 1174, and by Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 135, 136.

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of which the owners afterwards sustained a loss in respect of seamen's wages and provisions, by the detention of the ship, was ruled by Buller, J., and not denied by the full Court, to be barratry (*m*).

Wilful breach of blockade.

So the wilful and intentional breach of a blockade by the master's sailing towards, into, or out, of a blockaded port, without the knowledge or consent of the owners, though it may be with a view to their benefit, is barratry (*n*). But this cannot be maintained where the evidence is quite consistent with the supposition that the captain acted either ignorantly or in obedience to orders from his owners (*o*).

Resistance to right of search, or attempt at rescue.

842. It has been held in the United States, and apparently on good grounds, that the loss of a neutral vessel consequent either upon a wilful resistance of the right to search, or an attempt to rescue her when rightfully detained and sent in for examination by a belligerent cruiser, is a loss by barratry (*p*).

Illegal trading without instructions from owners.

Illegal trading, in consequence of which the vessel is seized and condemned, if knowingly carried on by the captain without the directions, though principally with a view to the benefit, of his owners, is an act of barratry.

In 1804, while England was at war with Holland, an English ship was insured for a slaving voyage from Liverpool to the African coast, there to stay and trade, and proceed thence to a port of sale in the West Indies. The captain, being on the African coast, and not finding a good market in

(*m*) Robertson *v.* Ewer (1786), 1 T. R. 127, cited by Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 139.

(*n*) Goldschmidt *v.* Whitmore (1811), 3 Taunt. 508.

(*o*) Everth *v.* Hannam (1815), 6 Taunt. 375; 2 Marsh. 72, *S. C.* The American authorities are collected by Phillips (ss. 1067, 1068). They do not appear quite consistent, either with one another or our own law.

(*p*) Dederer *v.* Delaware Ins. Co. (1807), 2 Wash. C. C. R. 61; Wilcocks *v.* Union Ins. Co. (1809), 2 Binney's R. 574, cited Phillips, s. 1068. A recognition of the principle contained in these cases is attributed to Buller, J., in Saloucci *v.* Johnson (1799), 2 Park, Ins. 758, cited 8 East, 129; and see Garrels *v.* Kensington (1799), 8 T. R. 230, where no count was inserted for loss by barratry, as significantly remarked by Lawrence, J., p. 235.

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the British settlements there, put into D'Elmina, a Dutch fort on that coast, where he knew it was illegal for him to enter, and there exchanged his cargo for slaves. He had no instructions from his owners to go in there, but his object in so doing was to complete his cargo as cheaply and expeditiously as he could. In consequence of this act his vessel was seized by a British cruiser and condemned.

Lord Ellenborough, upon the principles already stated, held this to be a loss by barratry (*q*).

Where a master with knowledge of the Kidnapping Act (35 & 36 Vict. c. 19), prohibiting the carrying of Polynesian labourers in ships without a licence, shipped such labourers without a licence and without the consent of his owners, thereby occasioning the seizure and condemnation of the vessel, this was held to be barratry (*r*).

Cruising.

843. Upon the same principle, it is barratry in the captain of a merchant ship to cruise contrary to the intentions and instructions of his owners.

The owners of a ship chartered for a voyage from Liverpool to the West Indies and back furnished her with letters of marque for the homeward voyage, merely for the purpose of inducing seamen to ship, and without any intention that the vessel should in fact cruise: Their instructions to the captain were to proceed from the West Indies to Liverpool with all expedition. The captain, however, after getting out to sea commenced cruising, and, having plundered one American vessel, after some days took another, which he carried into Bermuda, where his own vessel was driven ashore in a storm and the cargo lost.

The Court held that this cruising, though possibly done with a view to benefit the owners, yet, being in fact a breach of his duty to them and resulting to their prejudice, was an act of barratry (*s*).

(*q*) Earle *v.* Rowcroft (1806), 8 East, 126.

(*r*) Australian Ins. Co. *v.* Jackson, *coram* P. C. (1875), 33 L. T. N. S. 286.

(*s*) Moss *v.* Byrom (1795), 6 T. R. 379.

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Smuggling.

844. Smuggling in fraud of and without the consent of the owners is barratry, and they may recover, even though the ship is only insured by the policy "on any lawful trade": for these words "lawful trade," mean the trade in which the ship is employed by her owners, and not any unlawful commerce in which the captain may barratrously engage without their concurrence (*t*). But although the owner may not have directly connived at the smuggling, yet if, by his gross negligence, acts of smuggling have been repeatedly committed by the mariners after warning and within a very short interval, he shall not recover for the loss occasioned by these their barratrous acts. Thus, where a ship had three times been seized after three successive trips for three distinct acts of smuggling by the crew, the owner was not allowed to recover the third time (*u*).

Mutinously carrying the ship out of her course, or purposely running her ashore.

If the ship is violently carried out of her course and fraudulently run away with by the captain and crew, this is a clear case of barratry from the moment the ship is so carried out of her course (*x*). So is purposely running the ship on shore without justifying necessity (*y*), or fraudulently procuring the ship to be condemned and sold. In this latter instance the act of barratry (as a "cause of action" under the Statute of Limitations) dates, not from the period at which the master abandoned the voyage, or even from the condemnation of the ship, but from the completion of the transaction by her delivery and sale (*z*).

(*t*) Havelock *v.* Hancill (1789), 3 T. R. 277.

(*u*) Pipon *v.* Cope (1808), 1 Camp. 434. Lord Ellenborough said:—"This is a clear case of *crassa negligentia* on the part of the assured. It was his duty to have prevented these repeated acts of smuggling by the crew. By his neglecting so to do, and allowing the risk to be monstrously enhanced, the underwriters are discharged." The passage in the text is retained from the 2nd edition, p. 849, but it is doubtful whether proof of mere negligence, or of anything short of *dolus*, would now be held to afford the underwriters any defence. See Trinder, Anderson & Co. *v.* Thames & Mersey Co., [1898] 2 Q. B. 114.

(*x*) Falkner *v.* Ritchie (1814), 2 M. & S. 290; Brown *v.* Smith (1813), 1 Dow, 349; Dixon *v.* Reid (1822), 5 B. & Ald. 597; 1 D. & Ryl. 207.

(*y*) Soares *v.* Thornton (1817), 7 Taunt. 627; 1 Moore, 373, *S. C.*

(*z*) Hibbert *v.* Martin (1808), 1 Camp. 538.

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Misconduct of the master, though not fraudulent, may be barratrous.

845. In the instances just mentioned the acts of the captain were manifestly criminal and fraudulent, and to the prejudice of the owners; but even in the absence of such fraud, misconduct amounting to gross malversation by the master in his office, if it be to the prejudice of his owners, may amount to barratry.

Thus, where the pilot swore that the captain, who had refused to sail when the wind was fair, persisted in doing so contrary to his directions when it was unfavourable, and, still disregarding the pilot's instructions, cut the cable, so that the ship drifted on the rocks; Lord Ellenborough held that this, if true, would amount to barratry (*a*).

Nonfeasance may in extreme cases amount to barratry.

There are cases in which to do nothing may be as criminal and mischievous as any positive acts. In such cases there seems little doubt that the wilful nonfeasance of the master, if productive of mischief to the owner, would be barratrous.

Thus, if a master sees another in the act of scuttling or firing the ship, and will not rise from his berth to prevent it, he is, *primâ facie*, chargeable with barratry; for, though a mere nonfeasance, it is a breach of trust, a fault, an act of infidelity to his owners (*b*).

But, short of this criminal degree of negligence, no loss occasioned by the mere ignorance, incompetence, or carelessness of the master can constitute an act of barratry. Thus, "unless accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry" (*c*).

But deviation from gross ignorance, apart from fraud, is not barratry.

846. A captain, whose instructions were to proceed immediately from London to Jamaica, having been carried out of his course, instead of taking his direct course to Jamaica, bore up to Santa Cruz, which was then in sight, where his ship was

(*a*) Heyman *v.* Parish (1809), 2 Camp. 149.

(*b*) Per Johnson, J., in the American case of Patapsco Ins. Co. *v.* Coulter (1830). 3 Peters, S. C. R. 222, cited 1 Phillips, Ins. s. 1074. Every case, however, of "wilful default" within the meaning of a statute is not necessarily barratry: Gill *v.* General Iron Screw Co. (1868), L. R. 3 C. P. 476.

(*c*) Per Lord Ellenborough in Earle *v.* Rowcroft (1806), 8 East, 130.

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laid under embargo and condemned as prize. The jury having found that this deviation was not fraudulent, the Court held it not barratrous. Lawrence, J., said "that he knew of no case in which it is said that the act of the captain is barratrous merely because it is against the interest of the owners; it must be done with a criminal intent; the jury here, having negatived fraud, had negatived criminality, therefore this was not a barratrous deviation" (*d*).

Mistake as to meaning of sailing instructions is not barratry.

The captain of a convict ship sailed from London for Sydney, with orders, after discharging his convicts there, to proceed thence for South America, taking New Zealand on his way; some time after he had arrived in Sydney he received fresh instructions from his owners, directing him to proceed at once from Sydney to the East Indies; under these circumstances the captain resolved, contrary to the letter of his last instructions, to make his voyage to New Zealand and back before prosecuting that from Sydney to the East Indies; he sailed accordingly, and the ship was lost on her return from New Zealand. It was contended at the trial that this was barratry in the captain; but Lord Tenterden told the jury that "barratry meant an act of the master in fraud of his duty to his owners," and that a mere mistake by the captain as to the meaning of his sailing instructions, or as to the best means of carrying them into effect, could not amount to barratry (*e*).

Aliter, where captain deviates in fraud of his duty to his owners.

847. Where, on the other hand, the captain deviates from the proper course of the voyage in fraud of his duty to his owners, and for his own private purposes unknown to them, this is an act of barratry from the moment the ship is carried out of her course.

The captain of a ship insured from London to Seville sailed for Guernsey, out of the course of the voyage, to take in brandy and wine on a smuggling adventure of his own,

(*d*) Phyn *v.* Royal Exch. Ass. Co. (1798), 7 T. R. 505. N.B.—From this case it is obvious that fraud, in speaking of barratry, means the same thing as criminality.

(*e*) Bottomley *v.* Bovill (1826), 5 B. & Cr. 210.

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unknown to the charterer (who was owner *pro hâc vice*), and the night after sailing sprung a leak, which compelled him to put back and ultimately to abandon the voyage: this was held by Lord Mansfield to be a clear case of barratry (*f*).

So where a captain, having received orders to proceed to Cocos Bay to load, made an arrangement with a private individual and for his own gain to make two voyages to Cocos Island, 250 miles away, without the knowledge of his owners, and the vessel became a total loss during the second voyage to the Island, it was held by Hamilton, J., that both voyages were barratrous, and that the owners were therefore entitled to recover (*g*).

Even dropping anchor and going ashore in a boat, to find a market for his own private adventure of negroes on board, was held by Lord Kenyon to be barratry in the captain, commencing from the moment of his first going out of his course for that purpose (*h*).

Or delays.

Unreasonable delay generally, as we have already seen, discharges the underwriter, as a variation of the risk; but where this delay is employed by the captain for the purpose of committing an act of barratry (as by an elaborate forgery of all the ship's documents, &c.), then the delay is part of the barratry for which the underwriters are liable, and not a deviation by which they are excused (*i*). "Criminal delay," in fact, as expressed by Burrough, J., "is a barratrous act" (*k*).

Detention of the ship and consequent expense owing to an incorrectness in her manifest is not a loss by barratry, unless clear proof be given that the incorrectness was wilful (*l*).

Barratry of the mariners.

848. If the captain is compelled by the mutinous violence of the crew to deviate from his course, though in the teeth of

(*f*) Vallejo *v.* Wheeler (1774), 1 Cowp. 143; *S. C.*, Lofft, 645.
(*g*) Mentz, Decker & Co. *v.* Maritime Ins. Co. (1909), 15 Com. Cas. 17.
(*h*) Ross *v.* Hunter (1790), 4 T. R. 33.
(*i*) Roscow *v.* Corson (1819), 8 Taunt. 684.
(*k*) *Ibid.*
(*l*) Bradford *v.* Levy (1825), Ry. & Mood. 331; 2 C. & P. 137.

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express instructions to the contrary, this will neither be such a deviation as to discharge the underwriters, nor will it be "barratry of the master," although, as it seems, it would be barratry of the mariners (*m*).

There have not been many decisions as to what will amount to barratry by the mariners; but it seems quite clear that when any crime or fraud attended by, or producing, the loss or destruction of the ship be committed by the mariners under such circumstances of violence or treachery that it could not have been prevented by the prudence or vigilance of the owner or of the master or his agent, this will be a loss by barratry of the mariners. On the contrary, if the owner or master might with ordinary force or reasonable vigilance have prevented it, this will not be a loss by barratry of the mariners, as we have seen in the case where the ship was confiscated for repeated acts of smuggling committed by the crew (*n*).

Where the crew overpower the captain or constrain him to consent to their proceedings, the same acts would be barratry in them as in the master.

Thus, where four of the mariners conspired with some prisoners of war on board and, having overpowered the master and the rest of the crew, ran the ship ashore, where she was captured; as it appeared that the owners and master had not been guilty of any gross negligence in failing properly to secure the prisoners on board, this was held to be a loss by the barratry of the mariners (*o*). And the judgment was the same in a case where only one of the crew, conspiring

(*m*) See the case of Elton *v.* Brogden (1747), as reported in 2 Str. 1264, and commented upon by Lord Mansfield in Vallejo *v.* Wheeler (1774), 1 Cowp. 154; by Lord Alvanley in the case of De Feise *v.* Stephens (1800), at the Cockpit, as cited Marshall, Ins. 523, n. (*b*); and, lastly, by Sir James Mansfield in Scott *v.* Thompson (1805), 1 B. & P. N. R. 186, and 1 Park, Ins. 194.
(*n*) Pipon *v.* Cope (1808), 1 Camp. 434, *ante*, s. 844.
(*o*) Toulmin *v.* Anderson (1808), 1 Taunt. 227; Toulmin *v.* Inglis (1808), 1 Camp. 421.

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with some prisoners of war on board, forced the captain and the rest of the crew ashore and ran away with the ship (*p*).

The rule, in fact, is that where the cause of the loss is a superior force, originating with the crew, the underwriters are liable as for barratry by the mariners.

By and against whom barratry is possible. The owners.

849. We now proceed to consider by and against whom barratry may be committed.

As we have already seen, it is part of the very definition of barratry that it is an act done by the master and mariners in fraud of their duty to their owners—*i.e.*, either the parties who are general owners of the ship, or the freighters, who, under the terms of the charter-party, are her special owners for the voyage.

No act, therefore, can be barratrous which is sanctioned or authorized by those who are either the absolute owners of the ship, or her owners for the voyage. "For," as Lord Mansfield says, "nothing is so clear as that no man can complain of an act to which he himself is a party" (*q*). And in another place he says: "Barratry is something contrary to the duty of the master and mariners in the relation in which they stand to the owners of the ship. An owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry; and, besides, barratry cannot be committed against the owner with his consent" (*r*).

850. Upon these principles it has been decided in the two following cases that the owner of the goods cannot recover as for loss by barratry in respect of any act of the master, however criminal, that is sanctioned by the owner of the ship.

(*p*) Hucks *v.* Thornton (1815), Holt's N. P. 30.

(*q*) Cowp. 155.

(*r*) Per Lord Mansfield in Nutt *v.* Bourdieu (1786), 1 T. R. 323. This refers to the case of sole owners: a part owner may commit barratry, *post*, § 852. Jones *v.* Nicholson (1854), 10 Exch. 28; Small *v.* U. K. Marine Ins. Assoc., [1897] 2 Q. B. 42, 311. And in America, Phœnix Ins. Co. *v.* Moog (1884), 78 Ala. 284.

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Owner of goods cannot recover as for a loss by barratry in respect of any act sanctioned by the owner of the ship.

Stamma, the plaintiff, shipped goods on board a vessel which, by the bill of lading, was to sail with them straight from Falmouth to Marseilles, and insured them for the direct voyage; learning afterwards that the ship was to touch at Genoa, Leghorn, and Naples before putting into Marseilles, he protested against it; nevertheless, the ship, by the owner's directions, did put into these ports first, and was blown up by a Spanish ship on her way back to Marseilles. The plaintiff claimed to recover for this as a "loss by barratry"; but it was held that he could not do so, as the master had acted consistently with his duty to his owners, and with their privity (*s*).

The master of a French ship, at the instigation and by the direction of his owner, fraudulently signed false bills of lading, by which he made goods that had been originally consigned to another firm deliverable to the house of which his owner was a partner, and the goods under these false bills of lading were delivered to his owner's firm and never paid for. The shipper of the goods sought to recover their value, alleging a loss by barratry; but Lord Mansfield, on the principles above laid down, held that he clearly could not do so (*t*).

Owners of ship cannot recover as for a loss by barratry in respect of acts done by the charterer's agents.

851. Upon the same principle, Lord Ellenborough held that the owner of a ship which had been chartered for a voyage could not recover under a count for barratry for a loss occasioned by an illegal act of the charterer's agent, which *per se* would have amounted to barratry. Hobbs, the general owner of a ship, chartered her for the voyage to Woodman, who covenanted to pay Hobbs 3,600*l.* in case of loss; Woodman addressed the ship to Kendal, whose orders he desired the captain implicitly to obey; the captain, in compliance with this direction, took in smuggled goods sent

(*s*) Stamma *v.* Brown (1743), 2 Str. 1173. See the remarks of Lord Ellenborough, 8 East, 135, 136.

(*t*) Nutt *v.* Bourdieu (1786), 1 T. R. 323.

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on board by Kendal, for which the ship was seized and condemned.

Lord Ellenborough held that Hobbs could not recover as for a loss by barratry, the loss being by construction imputable to himself.

"If I give the dominion of my ship to a charterer," said his Lordship, "his acts are my acts: and in this case Kendal, whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the plaintiff. Therefore the loss arose from following his own orders, and there is no pretence for imputing it to barratry" (*u*).

A master who is himself owner of the ship.

852. Upon the same principle it is clear that barratry cannot be committed by a master who is himself owner of the vessel. If, however, there be any question whether he is owner or not, it lies upon the underwriters to show that he is so: it is sufficient for the assured to have made out an act *primâ facie* barratrous (*x*).

Where the captain was general owner of the ship which he had bottomried and mortgaged, but of which he still had the control and navigation, Lord Hardwicke held that he could not commit barratry so as to give the assured on goods a claim against his underwriters, as for a loss by barratry (*y*).

So, where the master had given his promissory note for the amount of the purchase-money of a vessel, which was indorsed by another person, to whom the bill of sale was made out, and in whose name the ship was registered as a collateral security, it was held in the United States that the master under these

(*u*) Hobbs *v.* Hannam (1811), 3 Camp. 94. In Selw. N. P. 976, 9th ed. MS., a case of Boutflower *v.* Wilmer is cited, in which the point decided was, that the owner may recover for an act of barratry committed by the master with the privity of the freighter; but the distinction between these two cases, supposing both can be supported, must depend on the terms of the respective charter-parties, which are not given in either.

(*x*) Ross *v.* Hunter (1790), 4 T. R. 33.

(*y*) Lewin *v.* Swasso (1742), Postlethwaite's Dict. art. Assurance, p. 147.

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circumstances was to be considered as the owner of the ship, and therefore could not commit barratry (*z*).

But barratry may be committed by captain, though supercargo or consignee of the goods;

The fact that the captain is also supercargo or consignee of the goods will not prevent the owner of the ship or the owner of the goods from recovering for loss occasioned by his barratrous acts done in fraud of his duty as master (*a*); for they are not committed by the captain in his character of consignee or supercargo, but in his character of master of the vessel, a character which he cannot lay aside until the entire completion of the risk (*b*).

and by master who is part owner.

But barratry may be committed by a master who is part owner. Hence, where the master, being part owner, sold the ship and cargo, and appropriated the proceeds to his own use, it was held that this was a loss insured against by the words "barratry of the master," and, per Martin, B., also by the words "all other perils, losses, and misfortunes" (*c*). Similarly it has been held that an act of a master who is part owner, which would be barratrous as against his co-owners, may be equally barratrous against the mortgagee of his interest in the ship: for instance, where, as master, he occupies a position of trust in relation not only to his co-owners, but also to his mortgagee (*d*).

When are charterers to be considered owners in relation to barratry?

853. Barratry, as we have seen, is an act prejudicial either to the general owners of the ship or to the charterers, when, under the terms of the charter-party, the latter acquire such an interest in, or control over, the ship as to make them owners, in relation to the master and mariners, for the voyage.

This depends on the

The question when charterers can be considered owners in

(*z*) Barry *v.* Louisiana Ins. Co. (1822), 11 Martin, N. S. 630, cited 1 Phillips, s. 1083.

(*a*) Earle *v.* Rowcroft (1806), 8 East, 126.

(*b*) 1 Emerigon, c. xi. s. 3, p. 370; and see the American cases: Kendrick *v.* Delafield (1804), 2 Caines, 67; Cook *v.* Commercial Ins. Co. (1814), 11 Johnson, R. 40, cited 1 Phillips, Ins. s. 1080. See also 4 Boulay-Paty, 76.

(*c*) Jones *v.* Nicholson (1854), 10 Exch. 28; 23 L. J. Exch. 330.

(*d*) Small *v.* U. K. Marine Mutual Ins. Assoc., [1897] 2 Q. B. 42, 311 (C. A.).

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relation to barratry depends mainly upon the true construction and effect of the whole of the charter-party, and cannot be determined by any general rules.

854. Charter-parties, as far as relates to the dominion they confer over the ship upon the charterer, are of three kinds:

1. Either the contract is *locatio operis vehendarum mercium*—a mere covenant to carry the charterer's goods in the owner's ship, either at a gross sum or so much per ton, &c.; or, 2. It is *locatio navis et operarum magistri*—a letting of the ship in a state fit for the purpose of mercantile adventure, *i.e.*, with the master and mariners on board, as well as all other means necessary for her navigation; or, 3. (which is a much less frequent case) It is *locatio navis*—an absolute demise of the ship herself with her furniture and apparel, leaving the master and mariners to be hired, paid, and victualled by the charterer.

Now, in the first and last of these cases the question of the charterer's ownership, in relation to the master and mariners, presents no difficulty. In the first place it is quite clear that he has no such ownership, the entire possession of the vessel and the management and control of the captain and crew resting entirely with the general owner. In the last case it is equally clear that the charterer is vested with the absolute dominion of the ship for the voyage, and stands in relation of owner to the captain and crew, whom he appoints and who act under his control.

Difficulty in cases where the charter-party is a letting of the ship for the voyage, with the services of the master and crew.

855. It is in the second case that the difficulty has mainly arisen. With regard to this class of charter-parties, it may be laid down that wherever, from the whole tenor of the instrument, without paying any undue regard to particular expressions, such as "demise and let," &c., it may fairly be collected to have been the intention of the parties that the charterer should have the substantial control and exclusive use of the ship for the voyage—this will constitute him owner *pro hâc vice* (at all events, in relation to barratry), although

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the master and crew may be appointed and paid by the general owner. The possession or control thus exercised by the general owners over the master and mariners, such as it is, being, in the words of Lord Ellenborough, "not retained by them in order to restrain or interfere with the full and free use of the ship which they have let to hire for a term, but as subsidiary and subservient to such use" (*e*).

856. Without further reference to the cases on the general question, we proceed to examine those in which the question has been, whether the charterer is so far constituted owner for the voyage as that barratry may be committed against him by the master and mariners, even with the privity or instrumentality of the general owner.

Vallejo *v.* Wheeler.

In the first case, that of Vallejo *v.* Wheeler, Willes, the general owner of a ship, had, through Brown, his captain, chartered her to Darwin for a voyage from London to Seville (*f*). Darwin put her up as a general ship, and several merchants, amongst others the plaintiff, sent goods by her, for which they were to pay freight to Darwin: the terms of the charter-party are not set out, but it seems that the master and mariners were hired and victualled by Willes, the general owner.

On the voyage, the master, with the privity of Willes, the general owner, but without the knowledge of Darwin, the charterer, put into Guernsey, which was out of his course, to smuggle wine and brandy on a private adventure of his own: immediately after sailing from Guernsey the ship sprung a leak, to repair which she was obliged to put into Dartmouth,

(*e*) Per Lord Ellenborough in The Trinity House *v.* Clark (1815), 4 M. & S. 288. See Maclachlan, Shipping, 5th ed. 283, 374 *et seq.*; Carver on Carriage, ss. 112—117, who points out that the test usually is, whose servants are to be in charge? This is so with respect to liability under contracts of carriage; but, as appears from the cases of Vallejo *v.* Wheeler and Soares *v.* Thornton, which are referred to *infra*, a less rigid test is applied in relation to policies of insurance.

(*f*) The names are reversed in the report in Cowper; but the error is corrected by Buller, J., who had been one of the counsel in the cause, in Nutt *v.* Bourdieu (1786), 1 T. R. 323.

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and, in proceeding thence, she received further injuries, by which she was totally disabled from completing her voyage, and the goods were much damaged.

Lord Mansfield held that this act of the master's, although done with the privity of the general owner, yet being committed without the knowledge of Darwin, the charterer, who, under the circumstances, was owner for the voyage, was an act of barratry, for which the assured on goods might recover (*g*).

Soares *v.* Thornton.

857. In the next case, Soares, of London, agreed by charter-party with Fontes, the owner and commander of a Portuguese brig, that the ship should take on board, at Pernau, in Russia, on account of Soares, 100 tons of flax, to be delivered at Oporto; Soares to be at liberty, if they chose, to fill her up with goods, over and above the 100 tons, otherwise the captain might fill her up. The ship was not chartered at a gross sum for the voyage, but freight was payable at so much per ton. The master and crew were hired, paid, and victualled by the owner. The ship, commanded for the voyage by Gouvea, a Portuguese, was entirely filled up at Pernau with as many goods as she could hold by the agents of Soares, the charterers. On her voyage from Pernau to Oporto she was compelled, in consequence of sea-damage, to put into Deal, where Fontes, the owner, came on board, and took the management of her, and shortly afterward, Gouvea assenting, wilfully ran her ashore, by means of which the cargo was wholly lost.

The Court of Common Pleas, presided over by Gibbs, C. J., held, that as Soares, the charterers, had completely filled up the ship with their own goods at Pernau, the ship must thenceforth have been considered as under their

(*g*) Vallejo *v.* Wheeler (1774), 1 Cowp. 143; *S. C.*, better reported in Lofft, 645. In Ionides *v.* Pender (1872), 1 Asp. M. C. 432, Hannen, J., seems to have laid down the general rule that if the master scuttles the ship with the privity of the shipowner, this is an act of barratry as regards the charterer—a ruling which the learned reporter queried in a note.

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complete control; "they had a right to require that she should then proceed without the control of any other person, except themselves, to her place of destination." At the time of the loss, accordingly, they were exclusive owners; and the act which produced the loss having been committed without their concurrence, though with the connivance of the general owner, was, as against them, barratry (*h*).

Barratry as to charterers.

This case, therefore, decides that whenever charterers are so circumstanced at the time of loss as to have a right to the complete control and management of the ship, they are owners for the purposes of barratry, and barratry may be committed against them with the connivance of the general owners (*i*).

The principle of decision adopted in the American cases on this subject appears to be somewhat different from our own, and the charterer there seems not to be considered owner for the purposes of barratry, except in those comparatively rare cases where the ship is absolutely demised, and the master and mariners are hired, paid and victualled by him (*k*).

Rule of *causa proxima* less stringently applied to cases of barratry.

858. Loss by barratry seems to form an exception to the general rule of *causa proxima non remota spectatur*: it is not necessary (in fact, it hardly ever is the case) that the barratrous act should be the proximate cause of the loss; if there have been barratrous conduct on the part of the master and mariners, and a loss subsequently happens as a remote, though not as a direct, consequence of the act of barratry, or if the barratrous act have only been a co-operative cause of loss, in conjunction with some other peril, this is still enough to entitle the assured to recover under a count for barratry.

(*h*) Soares *v.* Thornton (1817), 7 Taunt. 627; *S. C.*, 1 Moore, 373.

(*i*) This statement is Arnould's, 2nd ed. p. 861; but inasmuch as the facts of the case show that the "control and management" of the vessel, in the ordinary sense of those words, were not in the charterers, but in the owner, the decision appears to be somewhat unsatisfactory.

(*k*) See the American decisions collected and commented upon by Phillips, Ins. vol. i. s. 1083. Parsons, however, chiefly relies on the English cases cited above, and states the law to be as laid down in the text. 1 Parsons, Ins. 572.

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Indeed, it might be inferred from the language of Lord Mansfield, in Vallejo *v.* Wheeler, that, even though the subsequent loss be not in any degree referable to the act of barratry, still the loss may be recovered as a loss by barratry (*l*); but it must be remembered that the case was one of barratrous deviation; and besides, as his Lordship himself adds, "there was a great deal of reason to say that the loss sustained was in consequence of the fraudulent deviation" (*m*).

The true position seems to be, that the loss ought to be referable, at all events, in the way of remote consequence, to the prior act of barratry, although not necessarily in the way of immediate and direct effect (*n*).

(*l*) Whether the loss happened in the act of barratry (that is, during the fraudulent voyage), or after it, is immaterial. Cowp. 155.

(*m*) 1 Cowp. 155.

(*n*) This passage is retained from the 2nd edition of this work (p. 862), and was accepted as a correct statement of the law by Field and Cave, JJ., and by Lord Coleridge, and Brett and Cotton, L.JJ., in delivering their judgments in the Queen's Bench Division and the Court of Appeal, in the case of Corry *v.* Burr (1881), 8 Q. B. D. 313, and 9 Q. B. D. 463. In the House of Lords, however, Lord Blackburn (8 App. Cas. at p. 398) took the opportunity of expressing his opinion that there is no authority for such a rule other than that of this text-book, and that the instances here given in support of it are all more properly to be explained as cases in which the Courts thought that the cause of loss was barratry, and that the consequence for which the parties were entitled to indemnity was not a remote consequence. Lord Bramwell, in the same case (at p. 404), merely expressed a doubt on the point. Notwithstanding Lord Blackburn's dissent, it is submitted that the cases referred to cannot satisfactorily be explained if the rule of *causa proxima* is to be rigidly adhered to. Thus, in addition to the cases cited below, in Earle *v.* Rowcroft (1806), 8 East, 126, it seems difficult to say that the loss was directly occasioned by the misconduct of the master in illegally trading, for there would have been no loss but for the subsequent seizure and condemnation of the vessel. And in Vallejo *v.* Wheeler (*ubi supra*), and in Mentz, Decker & Co. *v.* Maritime Ins. Co., Ltd. (1909), 15 Com. Cas. 17, it is only by a stretch of language that the loss can be said to have been proximately due to the barratrous deviation: it was proximately caused by perils of the sea. And in Cory *v.* Burr, where the facts were that the ship was seized by Spanish revenue officers in consequence of the barratrous act of the captain in smuggling, Lord Blackburn himself agrees that the loss was not proximately due to the barratry, but to the seizure. But inasmuch as on very similar facts the plaintiff in Earle *v.* Rowcroft recovered on a count for barratry, it is difficult to understand how it can fairly be said that there is no authority for the proposition that the rule as to proximate cause is less stringently applied to cases of this nature. The Marine Insurance Act, however (s. 55 (1)), recognizes no such distinction.

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Instances where the loss has been proximately caused by other perils but remotely by barratry.

859. Where, however, other perils have proximately caused the loss, it may be recovered under a count alleging it to be by those perils, though barratry may have been a co-operative or conducing cause.

Thus, if a ship were dashed to pieces by the winds and waves, owing to drifting on the rocks, in consequence of the barratrous act of the captain in cutting her cable, this might be recovered either as a loss by perils of the seas or a loss by barratry (*o*).

So, where a ship was captured by the enemy, through a barratrous agreement between her captain and the captain of the enemy, Lord Ellenborough held, that this might be recovered either as a loss by capture or a loss by barratry (*p*).

Where goods were seized in consequence of the captain's barratrous breach of blockade, it was held that the foreign sentence by which they were condemned as enemy's property could not prevent the plaintiff from recovering as for a loss "by barratry;" for, even if the sentence were conclusive of the fact of enemy's property, still it was by the barratrous act of the captain that the goods had assumed that character (*q*).

But a foreign sentence, stating the ship to have been seized for breach of blockade, is not conclusive evidence of barratry; for the breach of blockade might have been committed by the captain in ignorance and without intention, or in obedience to his owner's orders, in which case it would be no barratry (*r*).

The doubt expressed in this case, whether the assured could recover in respect of a seizure occasioned by a barratrous breach of blockade, without a count for loss by barratry, seems answered in the affirmative by the cases of Heyman *v.* Parish and Arcangelo *v.* Thompson.

(*o*) Heyman *v.* Parish (1809), 2 Camp. 149. See *ante*, § 822, where it is pointed out that there may be more than one *causa proxima* of a loss.

(*p*) Arcangelo *v.* Thompson (1811), 2 Camp. 620.

(*q*) Goldschmidt *v.* Whitmore (1811), 3 Taunt. 508.

(*r*) Everth *v.* Hannam (1815), 6 Taunt. 375; 2 Marshall, 72.

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If, indeed, the loss be merely barratrous, the case would be different; thus, the assured could not recover for loss caused by a fraudulent sale, or by running away with the ship, except under a count for barratry (*s*).

Of losses within the general clause, "all other perils, losses and misfortunes."

860. The underwriter also undertakes to protect the assured "against all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof."

This general and sweeping clause "includes only perils similar in kind to the perils specifically mentioned in the policy" (*t*). Moreover, it does not enable the assured to recover for a loss specifically excepted by other words in the policy (*u*).

Application of the *ejusdem generis* rule.

Thus, Lord Ellenborough held in the first case in which this clause came before the Courts that, where one British ship had fired upon and sunk another, mistaking her for an enemy, this, though not a loss by perils of the seas, yet fell within the scope of the general clause, and was recoverable under a count in the declaration, specially stating the cause of loss as it really occurred (*x*).

So where dollars were thrown overboard by the master at the moment of being captured, to prevent them falling into the hands of the enemy, the Court held, that though this was not a peril of the seas, and probably not, strictly speaking, a loss by jettison, yet it clearly fell within the scope of the general clause (*y*). And where a ship, after discharging

(*s*) Per Lord Ellenborough in Heyman *v.* Parish (1811), 2 Camp. 151. See also, as to this point, Walker *v.* Maitland (1821), 5 B. & Ald. 171; Blyth *v.* Shepherd (1842), 9 M. & W. 763.

(*t*) Rules for Construction of Policy, Mar. Ins. Act, 1906, Sched. I. r. 12. As to "all risks" policies, see *infra*, § 861b.

(*u*) Republic of Bolivia *v.* Indemnity Mut. Mar. Ass. Co., [1909] 1 K. B. 785; see *ante*, § 836.

(*x*) Cullen *v.* Butler (1815), 5 M. & S. 461. As to this case, however, see *ante*, s. 823, note (*s*).

(*y*) Butler *v.* Wildman (1820), 3 B. & Ald. 398. See Lord Sumner's observations on this case in Becker, Gray & Co. *v.* London Assurance Corp., [1918] A. C. at p. 116. See, too, The Knight of St. Michael, [1898] P. 30, and cases there cited, per Barnes, J.

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her cargo in her port of delivery, was put into a graving dock in repair, and there blown over by the wind and injured, as the ship at the time of the accident was not water-borne, nor in the ordinary course of her voyage (*z*); and again, where a ship was bilged and rendered incapable of pursuing her voyage by the accidental giving way of her tackle and supports, in the act of being moved out of a dock into which she had been put for repairs, out of the ordinary course of her voyage; the losses thus occasioned were held to be included in the general clause (*a*).

On the same principle, where an insurance was effected on goods "at and from London by land carriage to Harwich, and thence by packet to Gottenburg": it was held on demurrer that the loss of these goods in the course of their land carriage from London to Harwich by the fraud and negligence of the servants of the carriers was recoverable as a loss occasioned by a peril *ejusdem generis* with barratry (*b*).

Later cases on the general clause, and the *ejusdem generis* rule.

861. And in Davidson *v.* Burnand (*c*), the facts being that while the steamer was loading in harbour her draught was increased by the weight of the cargo, so as to bring the discharge pipe below the surface of the water, which then flowed down the pipe and through some valves which had negligently been left open and damaged the plaintiff's goods —this was held to be covered by the general clause.

In West India Telegraph Co. *v.* Home and Colonial Ins. Co. (*d*) the Court of Appeal went beyond any previous decision, by holding that the wreck of a steamer caused by the explosion of her boiler under ordinary pressure of steam in moderate weather was within the general words. The reasons, however, assigned were different, Lord Selborne

(*z*) Phillips *v.* Barber (1821), 5 B. & Ald. 161.

(*a*) Devaux *v.* J'Anson (1839), 5 Bing. N. C. 519. This decision is, however, doubted by Lords Halsbury and Herschell in Thames & Mersey Co. *v.* Hamilton (1887), 12 App. Cas. 484.

(*b*) Boehm *v.* Combe (1813), 2 M. & S. 172.

(*c*) (1868), L. R. 4 C. P. 117.

(*d*) (1880), 6 Q. B. D. 51.

Sect. 861. apparently thinking the loss due to a peril similar to a peril of the seas, while Brett, L. J., based his judgment on the ground that an explosion by steam was *ejusdem generis* with fire.

But in the later case of Hamilton *v.* Thames and Mersey Marine Ins. Co. (*e*), Brett, L. J. (then Lord Esher, M. R.), himself threw doubt upon his earlier view, and it was eventually disapproved in the House of Lords (*f*). The case raised the general question as to the liability of underwriters for damage to ship's machinery. The air-chamber of a donkey-pump burst because a valve which should have let the water into the boiler was stopped up while the pump was being worked by the donkey-engine. A claim being made by the shipowner, it was urged on his behalf that the damage was caused by a danger to navigation, and therefore by a peril similar to perils of the seas. The House of Lords, however, while accepting the principle established in Cullen *v.* Butler, held that it was impossible to say that the damage in this case was of a character to which a marine adventure is specially subject, and on this ground disallowed the claim.

Similarly, where a boiler, which was being lowered into the hold of a ship by a crane, fell into the hold, owing to the breaking of the tackle of the crane, and damaged the hull, the House of Lords held the loss was not caused by a peril *ejusdem generis* with a peril of the seas (*g*).

The Inchmaree clause.

861a. The decision of the House of Lords in Thames and Mersey Marine Ins. Co. *v.* Hamilton (*h*), led to the invention of the clause known as the "Inchmaree" clause, which is now almost universally inserted in policies on steamships, and is one of the Institute Clauses for policies on Hull. The clause reads as follows:—"This insurance also specially to cover (subject to the free of average

(*e*) (1886), 17 Q. B. D. 195.
(*f*) (1887), 12 App. Cas. 484.
(*g*) Stott (Baltic) Steamers, Ltd. *v.* Marten, [1914] 1 K. B. 442; 3 K. B. 1262; [1916] 1 A. C. 304.
(*h*) *Supra.*

Sect. 861a. warranty) loss of, or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo or caused (*i*) through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

It is obvious from the wording of this clause that it was not intended merely to give protection in circumstances similar to those which arose in the case to which it owes its origin. Its scope is much wider. The clause contains the agreement between the parties, defining the liability of underwriters for damage to hull or machinery in cases where the damage cannot be said to be the direct consequence of a marine peril.

The words "loss or damage . . . . through any latent defect" have occasioned the principal controversies respecting the construction of the clause. For several years, average adjusters, in dealing with the clause, were inclined rather to give effect to what was understood by them to be the intention of the parties than to construe its language according to its proper interpretation, and many claims were in fact allowed by them, for excellent reasons from a business point of view, which have now been decided to be outside its scope. It seems, in fact, to have been regarded as an insurance against any defects in machinery of which the assured was ignorant, entitling him to recover any loss sustained by him thereby from the underwriter whose policy was in existence at the time when he became aware of the defect.

(*i*) The words "directly caused, &c.," were added in 1914 (probably in order to cover the loss unsuccessfully claimed in Stott (Baltic) Steamers, Ltd. *v.* Marten, *supra*, s. 861.

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A good illustration of the kind of loss which is recoverable under the clause is afforded by the facts of the case of Wills and Sons *v.* The World Marine Insurance, Ltd. (*k*). The insurance was on a dredger; a link of the hoisting chain of the bucket ladder gave way, the ladder and buckets full, doing damage to the hull and machinery. There was a latent defect in the welding of the link, which would otherwise have been strong enough. Scrutton, J., held that inasmuch as the link broke, not from wear and tear, but through the latent defect, the underwriters were liable under the clause for the damage to the hull and machinery, and for certain other consequential damage, although the latent defect had, in fact, existed long before the commencement of the policy.

In another case (*l*), the same learned judge, while rejecting the assured's claim in the particular instance, gave the following summary of what is recoverable under this part of the "Inchmaree" clause:—(1) Actual total loss of a part of the hull or machinery, through a latent defect coming into existence and causing the loss during the period of the policy; (2) Constructive total loss under the same circumstances, as where, though the part of the hull survives, it is by reason of the latent defect of no value and cannot be profitably repaired; (3) Damage to other parts of the hull happening during the currency of the policy, through a latent defect, even if the latter came into existence before the period of the policy. The learned judge added: "The pre-existing latent defect itself is not damage, indemnity for which is recoverable, even if by wear and tear it becomes visible during the policy."

The learned judge's summary appears to be consistent with the following decisions of the Court of Appeal, both of which were in favour of the underwriters:—

In Oceanic Steamship Co. *v.* Faber (*m*), a policy contain-

(*k*) The Times, March 14th, 1911.

(*l*) Hutchins Brothers *v.* Royal Exchange Ass. Corp., [1911] 2 K. B. at p. 406.

(*m*) (1906), 11 Com. Cas. 179; (1907), 13 Com. Cas. 28 (C. A.).

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ing the "Inchmaree" clause was effected on a vessel for twelve months from 18th May, 1902, while in port at San Francisco. In October, 1902, a crack was discovered in the tail shaft, which had in fact been gradually developing from a latent flaw ever since 1891, but which the owner could not be blamed for not discovering earlier. The shaft was condemned and was replaced by a new one. The action was brought to recover the cost of the new shaft. Walton, J., in giving judgment in favour of the underwriters, said: "The effect and sense of this clause is not that the underwriters guarantee that the machinery of the vessel is free from latent defects, or undertake, if such defects are discovered during the currency of a policy, to make such defects good . . . . There must be a latent defect causing loss of or damage to the hull or machinery, and causing that loss or damage during the currency of the policy under which the claim is made. The loss or damage here is the fracture, the crack. Was that caused in consequence of a latent defect? . . . . The crack, which is the damage, is really nothing but the development of the flaw—that is, of the latent defect. In such a case I think the damage is not damage caused by the latent defect, but is the latent defect itself and nothing more; a latent defect becoming patent is all that has happened, and it seems to me that the latent defect becoming patent is not within the words of this clause."

The learned judge then expressed an opinion, though without deciding the point, that the clause does not make the underwriters liable for the breakage of a shaft itself, but only for damage to hull or machinery in consequence of such a breakage (*n*).

This decision was affirmed by the Court of Appeal (*o*). It was pointed out by Lord Alverstone, C. J., that there

(*n*) The Court of Appeal did not decide this point, but the members thereof did not accept the view of Walton, J. On the other hand, in the later case of Hutchins *v.* Royal Exchange Ass. Corp., [1911] 2 K. B. 398, the Court of Appeal appear to have approved the judgment of Walton, J., as a whole.

(*o*) (1907), 13 Com. Cas. 28.

Sect. 861a. was no evidence to show that the condition of things with regard to the shaft occurred during any period covered by the policy, and Buckley, L. J., thought, having regard to the smallness of the premium, that it could not have been intended to cover the risk of discovering during the currency of the policy that a latent defect, which had been existing for some time previously, was there.

On the general construction of the clause Fletcher Moulton, L. J., said: "I do not believe that this clause means that the machinery is insured against the existence of latent defects. It only means that if through their latency those defects have not been guarded against, and actual loss of the hull or machinery, or damage to the hull or machinery, arises from those defects, the insurers will bear the burden of that loss" (*p*).

The decisions in Hutchins Brothers *v.* The Royal Exchange Corporation (*q*) were to the same effect. The plaintiffs were the owners of the steamship "Ellaline," and insured her for twelve months from 10th December, 1908, in a policy containing the "Inchmaree" clause. The vessel, when built in 1906, was supplied with a stern frame containing a latent defect, which was not discoverable till 1909, when it was discovered and the stern frame condemned. The owners sued to recover the cost of replacement. Scrutton, J., said: "The only damage is the latent defect itself, which by wear and tear has become patent. But the latent defect did not arise during the currency of the policy; it existed in 1906; the only change is that a previous latent defect has by wear and tear become patent. It has not been constructively lost during the currency of the policy; it was constructively lost in 1906, if the true facts had been known; what has happened during the currency of the policy is the discovery of the true facts."

(*p*) There are some passages in the judgment of Buckley, L. J., which, as reported, are difficult to reconcile. Observations were made upon them in the judgment in Hutchins *v.* Royal Exchange Ass. Corp., *infra*.

(*q*) [1911] 2 K. B. 398.

Judgment was given in favour of the underwriters, and Sect. 861a. this judgment was affirmed in the Court of Appeal, for the reasons given by Scrutton, J., and also by Walton, J., in the previous case.

It has been held that weakness of design is not a latent defect within the "Inchmaree" clause (*r*); also that the breakage of a connecting rod of a marine engine is not *ejusdem generis* with the breakage of a shaft (*s*), and that where a claim cannot be brought strictly within the words of the clause, the assured cannot recover under the general words in the policy, even by showing that the loss is due to circumstances *ejusdem generis* with those specially mentioned in the clause (*t*).

861b. There seems to be no room for the *ejusdem generis* limitation in a policy containing an unqualified insurance against "all risks." Moreover, in such a case, if the assured can prove that his goods have in fact suffered exceptional damage during the transit, he may be entitled to recover on his policy without specifying and proving any particular casualty. Thus in Schloss *v.* Stevens (*u*), Walton, J., held that "all risks by land and water by any conveyance" covered all losses by any accidental cause of any kind occurring during the transit, and included damage due to exposure of the goods to damp occasioned by an abnormal delay in the transit. And this view was followed by the Court of Appeal in the case of an "all risks" policy where the assured proved exceptional damage to wool by water, but could not prove that it was due to any specific peril. "I think," said Lord

Insurance against "all risks."

(*r*) Jackson *v.* Mumford (1902), 8 Com. Cas. 61, Kennedy, J. The judgment was affirmed in the Court of Appeal: (1904), 9 Com. Cas. 414; but not on any point connected with the Inchmaree Clause. They held, affirming Kennedy, J., on this point, that in the policy (which was effected by a shipbuilder) "trials" was a peril insured against and covered the loss.

(*s*) *Ibid.*

(*t*) *Ibid.* See also Stott (Baltic) Steamers, Ltd. *v.* Marten, *ante*, § 861.

(*u*) [1906] 2 K. B. 665.

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Sterndale, M. R. (*x*), "that where the evidence shows damage quite exceptional, and such as has never in a long experience been known to arise under the normal conditions of such a transit, there is evidence of the existence of a casualty, or something accidental, and of a danger or contingency which might or might not arise, although the particular nature of the casualty was not ascertained. . . . It would of course have been competent to the insurers to rebut this *primâ facie* case by proving that the loss occurred by something outside the insured perils, but no such evidence was given. . . . These were policies of an unusual kind against all risks, and it was sufficient to show that the loss was occasioned by a casualty or something accidental, without proving further in what the exact nature of that casualty consisted."

Losses not enumerated, but recoverable as the legal or necessary consequences of the perils insured against.

862. The assured, as a general principle, may recover from the underwriter in respect of any extraordinary expenditures which he has necessarily incurred in consequence of any of the perils insured against; and also in respect of all charges or contributions which, either by the law of the land or the general law maritime, are attached as a direct legal consequence to these perils.

Thus, he is liable to the assured in respect of sums which the latter has been compelled to pay by way of general average contribution, or by way of salvage, or in reclaiming captured property, or in repairing damage done to the ship by the perils insured against, &c.

The subject of general average contribution is of too great extent, and has too important a connection with the law of Marine Insurance to be treated of incidentally in this place, and must be reserved for a separate chapter.

Salvage.

863. With the subject of salvage, except so far merely as it concerns the assured and the underwriters, we do not propose to deal; the whole doctrine having been discussed in

(*x*) Gaunt *v.* British and Foreign Ins. Co., Ltd., [1920] 1 K. B. 903.

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several well-known treatises on shipping, to which branch of the law maritime its consideration more properly belongs.

Salvage is recoverable under no special words, but as a loss arising from perils insured against.

The liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the law of the land, or the general law maritime, a direct and immediate consequence of perils against which he does insure.

Hence, in order to recover salvage charges, the assured need not, and in fact ought not, to declare for loss by the payment of salvage; but he should declare as for that species of loss which occasioned the payment of salvage—as, for loss by perils of the sea, in case of salvage from shipwreck; for loss by capture, when the salvage is a remuneration to re-captors (*y*).

Where salvage services have saved a ship from perils of different kinds which are separately insured against, it follows from the decision in Pyman SS. Co. *v.* Lords Commissioners of the Admiralty (*z*) that the salvage charges should be apportioned between the two sets of underwriters.

(*y*) This was so before the Mar. Ins. Act, 1906 (see Cary *v.* King (1736), Ca. temp. Hardwicke, 304; Aitchison *v.* Lohre (1879), 4 App. Cas. 755; Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455), and is now declared to be so by sect. 65 of the Act; see *infra*, § 865. The Act expressly recognises a distinction, which was first established by Aitchison *v.* Lohre, *supra*, between "salvage charges" to which alone the rule in the text is applicable, and salvage services rendered under contract; see sect. 65, sub-sect. 2. From this and the following paragraphs of our text it will appear that "salvage charges" are recoverable as a loss by perils insured against, and not as particular charges under the suing and labouring clause (Mar. Ins. Act, 1906, s. 78, sub-s. 2). Nor can they be regarded as particular average, being recoverable notwithstanding that the subject-matter insured is warranted free from particular average (Mar. Ins. Act, 1906, s. 76, sub-s. 2). They must, however, apparently be regarded as constituting a partial loss (Mar. Ins. Act, 1906, s. 56, sub-s. 1), and are not recoverable under a policy against total loss only: Dixon *v.* Whitworth (1880), 4 Asp. M. C. 327; see *post*, § 902. Salvage under contract, on the other hand, is recoverable as particular charges, under the suing and labouring clause, or as general average (Mar. Ins. Act, 1906, s. 65, sub-s. 2), even though the policy contains the f.p.a. warranty, or is against total loss only.

(*z*) [1918] 1 K. B. 480; [1919] 1 K. B. 49 (C. A.). In this case a disabled vessel was exposed to ordinary sea perils, and was also in danger of drifting on to a minefield.

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Although a salvage award is a judgment *in rem*, the underwriter is not thereby estopped from showing that there was in reality no peril of the sea or other occasion for salvage services (*a*).

The suing and labouring clause. Aitchison *v.* Lohre.

864. In Aitchison *v.* Lohre (*b*), an attempt was made to recover in respect of payments made to salvors, as made not in consequence of perils of the sea, but under the suing and labouring clause, which provides that "it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the insurers will contribute." In most cases it would make no difference under which head such payments were recoverable, provided they were in fact recoverable; but the facts of Aitchison *v.* Lohre were peculiar. It was an action on a policy of insurance for 1,200*l.* on the "Crimea," in the usual form, and containing the clause above mentioned. In the course of her voyage the vessel had sustained much damage by sea perils, so that she was become leaky and waterlogged, helpless, and not navigable, and in great danger of being completely lost, so those on board signalled the steamer "Texas" for assistance, which accordingly took her in tow and brought her into Queenstown. In the Queen's Bench Division such was the estimate of the damage sustained by the ship that the assured, who had elected to repair, had judgment for 100*l.* per cent., *i.e.*, for the full sum insured; and as this, in the opinion of that Court, exhausted the policy, the action was dismissed as to a further claim of 500*l.* for general average, and for salvage

(*a*) Ballantyne *v.* Mackinnon, [1896] 2 Q. B. 455. Cf. Dent *v.* Smith (1869), L. R. 4 Q. B. 414, in which the Court of Queen's Bench held that where part of a salvage award was, by the sentence of a foreign Court, charged against property which had been landed before the salvage operations were executed, the assured could recover it from his underwriter.

(*b*) (1877—1879), 2 Q. B. D. 501; 3 Q. B. D. 558; 4 App. Cas. 755.

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paid by the assured as the contribution for ship under these heads. The Court of Appeal affirmed the judgment for 100*l.* per cent., and also held that under the suing and labouring clause the assured was entitled to judgment for his further claim. In the Lords, on the motion of Lord Blackburn, the House affirmed the judgment for 100*l.* per cent., and reversed the judgment as to the further claim on the ground that general average and salvage do not come within either the words or the object of the clause.

Object of the clause. Lord Blackburn's judgment.

865. His Lordship, after quoting the words of the clause, continued: "The object" of the clause "was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery by the assured of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not this case. The owners of the 'Texas' did the labour here, not as agents of the assured and being to be paid by them wages for their labour, but as salvors acting on the maritime law, which, as explained by Lord Chief Justice Eyre in Nicholson *v.* Chapman (*c*), gives them a claim against the property saved by their exertions and a lien on it, and that quite independently of whether there is an insurance or not, or whether, if there be a policy of insurance, it contains the suing and labouring clause or not. The amount of such salvage occasioned by a peril has always been recovered without dispute under an averment that there was a loss by that peril (see Cary *v.* King (*d*)); and I have not been able

(*c*) 2 H. Bl. at p. 257.

(*d*) Cas. t. Hardw. 304.

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to find any case in which it was recovered under a count for suing and labouring" (*e*).

The fine distinction drawn by his Lordship between salvors acting on the maritime law and salvors working under a special contract will be duly observed by the reader. The point established by the case is that salvage expenses, in order to be recoverable under the clause, must be shown to have been incurred for services rendered in the particular case by the "factors, servants, or assigns" of the assured, within the strictest meaning of those words (*f*).

The law as settled by this decision is stated in sect. 65 of the Marine Insurance Act, 1906, in the following terms:—

> (1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.
>
> (2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

Effect of suing and labouring clause in a policy of re-insurance.

866. The limited effect of the suing and labouring clause is well illustrated by Uzielli *v.* The Boston Marine Insurance Company (*g*). The owners of a ship insured her by an ordinary policy at Lloyd's. Lloyd's underwriters re-insured their risk with the plaintiffs, who themselves re-insured with the defendants. All policies contained the usual suing and

(*e*) Aitchison *v.* Lohre, *ubi supra*. Cf. also Dixon *v.* Whitworth (1879), 4 C. P. D. 371; 4 Asp. M. L. C. 11; reversed on appeal, 4 Asp. M. L. C. 327; Pyman SS. Co. *v.* Admiralty Commrs., [1919] 1 K. B. at p. 55, per Scrutton, L. J.

(*f*) For a severe criticism of this decision by Maclachlan, see the 6th edition of this work, p. 793, and Appendix to Chap. II. Part III.

(*g*) (1884), 15 Q. B. D. 11.

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labouring clause, and both the re-insurance policies appear to have contained the ordinary clause declaring them to be re-insurances subject to the same terms, &c. as the original policies, and to pay as might be paid thereon. Damage was sustained amounting to 88 per cent., in addition to which Lloyd's underwriters incurred salvage expenses to the extent of 24 per cent., for all of which, making 112 per cent., they were reimbursed by the plaintiffs. It was held, however, by the Court of Appeal that the plaintiffs were not entitled to recover more than 100 per cent. from the defendants. The salvage expenses were recoverable only as losses due to perils of the sea. This being so, the damage of 88 per cent., together with 12 per cent. of the salvage, exhausted the policy, notwithstanding the clause "to pay as may be paid thereon, &c." (*h*). To the argument that the remaining 12 per cent. for the salvage might be recovered under the suing and labouring clause the Court replied that the Lloyd's underwriters who had effected the salvage were not the factors, servants, or assigns of the re-insuring plaintiffs (*i*).

In conformity with these decisions it is now expressly enacted (*k*) that "salvage charges" (*i.e.*, the charges recoverable under maritime law by a salvor independently of contract) (*l*) are not recoverable under the suing and labouring clause.

Can salvage charges be recovered as well as a total loss?

867. It is established, therefore, that where particular average damage sustained by a vessel, together with maritime salvage charges incurred by the assured, exceeds 100 per cent., the excess is not recoverable from underwriters. It is to be noticed that both cases were cases where the damage

(*h*) On this point, see Bigham, J.'s, criticism in Western Assurance Co. of Toronto *v.* Poole, [1903] 1 K. B. at p. 387.

(*i*) This decision was also severely commented upon by Maclachlan (6th ed. p. 795), and was also somewhat severely criticized by the Court of Appeal in British Dominions Gen. Ins. Co., Ltd. *v.* Duder, [1919] 2 K. B. 394.

(*k*) Mar. Ins. Act, 1906, s. 78, sub-s. 2.

(*l*) *Id.* s. 65, sub-s. 2, *supra*, § 865.

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was treated as particular average only. It does not by any means follow that if the assured in the former case had chosen, or if the assured in the latter case had been able, to treat the loss as total, he would not have been entitled to recover both the salvage charges and for a total loss, on an analogous principle to that whereby an underwriter may, in certain cases, be liable both for particular average damage and for a total loss occurring in the same voyage (*m*). This point, it appears, might have arisen in a later case (*n*) in which the underwriters were in fact held liable for a total loss notwithstanding a previous payment of salvage charges, but the decision turned on other grounds, namely, that the salvage charges had in fact been incurred on account of the underwriters in the first instance, and not on account of the assured at all. It was held, therefore, that the underwriters who had previously paid the salvage charges—but not, as it was found, to any agent of the assured—were liable nevertheless to pay the latter for a total loss, without deduction in respect of such previous payment.

Life salvage not recoverable.

868. Prior to 1846 salvage was awarded only in respect of services rendered to ship or cargo. It had indeed been the practice of the Court of Admiralty, where lives as well as property were saved, to increase the reward payable, but in respect of the saving of life alone salvage was never awarded. It follows of course that life salvage, as such, was not recoverable from underwriters, because there was no such thing. And although 9 & 10 Vict. c. 99, s. 19 (which is now represented by sect. 544 of the Merchant Shipping Act, 1894), made life salvage payable as such (*o*), yet it is not recoverable under a Lloyd's policy in the usual form. It is a risk, however, which is sometimes specially insured against (*p*).

(*m*) See Livie *v.* Janson (1810), 12 East, at p. 655.

(*n*) Buchanan *v.* London, &c. Ins. Co. (1895), 65 L. J. Q. B. 92.

(*o*) See The Cargo ex Schiller (1877), 2 P. D. 145; The Renpor (1883), 8 P. D. 115.

(*p*) Nourse *v.* Liverpool Sailing Ship Owners' Mutual, &c. Assoc., [1896] 2 Q. B. 16 (C. A.).

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"Particular charges."

869. Another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder, is that which is embraced under the term "particular charges." The distinction between "particular charges" and "particular average" was first definitely established in our Courts in Kidston *v.* Empire Insurance Co. (*q*), where the jury, after hearing the evidence of several average-adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term "particular average" as distinguished from the term "particular charges"—viz., that "particular average" denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance; and that expenses incurred in warehousing and forwarding goods are not "particular average," but are termed "particular charges."

Accordingly sect. 64, sub-sect. (2), of the Marine Insurance Act, 1906, states that "expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average" (*r*). They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred "in and about the defence and safeguard" of the subject-matter of

(*q*) (1866), L. R. 1 C. P. 535; 2 C. P. 357. It was, indeed, noticed in an earlier case (Booth *v.* Gair (1864), 15 C. B. N. S. 291), but less definitely, as the distinction, on the facts of that case, proved immaterial. Particular charges, incurred on behalf of one interest only, are also to be distinguished from general average expenditure incurred on the joint account. The difficulties sometimes experienced in maintaining this distinction are dealt with elsewhere, in the chapter on "General Average." Cf. McArthur, 173—177 (2nd ed.); Carver on Carriage, s. 398.

(*r*) "A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss": Mar. Ins. Act, 1906, s. 64 (1).

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insurance, within the suing and labouring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and labouring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo (*s*), when a peril insured against has occasioned the necessity of such expenditure (*t*).

Further consideration of the suing and labouring clause.

870. It is necessary to consider the suing and labouring clause in somewhat further detail, as also to notice certain decisions.

The clause is principally dealt with in sect. 78 (*u*) of the Marine Insurance Act, 1906, which provides as follows:—

Suing and labouring clause.

> (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to

(*s*) Lending, warehousing and forwarding charges are sometimes covered by express clauses. For a case on such a clause, see Popham *v.* St. Petersburgh Ins. Co. (1904), 10 Com. Cas. 31, 276. As to recovery of similar expenses, in the absence of such a clause, as suing and labouring, see St. Paul Fire & Mar. Ins. Co. *v.* Pacific Cold Storage Co. (1907), 157 Fed. R. 627.

(*t*) These could probably also be recovered under the suing and labouring clause, at the option of the assured (see per Lord Ellenborough in Livie *v.* Janson (1810), 12 East, 655); and it is at least doubtful whether even expenses incurred in order to avert a loss—such as, for instance, those which were held in Kidston *v.* Empire Ins. Co. to be recoverable under the suing and labouring clause—could not also be recovered from underwriters as money paid on their behalf, apart from the clause. It is the captain's duty in an emergency to act on behalf of all concerned. Might not expenses incurred by him in doing so be recovered by his owners from the underwriters under an implied contract of agency or indemnity, such agency having been thrust upon them or their servant by perils insured against? Cf. Le Cheminant *v.* Pearson (1812), 4 Taunt. 367. Some such view appears to have been held in the American case of White *v.* Republic Fire Ins. Co. (1869), 57 Maine, 91. If it were so decided the effect of the suing and labouring clause would appear to be no more than to render certain that which otherwise might have been considered doubtful.

(*u*) Other sections of the Act which deal with the suing and labouring clause either in express terms or by reference to its subject, viz., particular charges, are sect. 64 (2), *ante*, § 869; sect. 65 (2), *ante*, § 865; sect. 76 (2), (4), *post*, §§ 871, 897; and Rule 13 of the Rules for Construction of Policy in Sched. I., *post*, § 885.

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> be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.
>
> (2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.
>
> (3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.
>
> (4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss (*x*).

First, as is implied in sub-sect. (3) of this section, the clause does not come into operation except in anticipation of "any loss or misfortune" that would fall upon the insurers if it did happen. "If by perils insured against," said Brett, L. J., "the subject-matter of insurance is brought into such danger that without unusual or extraordinary labour or expense a loss will very probably fall on the underwriters, and if the assured or his servants or agents exert unusual or extraordinary labour, or if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters, then each underwriter will, whether in the result there is a total or a partial loss, or no loss at all; not as part of the sum insured, but as a contribution independent of and even in addition to the whole sum insured, pay a sum bearing the same proportion to the cost or expense incurred as the sum they would have had to pay if the probable loss had occurred, or to the loss which, because the efforts have failed, has occurred, as that loss bears to the sum insured" (*y*).

(*x*) As to this sub-section, see § 799a.

(*y*) Per Brett, L. J., in Lohre *v.* Aitchison (1878), 3 Q. B. D. at p. 566.

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The cases that established the above-mentioned limitation of the applicability of the cause are Great Indian Peninsular Railway Co. *v.* Saunders (*z*), and Booth *v.* Gair (*a*).

Great Indian Peninsular Railway Co. *v.* Saunders.

In the former case, the policy was on iron rails for Bombay "warranted free from particular average unless the ship be stranded, sunk, or burnt." The vessel was compelled by perils insured against to put into Plymouth in such a state as not to be worth repairing, but she was not stranded, sunk, or burnt. The rails were landed and sent on by other vessels at a cost of 825*l*., the whole of which sum, inasmuch as the original contract of carriage provided for payment of freight "ship lost or not lost," was an extra expense incurred by the shippers in consequence of the loss of the original ship. It was held that for this sum the underwriters were not liable, either under the suing and labouring clause or otherwise, on the ground that at the time when the expenditure was incurred the iron was in no peril of total loss, for which alone the underwriters were responsible.

Booth *v.* Gair.

In Booth *v.* Gair (*b*), bacon was insured on a voyage from New York to Liverpool "free from average, unless general, or the ship be stranded, sunk, or burnt," with the suing and labouring clause in ordinary form. The vessel became a constructive total loss, owing to perils of the sea, but without being stranded, sunk, or burnt; there was a partial, but no total loss of the bacon, which was landed at Bermuda and part sent on to Liverpool. No expenses appear to have been incurred in saving the goods from a total loss (*c*); but certain

(*z*) (1861), 1 B. & S. 41; 2 *id.* 266; 30 L. J. Q. B. 218; 31 *id.* 206. This case was distinguished in Wilson Bros. Bobbin Co., Ltd. *v.* Green, [1917] 1 K. B. 860, where there was no warranty against particular average.

(*a*) (1863), 15 C. B. N. S. 291; 33 L. J. C. P. 99.

(*b*) *Ubi supra.*

(*c*) This sentence is taken from the *résumé* of the case by Willes, J., in L. R. 1 C. P. at p. 549. But this does not seem to have been admitted by the plaintiff, on whose behalf it was expressly contended that, had the cargo not been forwarded at once, it would have been in danger of perishing (see 33 L. J. C. P. at p. 100), and that the difference in the character of the cargo distinguished the case from that of Gt. Indian Co. *v.* Saunders. McArthur (p. 267, 2nd ed.) on this ground thinks this decision wrong. There is force in McArthur's criticism, especially in view of the established rule that a constructive total loss of goods may be constituted by a loss of the insured adventure. The principle, however, on which the decision purports to be based is unexceptionable, though the Court may have come to a questionable conclusion on the facts. Cf. also The Pomeranian, [1895] P. 349; and Wilson Bros. Bobbin Co., Ltd. *v.* Green, *supra.*

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expenses were incurred by way of warehousing, coopering, reshipment, &c. It was held, in accordance with the decision in the case last cited, that inasmuch as these expenses were not incurred in order to avoid any risk of a total loss, the underwriters were not liable.

Expenses incurred in order to avert a loss for which, if it had happened, underwriters would have been liable.

871. These cases were followed in 1866 by Kidston *v.* The Empire Marine Ins. Co., Limited (*d*), which established the point which had hitherto been left open, viz., that where the expenses are incurred in order to avert a loss for which, if it had happened, the underwriter would have been liable, then such expenses are recoverable under the suing and labouring clause. The action was brought on a policy on chartered freight, containing the usual suing and labouring clause and the warranty against particular average. The vessel became a constructive total loss, and the cargo, after being landed and warehoused at Rio, was forwarded to its destination by another vessel for an agreed freight of 2,467*l*., which the plaintiffs paid, ultimately receiving from the owners of the cargo the full charter freight. It was held by the Court of Common Pleas and the Exchequer Chamber that inasmuch as the 2,467*l*., together with the landing and warehousing expenses, had been paid with the object of averting the total loss of freight which would otherwise have been suffered, and for which the underwriters would have been liable, these amounts were recoverable under the suing and labouring clause, notwithstanding the warranty against particular average. Effect is given to this decision by the express terms of the Marine Insurance Act, 1906, which provides that "Where the subject-matter is insured free from particular average, either wholly or under a certain percentage,

(*d*) (1866), L. R. 1 C. P. 535; 2 C. P. 357 (Ex. Ch.).

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the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against" (*e*).

The result in this last case showed that there had been no loss whatsoever on the subject of insurance; the full freight was earned and received. That was the proper effect of the clause. Prevention of loss is the very object in view. It contemplates the benefit of the insurers only, and the insurers on that account undertake for the expenditure. Cases do frequently occur in which the insurers by the operation of this clause are saved from loss, and the damage done is thrown upon the assured (*f*). For instance, under a policy on goods warranted free from average under 5 per cent., the goods, suppose, have been wetted by sea water; the damage to them, unless they are taken out and dried, would go on increasing beyond the 5 per cent., till it threatened the cargo with destruction; but they are dried at an expense of 3, 2, or 1 per cent., and the damage done is less than 5 per cent. The insurers bear the cost of drying, and the assured the loss by sea damage (*g*).

By this clause the insurers undertake an engagement supplementary to the contract of insurance, properly so called, and quite of a different nature (*h*). The assured may recover thereunder notwithstanding that the insurer may have paid for a total loss, and (as we have already seen) notwithstanding any warranty against particular average (*i*). It follows that "particular charges" cannot be added to the "particular average," or damage done to the subject of insurance, so as

(*e*) Sect. 76, sub-sect. 2. See also sect. 78, sub-sect. 1, *ante*, § 870. It appears to be otherwise where the policy is against "total loss only": Dixon *v.* Whitworth (1880), 4 Asp. M. L. C. 327.

(*f*) Per Willes, J., in Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 543, 544.

(*g*) Per Willes, J., L. R. 1 C. P. 544.

(*h*) Mar. Ins. Act, 1906, s. 78, sub-s. 1, *ante*, § 870. Cf. Lohre *v.* Aitchison (1878), 3 Q. B. D. at p. 567, per Brett, L. J.

(*i*) Mar. Ins. Act, 1906, s. 78, sub-s. 1.

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to increase the amount of the latter to 3 or 5 per cent., and so avoid the effect of the memorandum (*k*).

Other decisions on the suing and labouring clause.

Costs of resisting claim for which underwriters would have been liable to indemnify.

872. The independent character of the clause formed one of the grounds of the decision in Xenos *v.* Fox (*l*). In this case the plaintiffs were the owners of the "Smyrna," and had been sued for running down another vessel. This action they successfully defended, but were put to costs. Their policy, in addition to the suing and labouring clause, contained a collision clause entitling them to recover from their underwriters a certain proportion of any damages which they might have to pay by reason of their vessel accidentally or negligently damaging any other vessel. Relying on the suing and labouring clause, they attempted to get from their underwriters the costs incurred in their successful defence of the action brought against them, on the ground that, had they not been incurred, there would have been a good claim against the underwriters on the collision clause. The Court of Common Pleas, however, decided against this somewhat ingenious claim, mainly on the ground that the suing and labouring clause was an engagement of limited application, extending only to the ordinary insurance perils, and not to those specially covered by the collision clause. The Exchequer Chamber appear to have concurred in this view, and also to have considered that no "loss or misfortune" contemplated by the clause had ever arisen.

Clause not applicable to carrier's insurance against liability.

In a case where an insurance was effected by a carrier of cargo, not upon the cargo itself, but in order to protect himself to the extent of 20,000*l.* from certain liabilities which he might incur as carrier thereof, it was held that the suing and labouring clause was entirely inapplicable to such a contract, and should be ignored (*m*). It has also been held that the clause "no salvage charges" in a policy of re-

(*k*) Mar. Ins. Act, 1906, s. 76, sub-s. 4, *post*, § 896.

(*l*) (1868), L. R. 3 C. P. 630; 4 C. P. 665. See Munson *v.* Standard Mar. Ins. Co. (1907), 156 Fed. R. 44.

(*m*) Cunard SS. Co. *v.* Marten, [1902] 2 K. B. 624; [1903] 2 K. B. 511.

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insurance excludes liability under the suing and labouring clause (*n*).

Expenses to avoid further deterioration of cargo.

873. Meyer *v.* Ralli (*o*) affords a good illustration of the principles established by the previous decisions. A cargo of rye was insured by a policy warranted free of particular average. The voyage was necessarily abandoned, owing to perils of the sea; part of the rye was so damaged that it had to be sold at once, the rest could have been profitably re-conditioned and forwarded to its destination. This course, however, the captain neglected to take, so that a substantial portion remained in warehouses for more than a year, subject to charges. It was held that the plaintiffs, under the suing and labouring clause, were entitled to recover the expenses of unshipping the whole and conveying it to a warehouse, and of the separation of the comparatively sound part from that which was irreparably damaged, and of the expense of re-conditioning the former—all these being expenses necessary in order to avert a total loss—but for no other expenses were the underwriters responsible.

Under a policy on live cattle against all risks, including mortality from any cause whatsoever, the insurers were held liable, under the clause, for the cost of extra fodder supplied whilst the vessel was detained in a port of refuge for repairs necessitated by perils of the sea, inasmuch as if the animals had perished for want of it, there would have been a valid claim for loss by mortality (*p*).

Only reasonable expenses recoverable.

874. It need hardly be said that only such expenditure can be recovered under the clause as can be shown to have been reasonably necessary (*q*).

A ship with a cargo of palm oil for Liverpool stranded on the Welsh coast near Pwllheli, and it became necessary to land her cargo. She was then towed to Carnarvon, and there

(*n*) Western Ass. Co. of Toronto *v.* Poole, [1903] 1 K. B. 376.
(*o*) (1876), 1 C. P. D. 358.
(*p*) The Pomeranian, [1895] P. 349, per Gorell Barnes, J.
(*q*) By the Mar. Ins. Act, 1906, s. 65, sub-s. 2, and s. 78, sub-s. 1, the expenses in order to be recoverable must have been "properly incurred."

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made seaworthy for the rest of the voyage. Meanwhile, the shipowner had sent the cargo overland by rail to Liverpool at an expense of over 200*l.*, and thereby earned his freight. In an action on his policy on freight to recover this expenditure, it was held that, although the occasion and purpose justified some expenditure, namely, to prevent a total loss of the freight, yet, as he might have retained the oil till his ship was repaired, and have reshipped it at an expense of 70*l.*, he was entitled to recover 70*l.* and no more (*r*).

It is not considered necessary further to enumerate cases in which particular charges may be recovered under the suing and labouring clause. Sufficient has been said by way of illustration of such principles as are peculiar to the construction of the clause. Subject to such principles, claims under the clause are dealt with as claims made in respect of perils directly insured against. This subject is dealt with in other parts of this work.

If the underwriter himself incurs expenses which if incurred by the assured would be recoverable under the suing and labouring clause, it is obvious that he cannot recover them from the assured (*s*).

Other expenses recoverable under policy on ship.

875. Apart from the suing and labouring clause, other expenditures and disbursements incurred in the course of the voyage in consequence of extraordinary casualties, for the benefit not of the whole adventure, but of the ship alone, are recoverable by the assured from the underwriter, either under a special count, or, generally, as a consequence of some peril insured against.

Expenditures for the necessary repairs of ship.

Thus, actual disbursements necessarily made in a port of distress, or elsewhere, for repairing damage done to the ship

(*r*) Lee *v.* Southern Ins. Co. (1870), L. R. 5 C. P. 397.
(*s*) Crouan *v.* Stanier, [1904] 1 K. B. 87. In that case the policy was against "total or constructive total loss only," and Kennedy, J., held that the clause is not impliedly excluded in such an insurance, and that the underwriter could not recover from the assured the expense of salving the vessel which had been unjustifiably abandoned. In short, the underwriter cannot claim salvage against the assured.

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in the course of the voyage, by the violent operation of the perils insured against, are recoverable from the underwriter upon an averment of loss by those perils (*t*). The cost of such repairs includes the cost of replacing coals and engine-room stores consumed in repairing a steamer, or in working her engines or winches to assist in such repairs, or in moving her to a place of repair within the limits of the port where she is lying (*u*). None of these repairs, however, must be such as are properly attributable to the ordinary wear and tear of the voyage, for which, as we have already seen, underwriters are not responsible.

In calculating, however, the amount for which the underwriter is liable in respect of repairs, a deduction is in most cases made of one-third of the value of the new work which replaces the old. Upon the subject of this deduction, generally known in insurance law by the term of "one-third new for old," we shall have more to say in treating of the adjustment of particular average losses.

Expenses of endeavouring to procure restoration of captured ship, fall on the underwriter.

876. Besides the cost of necessary repairs, there are other expenditures which may be recoverable from the underwriter.

Thus, as capture or hostile seizure, *primâ facie*, dissolves the contract of affreightment, or at all events suspends it for a time (*x*), the wages, provisions and other expenses of the master and crew in endeavouring to procure a restoration of the captured ship or the detained cargo, such expenses not being comprised within those ordinary services of the voyage which are payable out of the freight, give the assured a claim either against the underwriter on ship or on cargo, according as the ship alone or the cargo alone is the sole cause of seizure and detention. Where the services of the master and crew

(*t*) See per Lord Ellenborough in Livie *v.* Janson (1810), 12 East, at p. 655. His Lordship also suggests that such expenditures, especially when followed by a total loss, might more properly be claimed independently under the suing and labouring clause.

(*u*) There is an express rule of the Association of Average Adjusters to this effect. See Appendix B.

(*x*) The Hiram (1800), 3 C. Rob. 180; Liddard *v.* Lopes (1809), 10 East, 526.

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are thus given for the joint benefit of both ship and cargo, as they are when both are the subject of detention, the expense should be borne by both (*y*).

Expenses incurred during detention by embargo, are not a charge on the underwriters, nor during delay for repairs.

But an embargo, detention, or arrest of princes, does not necessarily work a dissolution of the contract of affreightment (*z*): the shipowner, therefore, owes all the services of his crew during this period to the freighter, and their wages and provisions during the detention are a charge upon the freight, an ordinary expense of the voyage, which the shipowner cannot recover against his underwriters (*a*).

Upon the same principle it is that the wages and provisions of the crew during the ship's detention in a port of distress for repairs are not recoverable from the underwriter as an average loss, but must be borne by the shipowner as one of the necessary expenses of earning freight (*b*).

Principle of the cases.

The principle of all these cases in thus shortly and clearly expressed by Benecke: "The owner owes the services of the crew to the freighter and to the ship herself during the whole voyage, and consequently also during the time of repairs or detention, which forms part of the voyage, and he cannot call upon the underwriter for expenses which are foreign to his (the underwriter's) contract" (*c*).

Losses on goods. Underwriter not liable for merchant's loss in having

877. As to goods, the underwriter thereon is not responsible, under the common form of policy, for loss the merchant may incur by having to pay the same freight on sea-damaged goods arriving in bulk at their port of destination, as he would

(*y*) Arnould (2nd ed. p. 870) said this was a case for general average contribution; but this is doubtful.

(*z*) Hadley *v.* Clarke (1799), 8 T. R. 259, where the detention must be regarded as temporary only: see Horlock *v.* Beal, [1916] 1 A. C. 486; Tamplin SS. Co., Ltd. *v.* Anglo-Mexican Co., Ltd., [1916] 2 A. C. 397.

(*a*) As to ship, see Eden *v.* Poole (1785), 1 Park, Ins. 117; Robertson *v.* Ewer (1786), 1 T. R. 127. As to freight, see Sharp *v.* Gladstone (1805), 7 East, 33; Everth *v.* Smith (1814), 2 M. & S. 278.

(*b*) Lateward *v.* Curling (1776), 1 Park, Ins. 288; Fletcher *v.* Poole (1769), *ibid.* 115.

(*c*) Benecke, Pr. of Indem. 463. These cases have, however, been otherwise explained; see Field SS. Co. *v.* Burr, [1898] 1 Q. B. 821; [1899] 1 Q. B. 579 (C. A.); *ante*, § 835.

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to pay full freight on damaged goods arriving in bulk.

Or *pro ratâ* freight.

have had to pay had they arrived there sound (*d*). Nor can he be charged with *pro ratâ* freight which the merchant may have had to pay the shipowners (after capture of ship and cargo and subsequent restitution of the proceeds of the goods) in respect of that part of the voyage performed before the capture (*e*).

Loss on sale of goods to repair ship.

Where goods are necessarily sold by the master in a port of distress to defray the expenses of repairing the ship, the loss sustained from the sale by the shipper of the goods may be recovered by him against the owner of the ship, but cannot be claimed as an average loss from the underwriter on goods (*f*).

Expenses of damaged sales.

The expenses incident to the sale by auction of sea-damaged goods are, as we shall see in treating of adjustment, added to the average loss payable by the underwriters on goods (*g*).

Partial losses on freight.

878. As Stevens remarks, the word "average" is very inapplicable to claims for partial losses on freight, which, in fact, can only arise from one cause, viz., a total loss on part of freight (*h*).

It seems in this country that a claim in respect of partial loss on freight can only be made good when either, 1st, only part of the full intended cargo out of which the freight was expected to arise was on board, or contracted for at the time of loss (*i*); 2nd, when some separable part of the whole cargo

(*d*) Baillie *v.* Moudigliani (1785), 1 Park, 117; 1 Phillips, s. 1140. As to policies on "contingency freight," see *ante*, §§ 232, 811.

(*e*) Baillie *v.* Moudigliani (1785), 1 Park, 116; Abbott on Shipping, 721, 14th ed. See also per Story, J., as cited 1 Phillips, s. 1138. Phillips himself takes a different view.

(*f*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; Sarquy *v.* Hobson (1823), 2 B. & Cr. 7; 3 Dowl. & Ry. 192; *S. C.*, 4 Bing. 131; 12 Moore, 474; Duncan *v.* Benson (1847), 1 Exch. 537; Benson *v.* Duncan (1849), 3 Exch. 655; 1 Phillips, s. 1139.

(*g*) See *post*, § 1019.

(*h*) Stevens, Av. 174; Brockelbank *v.* Sugrue (1831), 1 Moo. & Rob. 102.

(*i*) Forbes *v.* Aspinall (1811), 13 East, 323; Forbes *v.* Cowie (1808), 1 Camp. 520.

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(*i.e.*, separately valued or insured by the policy (*k*)) goes in bulk to the bottom of the sea, or is otherwise totally destroyed by a peril insured against (*l*). In both these cases there is a clear total loss of part, or partial loss, of freight, which must be adjusted by the underwriter in the mode hereafter to be indicated.

A third case, it seems, may arise. If a ship, with a full cargo on board, is so damaged that she can only be so far repaired at the port of distress as to take on part of the cargo, and the residue is thereupon necessarily and justifiably sold, it has been intimated that there may be a total loss on that part of the freight which the ship is thus incapacitated from earning (*m*).

Loss of freight on part of cargo, justifiably sold by master, is not an average on the underwriters on freight. Mordy *v.* Jones.

879. In the following case, however, it was decided that, where the ship can be so repaired as to take on all the cargo, even a justifiable sale by the master of part of the cargo at an intermediate port, whereby the freight of such part was lost to the shipowners, did not give them a claim against the underwriters on freight, as the loss was not due to any peril insured against.

A ship, the freight of which was insured for a voyage from Kingston, in Jamaica, to Liverpool, sailed from Kingston with a full cargo of colonial produce; but soon afterwards, from the starting of a plank in violent weather, was forced to put back, and to unload the whole of her cargo. After the ship was repaired it was found that part of her cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be re-shipped without danger from ignition to the ship and the rest of the cargo, except after a process which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the master, acting as a prudent man would, if

(*k*) Ralli *v.* Janson (1856) (in error), 6 E. & B. 422; 25 L. J. Q. B. 300.

(*l*) See The Merchant Shipping Co. *v.* Armitage (1873), L. R. 9 Q. B. 99 (Ex. Ch.); Stevens, Av. 174.

(*m*) Per Maule, J., in Moss *v.* Smith (1845), 9 C. B. 104.

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uninsured, sold the damaged goods, and, finding he could not obtain other goods to complete his cargo in reasonable time, sailed for Liverpool and paid over to the parties interested the net proceeds of the damaged goods, without retaining freight. The shipowner claimed from the underwriters a total loss of freight on the goods so sold. The Court of King's Bench held that the underwriter on freight was not liable, because the loss was due rather to the prudent conduct of the captain than to any peril insured against (*n*).

Another case in which the conduct of the captain, or of his owners, was held to be the cause of a loss of freight, rather than any peril insured against, is that of Williams *v.* Canton Insurance Office, decided in the House of Lords, where it was held that the loss was not due to a peril of the sea, but to the fact that the form in which the plaintiffs had taken the bills of lading had not preserved to them their lien over the whole cargo for the chartered freight (*o*).

Loss where only *pro ratâ* freight earned.

Where only freight *pro ratâ* is earned, the loss on freight in the United States is adjusted as a salvage loss, *i.e.*, the underwriter pays the whole amount of the insurance, deducting the *pro ratâ* freight (*p*).

Expenses of re-shipping and

880. When a ship has put into a port of distress for repairs, and to that end the cargo is obliged to be unloaded,

(*n*) Mordy *v.* Jones (1825), 4 B. & Cr. 394; 6 D. & Ryl. 479. The Court appears to have been influenced by the mischief that might arise if by a contrary decision they were to hold out a temptation to masters to sail away instead of stopping until the goods could be re-shipped. Arnould (2nd ed. p. 978) and Phillips (vol. i. s. 1142), conceiving such considerations to be the *ratio decidendi* of the case, have disputed the decision itself; but Maclachlan (Arnould, 6th ed. p. 803) gives the true explanation, and cites Moss *v.* Smith (1845), 9 C. B. 94; and Philpott *v.* Swann (1861), 11 C. B. N. S. 270; 30 L. J. C. P. 358, in confirmation of his view, and also as decisions to a similar effect.

(*o*) Williams *v.* Canton Ins. Office, [1901] A. C. 462; *S. C., sub nom.* Brankelow SS. Co. *v.* Canton Ins. Office, [1899] 2 Q. B. 178 (C. A.). See *ante*, § 789.

(*p*) Coolidge *v.* Gloucester Mar. Ins. Co. (1819), 15 Mass. R. 341; 2 Phillips, s. 1440. But see Price *v.* Maritime Ins. Co. (1900), 5 Com. Cas. 332; [1901] 2 K. B. 412 (C. A.), where the insurance was by a pledgee.

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the charges of unshipping and re-shipping the cargo will fall upon different persons according to circumstances (*q*). Where a ship was detained, and her homeward cargo unloaded, under embargo of the foreign government in whose port she was preparing for her homeward voyage, it was held that the expenses of re-shipping this cargo, after the embargo was taken off, whereby she was ultimately enabled to earn freight, ought to be deducted from the freight earned before paying it over to the underwriters on freight who had paid for a total loss (*r*). The charges of wages and provisions, however, incident to such detention or to a delay for repairs, seem to be no more chargeable on the underwriter on freight than on the underwriter on ship, and for the same reason (*s*).

forwarding cargo.

Wages and provisions during detention.

Freight on substituted cargo.

It has been decided in this country, that if a ship ultimately earn freight, though not that intended for her, the expenses of a delay or detention in the course of the voyage, by reason of some of the perils insured against, as for repairs, by being icebound, &c., do not constitute a claim for an average loss against the underwriters on freight (*t*): but the expenses of putting such substituted cargo on board at a port of distress, are to be deducted from the freight paid over as salvage to the underwriters on freight who have adjusted as for a total loss (*u*).

Whether it is the duty of the master, in case of damage to the cargo, to incur expense in drying it or otherwise restoring it to a transportable condition, must depend on circumstances:

(*q*) See chapter on "General Average."

(*r*) Sharp *v.* Gladstone (1805), 7 East, 24. In this case, however, there had been an abandonment.

(*s*) The contrary was supposed to have been intimated by Buller, J., in Eden *v.* Poole, as reported by Park on Insurance; but the report was found incorrect by Mr. East, as stated by him in a note to Sharp *v.* Gladstone (1805), 7 East, at p. 32. See also Everth *v.* Smith (1814), 2 M. & S. 278.

(*t*) Brockelbank *v.* Sugrue (1831), 1 Moo. & Rob. 102. See *S. P.*, as to salvage, loss of freight, Everth *v.* Smith (1814), 2 M. & S. 278; but *aliter* where the policy was on disbursements in respect of passengers, New Zealand Shipping Co., Ltd. *v.* Duke, [1914] 2 K. B. 682.

(*u*) Barclay *v.* Stirling (1816), 5 M. & S. 6. See Sharp *v.* Gladstone (1805), 7 East, 24.

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Extra charges caused by transhipment of goods where original ship is disabled.

881. Where the original ship is lost or disabled, and the goods are sent on by the master in a substituted ship, for the benefit of the owner of the goods, the extra expenses of transhipment, beyond the cost of the original freight, may perhaps be thrown on the underwriters on the goods; if, however, they were sent on for the sole purpose of earning freight, these expenses should, on principle, be borne by the underwriter on freight (*y*). If the expenses were incurred for the common benefit of both cargo and freight, both should be charged therewith (*z*).

Partial loss on profits.

With regard to profits, it has been held in the United States, that when the goods, out of which the profits are to arise, arrive sea-damaged, or a part of them is totally lost, this is *pro tanto* a partial loss on the profits, and to be adjusted accordingly (*a*); and the same has been there held where part of the goods have been necessarily sold (*b*).

(*x*) 2 Phillips, Ins. s. 1452; Notara *v.* Henderson (1870), L. R. 5 Q. B. 346; (1872), 7 Q. B. 225.

(*y*) Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357. So in the United States, Saltus *v.* Ocean Ins. Co. (1815), 12 Johnson, R. 107; Schieffelin *v.* New York Ins. Co. (1812), 9 *ibid.* 21; 2 Phillips, Ins. s. 1438.

(*z*) Rose *v.* Bank of Australasia, [1894] A. C. 687.

(*a*) Loomis *v.* Shaw (1800), 2 Johnson, Cas. 36.

(*b*) Waln *v.* Thompson (1812), 9 Serg. & Rawle, 115.

CHAPTER III.

EXCEPTED RISKS AND LOSSES.

	SECT.
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882. BEFORE proceeding to consider the subjects of general and particular average, total and partial losses, and the doctrine of adjustment, we will advert to certain risks and losses which are excepted from the policy either by the common memorandum, or by other express stipulations.

Of the common memorandum. Reasons for its introduction.

Amongst the commodities which are the subjects of marine insurance, it is obvious that there are many which are liable to be deteriorated in a much greater degree than others by the effect of the perils insured against, *e.g.*, the same quantity of sea water will damage one article 50 per cent., and another only 10 per cent.; a month's delay will hardly affect one description of goods, and may entirely spoil another.

There are, also, many articles of a perishable nature with regard to which it is very difficult to discover how far their deterioration is owing to the direct operation of the perils of the seas, for which the underwriter would, *primâ facie*, be liable, and how far to that inherent decay and internal decomposition, for the effect of which he is not responsible.

In order to avoid the difficulty of adjusting the rate of premium on such commodities to the risk incurred on them, and to escape being harassed with claims for partial losses

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The policies of all states contain similar clauses.

The policies of all mercantile states contain stipulations, introduced with this object, which vary greatly both in respect of the articles enumerated and the amount of percentage at which the liability of the underwriter commences. The stipulation in use in this country (which was first introduced about the year 1749 (*b*)), is generally called the common memorandum, and the articles enumerated in it are called memorandum articles. The form given in the First Schedule to the Marine Insurance Act, 1906 (which is that of a Lloyd's policy) is as follows:—

[Memorandum.]

> *N.B.*—Corn, fish, salt, fruit, flour, and seeds are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship (*c*) and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded (*d*).

(*a*) See the judgment of Lord Alvanley in Dyson *v.* Rowcroft (1803), 3 B. & P. 476; Benecke, Pr. of Indem. 464, 465; Stevens, Av. 219; 4 Boulay-Paty, Droit Mar. 87.

(*b*) 1 Magens, 10. See also Boyfield *v.* Brown (1737), 2 Str. 1065.

(*c*) The "*Janson*" Clause (see Owen's Clauses, 3rd ed. p. 125) throws the initial 3*l.* per cent., in the case of particular average on ship, on the owners, who are further made to agree to remain uninsured for such 3*l.* per cent. on the whole value of the vessel. The clause applies whether or not the ship be stranded, sunk, or burnt.

(*d*) The words "sunk or burnt" are frequently added (see The Glenlivet, [1893] P. at p. 168); also words extending the liability of the underwriter in case of collision. The Institute Clauses are noticed *infra*, and will be found in Appendix B. The punctuation of the memorandum varies, and in many of its forms is open to criticism. It is clearly the intention of all parties that the exception "unless general, &c." shall apply not only to the 3*l.* per cent., but also to the 5*l.* per cent. articles. There should obviously be no comma before "under 5*l.* per cent." or before "under 3*l.* per cent." After "under 3*l.* per cent." there should be a comma.

(*e*) Moody *v.* Surridge (1794), 2 Esp. 633.

(*f*) Mason *v.* Skurray (1780), 1 Marshall, Ins. 225; 1 Park, 245, 253.

(*g*) Scott *v.* Bourdillon (1806), 2 B. & P. N. R. 213.

(*h*) Journu *v.* Bourdieu (1787), 1 Marshall, Ins. 224; 1 Park, 245.

(*i*) Astor *v.* Union Ins. Co. (1827), 7 Cowen, R. 202; Bakewell *v.* United Ins. Co. (1801), 2 Johns. Cas. 246; 2 Phillips, s. 1764.

(*k*) Baker *v.* Ludlow (1801), 2 Johns. Cas. 289; Phillips, s. 1764.

(*l*) Coit *v.* Commercial Ins. Co. (1811), 7 Johns. R. 385.

(*m*) For the origin and meaning of this word, see Maclachlan's learned discussion in the 6th ed. of this work, pp. 919—926; and Lowndes, Gen. Av. p. 11.

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Construction of the common memorandum. 1. What articles are included.

883. The language of this stipulation is evidently very ambiguous, and a great variety of questions have arisen as to its construction. The first question is, what is included under the words by which the enumerated articles are described in the first and second clauses? As to this it has been decided in this country that the word corn includes malt (*e*), peas and beans (*f*), but not rice (*g*), and that the word salt does not include saltpetre (*h*).

In the United States it has been decided that hides and skins do not include furs (*i*), and that the specification of one description of an enumerated article, as dried fish, excludes all other descriptions of the same, as pickled fish (*k*); so, also, where the word roots was among the enumerated articles, it was held not to include sarsaparilla, because not liable to decay by sea damage (*l*).

2. Meaning of the words "warranted free from average."

884. The next question is as to the meaning of the words "warranted free from average"; the ambiguity here chiefly arises from the use of the word average (*m*), as to the various meanings of which we shall have more to say elsewhere. As here used it means partial loss by perils insured against, and the purport therefore of the words "warranted free from

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average," is that the underwriter, as to the articles first enumerated, stipulates to be free from liability for any extent of deterioration which does not amount to a total loss. And as to the articles subsequently enumerated, he makes the same stipulation as to all damage which does not amount to 5 per cent. or 3 per cent. of their prime cost, or insured value; it being understood in both cases that, if the loss do amount to the agreed percentage, he engages to pay the full amount (*n*).

In point of fact, therefore, an insurance upon the articles warranted free from average in clause (1), is equivalent to an insurance against their total loss only, actual or constructive (*o*).

3. Meaning of the words "unless general."

885. The next question is as to the meaning of the words "unless general." It was on one occasion contended, that these words amounted to a condition that if a general average loss took place, then the underwriters were liable for partial loss also; but this, as might have been expected, was held not to be so, and it was decided that the true construction of the words "warranted free from average unless general" was that the underwriter is exempted by the memorandum from liability for anything less than a total loss, except it be of the nature of general average; but that for general average losses he is in all cases liable (*p*). And the warranty against particular average does not preclude an assured who has incurred expenses in order to prevent a total loss, from recovering the amount thereof, as particular charges, under the sue and labour clause (*q*). Accordingly, it is one of the "Rules for Construction of Policy" that the term "average unless general" means a partial loss of the subject-matter

(*n*) Per Lord Alvanley in Dyson *v.* Rowcroft (1803), 3 B. & P. 476.

(*o*) Adams *v.* McKenzie (1863), 32 L. J. C. P. 92. The insurer is, however, liable for salvage charges, which it appears are not covered by a "total loss only" policy. See Mar. Ins. Act, 1906, s. 76 (2), *ante*, § 871; Dixon *v.* Whitworth (1880), 4 Asp. M. L. C. 327.

(*p*) Wilson *v.* Smith (1764), 3 Burr. 1550; Price *v.* The A1 Ships Small Damage Assoc. (1889), 22 Q. B. D. 580.

(*q*) Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357.

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insured other than a general average loss, and does not include "particular charges" (*r*).

4. Meaning of the words "or the ship be stranded." To give effect to these words it need not be shown that the loss arose from the stranding.

886. Next, as to the words "or the ship be stranded," it has been decided that if the ship be stranded, the underwriters are liable for partial losses, though the damage or deterioration in respect of which the claim is made be shown to have proceeded, not from the stranding itself, but from some other peril; thus, in the leading case of Burnett *v.* Kensington, the facts were, that the ship, having sprung a leak by striking on a rock, was making so much water, that the captain, for the general safety, was obliged to run her on shore;—the cargo, which was fruit, "warranted free of average," was greatly damaged, but it was expressly found that the whole damage was done by the leak, and none by the subsequent stranding—the Court, after two arguments and the most mature deliberation, held the underwriters liable for the average loss on the cargo, notwithstanding the memorandum (*s*). The reason that mainly influenced the Court in their decision was that, by determining that the assured could only recover for loss occasioned by the stranding, they would let in all the doubt and difficulty as to the causes of the loss, which the introduction of the exception "unless stranded" into the memorandum was intended to remove (*t*).

(*r*) Mar. Ins. Act, 1906, Sched. I. r. 13. See also sect. 76 (2) of the Act, *ante*, § 871.

(*s*) Burnett *v.* Kensington (1797), 7 T. R. 210; confirming Cantillon *v.* London Ass. Co. (1754), cited 3 Burr. 1553, and Bowring *v.* Elmslie (1790), cited 7 T. R. 215, and overruling, as to this point, Wilson *v.* Smith (1764), 3 Burr. 1550. In America, see London Assurance *v.* Companhia de Moagens (1897), 167 U. S. 149.

(*t*) See per Grosse, J., 7 T. R. 224; and cf. Nesbitt *v.* Lushington (1792), 4 T. R. 783; and Thames, &c. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476. A clause in general use provides as follows:—"Warranted free from particular average under 3 per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby." It is submitted that where such a clause is attached to a policy which also contains the common memorandum, effect would be

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Though the stranding take place in one part of the voyage, and the average loss in another, still the underwriter is liable.

In this case of Burnett *v.* Kensington, it will be observed that the stranding, though subsequent in point of time, was yet in some degree connected with, in fact was necessitated by, the very peril that caused the damage to the cargo: it has been made a question in the United States, whether the underwriter is liable, if the stranding take place in one part of the voyage, and the cargo be not damaged until a subsequent part of it, by a cause wholly unconnected with the stranding (*u*). This, however, is a point on which is is apprehended that no doubt can be entertained in English law, it being distinctly admitted by Grose, J., as a consequence clearly following from the decision of the Court in Burnett *v.* Kensington, "that, if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather, and the cargo sustains an average loss of 90 per cent., the underwriters are answerable for the whole of that average loss," though no part may have happened in consequence of the previous stranding (*x*).

Provided the goods be still at risk, and on board the ship.

887. Where, however, the stranding takes place after the memorandum articles have ceased to be at risk (as where they were landed and sold at Rio in the course of the voyage, and the stranding took place off Bordeaux, the port of destination), this does not render the underwriter liable for an average loss sustained by them in the course of the voyage, for the stranding contemplated by the memorandum must be one which takes place after the adventure on the memorandum articles has commenced, and before it has terminated (*y*). Moreover, the goods must be on board the ship at the time of the stranding (*z*).

given to the final words by limiting the underwriters' liability in accordance therewith, notwithstanding the decision in Burnett *v.* Kensington.

(*u*) 2 Phillips, Ins. s. 1761.

(*x*) Per Grose, J., in Burnett *v.* Kensington (1797), 7 T. R. 223, 224.

(*y*) Roux *v.* Salvador (1835), 1 Bing. N. C. 536; (1836), 3 *ibid.* 266; Thames, &c. Ins. Co. *v.* Pitts, [1893] 1 Q. B. 476; The Alsace Lorraine, [1893] P. 209.

(*z*) Thames, &c. *v.* Pitts; The Alsace Lorraine, *ubi supra*.

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Effect is given to these decisions by rule 14 of the Rules for Construction of Policy contained in the First Schedule to the Marine Insurance Act, 1906, which states that "where the ship has stranded the insurer is liable for the excepted losses although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board."

Stranding of a lighter is not within the exception.

It has also been decided, that the words "or the ship be stranded" are exclusively confined to the stranding of the ship, and that the stranding of a lighter, in which goods are being conveyed from the ship to shore, is not within the exception (*a*).

The meaning of the memorandum, therefore, is—

1. That all losses, in the nature of general average, are to be paid by the underwriter as though the policy did not contain the memorandum:

2. That the underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded:

3. But that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist.

It is obviously, therefore, of great importance to ascertain when a ship is considered "to be stranded" within the meaning of the memorandum.

What is a stranding within the memorandum.

888. The term "stranding" is very badly chosen, and has given rise to a variety of decisions which, in the language of Lord Ellenborough, "display a curiosity not at all creditable to the law" (*b*).

(*a*) Hoffman *v.* Marshall (1835), 2 Bing. N. C. 383; 2 Scott, 504. This contingency, however, may be expressly provided for, as in Thames, &c. *v.* Pitts, *ubi supra*, where the words were "unless the ship or craft should be stranded, &c."; as to the effect of which words, see per Day, J., at p. 486.

(*b*) Per Lord Ellenborough in M'Dougle *v.* Royal Exch. Ass. Co. (1816), 4 Camp. 284; 4 M. & S. 503.

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The following appear to be the principal points determined as to what constitutes a stranding within the meaning of the memorandum:—

There must be a settling of the ship for a time, as distinct from a mere "touch and go."

If, as Lord Ellenborough says (*c*), "it be merely touch and go" with the ship,—if, that is, she merely touches on the obstructing object (whether rock, bank, reef, or of whatever other nature) without remaining fixed upon it for some space of time, that will not constitute a stranding; if, on the other hand, she settles down on it in a quiescent state, it will (*d*). The amount of damage sustained by the ship has nothing to do with the question of stranding or no stranding (*e*).

On piles in river bed.

Thus, where a ship ran aground on some piles, placed in a river bed about nine yards from the shore, in order to keep up the banks, and there rested till they were cut away, this was held to be a stranding (*f*).

On mud-bank for two hours.

A ship was proceeding down a tidal river when the wind suddenly took her ahead, and she went ashore stern foremost on the mud bank of the river. There she remained fast for about two hours, till the tide flowed, when she got off and proceeded on her voyage; it was not found that she had sustained any injury. Lord Ellenborough held that this was a stranding; he says, "It is not merely touching the ground that constitutes stranding. If the ship touches and runs, that circumstance is not to be regarded. There she is never in a quiescent state; but if she is forced ashore, or driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she may thereby sustain" (*g*). So, where a ship was driven by a current on a rock, and remained fixed there from fifteen to twenty minutes, it was held a stranding (*h*).

On a rock for twenty minutes.

(*c*) 4 Camp. 283.

(*d*) Dobson *v.* Bolton (1799), 1 Park, Ins. 239; 1 Marshall, Ins. 231; Harman *v.* Vaux (1813), 3 Camp. 429; Baker *v.* Towry (1816), 1 Stark. 436; M'Dougle *v.* Royal Exch. Ass. Co. (1816), 4 Camp. 283.

(*e*) Harman *v.* Vaux (1813), 3 Camp. 429.

(*f*) Dobson *v.* Bolton (1799), 1 Park, Ins. 239; 1 Marshall, Ins. 231; 2 Phillips, Ins. s. 1758.

(*g*) Harman *v.* Vaux (1813), 3 Camp. 429.

(*h*) Baker *v.* Towry (1816), 1 Stark. 436.

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But, where a ship coming out of a harbour struck on a rock, fell over on her beam ends, and after remaining so for a minute and a half floated off and proceeded on her voyage, Lord Ellenborough held that this was no stranding. "To use a vulgar phrase which has been applied to this subject, if it is 'touch and go' with the ship there is no stranding. It cannot be enough that the ship lay for a few moments on her beam ends. Every striking must necessarily produce a retardation of the ship's motion. If by the force of the elements she is run aground and becomes stationary, it is immaterial whether this be on piles or on rocks on the sea shore; but a mere striking will not do, wheresoever that may happen" (*i*). When the case came before the full Court, his Lordship said, "I take it that stranding in its fair legal sense implies a settling of the ship—some resting or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked; from which misfortunes a great deal of damage does frequently occur" (*k*).

Mere "touch and go."

In the case of Baring *v.* Henkle (*l*), Lord Kenyon held that a ship in a tidal river which was fouled and driven on a bank, where she remained an hour, was not stranded. This decision, which is inconsistent with the later authorities, is very questionable (*m*).

No stranding where the ship takes the ground in the ordinary course of navigation.

889. Another important test is to ascertain whether the ship took the ground in the ordinary course of the navigation, or in consequence of some unusual and unexpected calamity.

"Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural

(*i*) M'Dougle *v.* Royal Exch. Ass. Co. (1816), 4 Camp. 283; *S. C.*, 4 M. & S. 503.

(*k*) 4 M. & S. 505. "Stranding," however, does not, at any rate in a clause covering a tug's liability for the "stranding or grounding" of her tow, include sinking in deep water, and there taking the ground: Baker-Whiteley Coal Co. *v.* Marten (1910), 26 Times L. R. 314.

(*l*) Baring *v.* Henkle (1801), 1 Marshall, 232; 2 Phillips, Ins. s. 1758.

(*m*) Per Taunton, J., in 3 B. & Ad. 27; per Lord Campbell in 1 E. & B. 460.

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deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a stranding within the memorandum" (*n*).

Hearne *v.* Edmunds.

A vessel, under the care of a pilot, while being taken up Cork river, twice took ground from shallowness of water, and remained aground, on the first occasion eight, and on the second occasion ten, hours. She was each time floated off by the tide, and afterwards at high water was moored to a quay in Cork harbour: on the tide ebbing she fell over on her side, and lay on her broadside for two whole tides, by which the ship and cargo (which was warranted free of average) were much damaged. Taking the ground in the manner mentioned appeared in evidence to be no more than was usual with all vessels of the same class in the Cork river. This was therefore held not to be a stranding within the memorandum (*o*).

So, where a vessel entered a tidal harbour, and was moored in the very place indicated by the harbour-master, and, upon the tide ebbing, took the ground in the precise spot where it was intended she should, and, in so doing, struck on some hard substance, whereby her bottom was damaged, this was held not to be a stranding, but a mere taking the ground in the ordinary course of the navigation (*p*).

But where the ground is taken by reason of some accidental occurrence or extraneous cause, that is a stranding.

890. "But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event is a stranding within the meaning of the memorandum" (*q*); or, as Tindal, C. J., expresses it, "where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which

(*n*) Per Lord Tenterden in Wells *v.* Hopwood (1832), 3 B. & Ad. 34. As to the reasons for the rule, see per Tindal, C. J., 8 Bing. 463; Parke, J., in 3 B. & Ad. 29.

(*o*) Hearne *v.* Edmunds (1819), 1 Brod. & B. 388; 4 Moore, 15.

(*p*) Kingsford *v.* Marshall (1832), 8 Bing. 458; 1 M. & Scott, 657. See also Magnus *v.* Buttemer (1852), 11 C. B. 876; 21 L. J. C. P. 119.

(*q*) Per Lord Tenterden, 3 B. & Ad. 34.

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the ship is engaged, either wholly or in part, but from some accidental or extraneous cause, that is a stranding" (*r*).

Instances: Breaking of rope, where improperly moored.

A pilot, contrary to the warning of the captain, and in his absence, fastened a ship by a rope to the pier of the St. George's dock basin, where the dock-master told him she would not lie safely. Soon afterwards the ship took ground astern, and, the tide ebbing, the rope broke, and she fell over on her side and was much damaged. The Court held that this was clearly a stranding, the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened (*s*).

Breaking knees by heavy swell.

The decision was the same where a ship took the ground in Boulogne harbour, and had her knees broken by a heavy swell running into the harbour (*t*).

Settling on piles owing to emptying canal.

A ship being in Wisbeach river (which is an artificial inland navigation) it became necessary to draw off the water: upon the water's sinking, the ship accidentally settled down on some piles, which were not previously known to be there. This was held to be a stranding, the event not being in the ordinary course of the navigation; for "we cannot suppose," says Abbott, C. J., "that these canals are so constantly wanting repair as to make the drawing off the water an occurrence in the ordinary course of the voyage" (*u*).

Taking ground when warped in harbour.

A ship, on entering a tidal harbour, struck the fluke of an anchor, and being afterwards moored in deep water was found to be in danger of sinking. For this reason she was warped further up the harbour, where she took ground and remained fast. This was held to be a stranding, for, as remarked by Bayley, J., "the ship, in this case, was laid on the strand, not in the ordinary course of navigation, but *ex necessitate* to avoid an impending danger" (*x*).

(*r*) 8 Bing. 464.

(*s*) Carruthers *v.* Sydebotham (1815), 4 M. & S. 77; and see the observations of Taunton, J., on this case in 3 B. & Ad. 25.

(*t*) Fletcher *v.* Inglis (1819), 2 B. & Ald. 315.

(*u*) Rayner *v.* Godmond (1821), 5 B. & Ald. 225.

(*x*) Barrow *v.* Bell (1825), 4 B. & Cr. 736.

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Falling over by breaking of rope.

A ship was obliged to put into a harbour which was dry at every tide, and was there moored alongside a quay where ships of her burthen usually lay: in addition to the usual moorings, it was found necessary to lash her by a rope fastened round her masts to posts on the shore; when the tide ebbed, this rope, not being of sufficient strength, broke; on which she fell over on her side and was stove in. This was held to be a stranding: the falling over having taken place, not in the ordinary course of the voyage, but in consequence of an unforeseen accident, viz., the breaking of the rope (*y*).

So, too, where a vesesl was necessarily beached by salvors in consequence of her crippled condition resulting from perils of the sea, and while lying in that position sustained considerable further injury, it was held that there was a stranding (*z*).

Taking ground upon a hard bottom.

Finally, the point was discussed in a case the facts of which were as follows:—The risk was on goods until safely landed at Dingle, a port in a tidal harbour on the west coast of Ireland, where vessels of the size of the ship in question could only reach the quay to unload during high spring tides. The vessel was in the course of being brought to the quay; but as it was found that she could not get within 20 feet of it, she was left where she was to await a higher tide, it being intended that, in accordance with the usual practice, she should, while so waiting, take the ground on an even keel on hard sand. Instead, however, of doing so, she pitched by the head across a bank into a hole and remained in such a position as to cause her timbers to be strained, by reason whereof she made water and damage resulted to the cargo. The bank and tide which caused the mischief had not been previously known to exist, but were afterwards ascertained to have been fortuitously caused, and no vessel had met with a similar occurrence before. The Court of Appeal, affirming Field, J., accepted as correct the statement of the law in the

(*y*) Bishop *v.* Pentland (1827), 7 B. & Cr. 219.
(*z*) De Mattos *v.* Saunders (1872), L. R. 7 C. P. 570.

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cases above cited, but decided that under the circumstances the stranding was not in the ordinary course of navigation. "It is sufficient to say," said Brett, L. J., "that where by temporary circumstances the bottom of the harbour is in a different condition from its ordinary state, and a vessel takes the ground in a different manner from that which was intended, she may be said to be stranded" (*a*).

What is a sinking or a burning within the memorandum.

891. It may often be a question of some nicety to determine whether a vessel is "sunk" or "burnt" within the meaning of the memorandum. In The Glenlivet (*b*), a fire broke out on board the ship, in one of the coal bunkers, severe enough to do some damage to the plating before it was extinguished. The shipowner contended that any fire doing any structural damage was sufficient to constitute a burning of the ship (*c*). The Court of Appeal, however, while agreeing that a partial burning might be sufficient, held that the question as to whether, under all the circumstances of the particular case, the vessel was within the ordinary meaning of the English language a "burnt" ship, was one of fact, and that in this particular case the vessel had clearly not been "burnt."

There has been no judicial decision on the meaning of "sunk," and it may be doubted whether a vessel would be held to have "sunk" where she has been throughout capable of being navigated and has eventually reached port in safety. In Bryant & May *v.* London Assurance Co. (*d*) the vessel on arrival at Gravesend, with a cargo of match splints, had her deck submerged as far aft as the mainmast, and the cargo was much wetted. The plaintiffs contended that she had sunk as far as a vessel with such a cargo could sink. But a special

(*a*) Letchford *v.* Oldham (1880), 5 Q. B. D. 538. Cf. also Wells *v.* Hopwood (1832), 3 B. & Ad. 20; Corcoran *v.* Gurney (1853), 1 E. & B. 456; 22 L. J. Q. B. 113.
(*b*) [1893] P. 164; [1894] P. 48.
(*c*) This construction was adopted by a Circuit Court of Appeals in America, where the words were "on fire": Thames and Mersey Mar. Ins. Co. *v.* Pacific Creosoting Co. (1915), 223 Fed. R. 561.
(*d*) (1886), 2 Times L. R. 591; Gow, Mar. Ins. 180.

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jury found that there had been no sinking within the meaning of the memorandum.

The meaning of "collision" has been already dealt with when treating of the more general words in the policy (*e*). It is unnecessary to discuss this expression specially in this context.

The 5 and 3 per cent. clauses.

892. The object of both the 5 per cent. and the 3 per cent. clause is the same, viz., to protect the underwriter against trifling claims. The former, comprising articles more liable to sea damage than the general cargo, though not so perishable as those which in the first clause are warranted free of all average, stipulates that with respect to them the underwriter shall not be liable unless the loss amounts to 5 per cent.; the latter clause provides that, with regard to the general cargo, the ship and freight, he shall not be liable unless the loss amounts to 3 per cent. (*f*).

Upon the construction of these clauses many questions have arisen, which may, however, all be comprised under two general heads, viz.: 1. How is the required amount of loss to be made up in itself? 2. Upon what value is it to be calculated?

1. How the required percentage is to be made up.

893. The first question that presents itself under the first head is this: Can successive losses, happening at different times, be added together, so as to make the underwriter liable if their aggregate amount exceeds 5 per cent. or 3 per cent.?

With regard to freight and goods, there never has been any doubt that the true rule is to take the aggregate amount of the whole damage occasioned in the course of the voyage; on the ground that until the end of the voyage it is impossible to estimate the real amount of damage done to the cargo (*g*).

(*e*) *Ante*, §§ 795, 826. In America, cf. London Assurance *v.* Companhia de Moagens (1897), 167 U. S. 149.

(*f*) The articles specified in the 5 per cent. clause are generally called, together with those in the first clause, enumerated articles; the "other goods" included generally in the 3 per cent. clause, are called the non-enumerated articles.

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(1) Successive losses happening at different parts of voyage may be added together.

It was decided in 1832 that the rule was the same in this country with regard to the ship also (*h*). An earlier case in America had decided the contrary (*i*).

In 1885 the point was considered by the Court of Appeal (*j*). The decision of 1832 was declared to be binding as regards voyage policies. The law of this country, therefore, now is that successive, distinct and separate average losses, whether on ship, freight or cargo, may at the termination of a voyage covered by a voyage policy be added together, so that if the aggregate exceeds the stipulated percentage the underwriter will be liable.

As regards time policies, however, a distinction is made. It was argued on behalf of the shipowner, in the case in the Court of Appeal above referred to, that he was entitled to wait until the end of the year for which his vessel was insured and then add together all the average losses incurred, although they had been incurred in separate and distinct voyages during the year. It was held, however, in view of the long established maritime practice of dividing the voyages and treating each voyage as a separate matter, that the shipowner could only add together such average losses as occurred in the same voyage (*k*).

(2) Whether general and particular average can be added together to make up the amount.

894. A second rule is, that "a general average loss cannot be added to a particular average loss to make up the specified percentage" (*l*).

(*g*) Benecke, Pr. of Indem. 473; Stevens, Av. 228; Donnell *v.* Columb. Ins. Co. (1836), 2 Sumn. 366.

(*h*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 C. & J. 244.

(*i*) Brooks *v.* Oriental Ins. Co. (1828), 7 Pick. (Mass.) R. 259; disapproved, however, in Donnell's Case, *ubi supra*.

(*j*) Stewart *v.* Merchants' Marine Ins. Co. (1885), 16 Q. B. D. 619. Cf. also Price *v.* The A1 Ships Small Damage Ins. Assoc., Ltd. (1889), 22 Q. B. D. at p. 588. The decision in Stewart's Case was severely criticised by Maclachlan in the 6th edition of this work (pp. 829—833).

(*k*) The Institute Time Clauses (see Appendix B.) contain express provisions on this point.

(*l*) Mar. Ins. Act, 1906, s. 76 (3), adopting the decision of the Court

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(3) Particular charges cannot be added to the average.

896. A third rule is, that expenses (called "particular charges" by average adjusters) incurred for saving or preserving the cargo and freight (such as warehouse rent in an intermediate port, and expenses of unloading and reloading) cannot be added to the damage, in order to make it up to the required amount (*m*); for, as Stevens says, these expenses are not of the nature of a loss, but are charges incurred to preserve and bring forward the property: the clause only contemplates a loss, and that such loss should arise from an accident (*n*). These charges themselves must be paid by the underwriter, whether they amount to 3 per cent. or not (*o*).

(4) Nor the expenses of ascertaining the amount of loss.

897. Fourthly, it is a rule that the expenses of and incidental to ascertaining and proving the loss cannot be added to the damage to make up the required percentage (*p*); but if the damage *per se* exceeds the required amount, then these charges are added to it and paid by the underwriter; otherwise they are paid by the assured: the rule being that they should fall on the party who must have sustained the loss had its amount been ascertained without any expense.

These two latter rules are both embraced in sub-sect. 4 of sect. 76 of the Marine Insurance Act, 1906, which provides that—

> (4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

of Appeal in Price *v.* The A1 Ships Small Damage Assoc. (1889), 22 Q. B. D. 580—a decision which the editors in an earlier edition of this work ventured to criticize. See 7th ed. §§ 894, 895. See also McArthur, 282, and App. IV. In consequence of this decision the Association of Average Adjusters altered their rule of practice so as to conform thereto.

(*m*) Mar. Ins. Act, 1906, s. 76 (4), *infra*, § 897; Stevens, 230; Benecke, 472.

(*n*) Stevens, 230.

(*o*) Benecke, 472; 2 Phillips, Ins. s. 1777. Cf. Kidston *v.* Empire Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357.

(*p*) Benecke, Pr. of Indem. 474; 2 Phillips, Ins. s. 1791.

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II. On what amount the percentage is to be calculated.

On the amount at risk at the time of loss.

898. The second question is upon what amount is the percentage to be calculated: (1.) It is a rule that the exception is limited in its application to the amount at risk under the policy at the time of loss—*i.e.*, if it amounts to 5 per cent. or 3 per cent. on the interest then on board it is sufficient, though it may not amount to 5 or 3 per cent. on the interest subsequently at risk under the policy. This is established by a very revolting instance. In a policy on a slave ship the slaves were warranted "free of average under 5 per cent. for loss from insurrection." An insurrection took place at a time when there were only forty-nine slaves on board: seven were killed in suppressing it. It was held that the underwriters were liable, this being a loss exceeding 5 per cent. of the number on board when it took place, though it was by no means 5 per cent. of the number that ultimately formed the complete cargo (*q*).

When insured in gross, the percentage is calculated on the whole quantity of each enumerated article.

(2.) Upon the articles enumerated in the 5 per cent. clause when insured in gross (as is often the case with hides, flax, hemp, &c.), the proportion of damage is calculated upon the whole amount of each specified article taken separately, *i.e.*, the construction of the memorandum is the same as if it were worded "sugar free of average under 5 per cent., tobacco free of average under 5 per cent., hemp free of average under 5 per cent.," and so on with the rest of the enumerated articles. Thus, if flax and hemp be insured together, valued at 1,000*l.*: let the aggregate amount of damage upon both articles be 100*l.*, *i.e.*, 10 per cent. on their whole value taken jointly; yet, unless the damage on each amounts to 5 per cent. of its value taken separately, the claim can be made good only on the one on which it reaches that amount (*r*).

When not enumerated, then on all together; except where each class of commodities is separately valued.

(3.) Where, however, as in the 3 per cent. clause, the rest of the cargo, under the general term "all other goods," is warranted free of average, without any specific enumeration of distinct classes, it is obvious that the same rule cannot apply: accordingly, the practice is to regard the whole of

(*q*) Rohl *v.* Parr (1796), 1 Esp. 445.

(*r*) Stevens on Average, 223; 2 Phillips, Ins. s. 1785.

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the non-enumerated articles as forming together one mass of property, and then to calculate the percentage of damage on their aggregate value (*s*); unless, indeed, the non-enumerated articles have been separately valued in the policy, for then, it seems, such separate valuation gives a distinct basis on which to compute the damage, as, *e.g.*, if coffee is valued at 300*l.* and tea at 3,000*l.*, the amount of damage on the coffee must amount to 9*l.*, and on the tea to 90*l.*, in order to make the underwriter liable; if it were 11*l.* on the coffee and 89*l.* on the tea, he would be liable on the former only, and not on the latter (*t*).

Where merely shipped in separate packages, without separate valuation, the percentage of loss is calculated on the whole.

(4.) Where, however, large quantities of the same description of articles, whether enumerated or unenumerated, are made up in separate packages, the damage must amount to 5 per cent. or 3 per cent. of the whole aggregate of packages of the same class of goods, and cannot be calculated upon each separate package.

Thus, suppose 101 hogsheads of sugar or 101 bags of coffee to be insured free of average, the former under 5 per cent., the latter under 3 per cent.; suppose, further, five of the hogsheads or three of the bags to be so damaged as to be wholly unfit for use, the underwriter is not liable (*u*).

Clauses specially inserted to avoid this mode of calculating the percentage.

899. It is obvious that this mode of estimation must in many cases be unfavourable to the assured; in order, therefore, to protect himself and render the underwriter liable, where otherwise, on the strict construction of the memorandum, he could not be so, certain stipulations have been introduced into the policy on behalf of the assured, as *e.g.*, in the case of a steamer, "hull valued at *l.*, machinery at *l.*, to pay average on each as if separately insured;" or, in case of goods, "to pay average on each species, as though separate interests separately insured;" "To pay average on ten, fifteen or twenty hogsheads, succeeding

(*s*) 2 Phillips, Ins. s. 1786.
(*t*) 2 Phillips, Ins. s. 1788; and the case of Ocean Ins. Co. *v.* Carrington (1820), 3 Conn. R. 357, there cited.
(*u*) 1 Magens, 73; Stevens, 224; Benecke, 474.

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numbers," or, "running landing numbers, as if, &c.," as before. If there are no numbers, in such case the practice is to disregard the special clause entirely, and to pay the average only if it amount to the stipulated percentage on the whole quantity (*x*). To meet the case where goods are shipped in bales or packages, each bale or package, each five bales, &c., is often declared to be a separate insurance. So, also, in policies on wood cargoes, including the risk of craft or raft and deck-load, it is usual to stipulate that each craft, raft, or deck-load is to be deemed a separate insurance (*y*).

Effect of these clauses.

900. The effect of these clauses is to make the underwriter liable in many cases where he would have escaped from liability altogether upon the strict construction of the usual printed clauses.

Thus, let 1,000*l.* be insured on ten cases of manufactured goods valued at 100*l.* each case, "to pay average on each package, as if separate interests separately insured;" suppose five of the cases to be damaged each 3 per cent., or 15*l.* in the whole, then compensation may be claimed from the underwriters, though, without the clause, the loss must have amounted to 30*l.* in order to make them liable (*z*).

Where damage exceeds the required percentage on the whole amount as well as on the separate lots.

If the damage exceeds the required percentage on the whole amount, the assured may, at his option, calculate the percentage either on the whole amount or on the damaged packages.

Thus, supposing on the same data one of the cases to have been damaged 50 per cent., or 50*l.*, and the rest to arrive damaged only 1 per cent., the assured may recover the amount of damage on the nine cases, though under the required percentage, because the whole damage exceeds 5 per cent. on the whole value. The reason is, that this clause, having been introduced for the benefit of the assured, must be construed in his favour (*a*).

(*x*) Benecke, Pr. of Indem. 478; and see note, *ibid.*
(*y*) See Gow, Mar. Ins., Appendix M., for illustrations.
(*z*) Stevens, 226.
(*a*) Hagedorn *v.* Whitmore (1816), 1 Stark. 157; Stevens, 226;

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Liberal construction where these clauses are not inserted.

Stevens said that the insertion of these clauses was in his time so much a matter of general usage whenever goods were insured direct from their place of growth or manufacture, that, even when omitted, the policy was acted upon as though they had been introduced (*b*).

It has been decided in the United States that, in order to calculate whether the percentage of loss amounts to 5 or 3 per cent. on the insurable value of the goods, the premium is to be deducted from that value (*c*); but no such principle appears to be acted upon in this country; on the contrary, the rule here is that the underwriter is liable whenever the loss (under the limitations already pointed out) amounts to 5 per cent. or 3 per cent. on the value in the policy, or on the prime cost plus the premium and other costs of insurance.

If the percentage exceeds the required amount, the underwriter is liable for the whole amount of loss, and not merely for the surplus.

It appears to have been the intention of those by whom the clause was first introduced, that the surplus only of loss above the 5*l.* or 3*l.* per cent. should be paid by the underwriter; the practice, however, in this country has uniformly been that, when the loss exceeds the excepted amount of percentage, the underwriter is liable for the full amount of the loss, and not only for the surplus (*d*).

The "free of particular average" clause.

901. It will be noticed that the arrangement of all articles of commerce into the three classes contained in the memorandum is a very rough one, and is simply made by forming two classes out of a dozen enumerated articles and throwing all else into the residuum. This arrangement has in recent years been very much developed, with the result that the common memorandum has in practice been very largely superseded by the insertion of special terms adapted to the particular articles at risk. It is probable that, although

Benecke, Pr. of Indem. 476. The words "or on the whole" are often inserted, so as to make it clear that the assured has this option.

(*b*) Stevens, 225.

(*c*) Brooks *v.* Oriental Ins. Co. (1828), 7 Pick. R. 259; 2 Phillips, s. 1790.

(*d*) Stevens, 227. So in the United States, 2 Phillips, s. 1791. As to the "Janson" clause, however, see s. 882, n. (*c*), *ante*.

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the memorandum was itself originally introduced in order to restrict the liability of underwriters for particular average claims, its modern development has been just as much due to the acuteness of the merchant displayed in his search for the exact form of insurance which, as regards each particular subject of commerce, will afford adequate protection for real perils without throwing upon him the burden of paying for such as are not likely to arise. For example, some cargoes are not much liable to partial losses; the probability is that if they arrive at all they will arrive undamaged. The real danger in such a case is that of total loss. The merchant recognizing this fact insures at a cheaper rate with a warranty against particular average. With regard to the warranty against particular average, sect. 76 of the Marine Insurance Act, 1906, contains the following provisions:—

> Sub-sect. 1. Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.
>
> Sub-sect. 2. Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

In an English policy this warranty now takes the following, or some similar form, evolved after many years of bargaining between underwriter and merchant (*e*):—

"Warranted free from particular average, unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance (*f*).

(*e*) For an account of the process by which the warranty in its present form was eventually arrived at, see Gow, Mar. Ins. 183—187.

(*f*) For the construction of the clause, "warranted free from par-

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"Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, reshipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment.

"Grounding in the Suez Canal not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom" (*g*).

And apart from settled clauses, many of the large London merchants have special arrangements with their underwriters, providing for the exact risks insured against, which vary according to the nature of each article of commerce.

"Total loss only."

902. Clauses similar to the "free from particular average" clause in a cargo policy are used with respect to ship. It often happens that an insurer against all risks wishes to transfer part of the risk to other shoulders: this he may do by effecting a re-insurance "against total loss only." The re-insurer will then be exempt from all average claims, particular or general, and also from salvage charges (*h*), but will be liable for a constructive, as well as for an actual, total loss (*i*). Liability for a constructive total loss is sometimes excluded by insuring "against the risk of absolute total loss

ticular average and loss unless caused by stranding, sinking, burning, or collision of the ship or craft," in policies on frozen meat, see Otago Co-operative Assn. *v.* Thompson, [1910] 2 K. B. 145. Hamilton, J., held that "loss" in this warranty included total as well as partial loss of the subject-matter insured. The underwriter admitted that, notwithstanding the warranty, general average would be payable.

(*g*) The Institute Clauses should also be referred to, which, as regards insurances on ships, are much more favourable to underwriters. See Appendix B.

(*h*) Dixon *v.* Sea Ins. Co. (1880), 4 Asp. M. L. C. 327. This decision, however, applies only to salvage charges proper, which were held in Lohre *v.* Aitchison not to be recoverable under the suing and labouring clause. For particular charges an original insurer is liable under the suing and labouring clause, even in a "total loss only" policy: Crouan *v.* Stanier, [1904] 1 K. B. 87. But a re-insurer is not: Uzielli *v.* Boston Mar. Ins. Co. (1884), 15 Q. B. D. 11.

(*i*) Adams *v.* McKenzie (1863), 32 L. J. C. P. 92.

only." A vessel, however, which was originally only a constructive total loss may, owing to continued operation of the perils, become an actual total loss, so as to render underwriters liable under this clause (*j*). Sect. 902.

Warranties to be free of seizure and confiscation in port of discharge, &c.

903. During the Napoleonic war, when almost all the ports of the Baltic were in a state of occasional hostility to this country, and the adventurous expeditions to those seas were undertaken without any fixed destinations (the election of the ports of discharge being necessarily left to the captain's discretion, according to the exigencies of the case), it became frequent for the underwriters to insert a stipulation that they should not be answerable for the risk of capture, seizure, or confiscation in the ship's port of discharge, or in port or ports generally.

Warranty to be free of seizure. What is the ship's port of discharge within the meaning of the warranty.

Various cases were decided on the construction of these clauses, in most of which the sole question was, whether the ship, at the time of seizure, was in that, which, with reference to the nature of the risk and the whole circumstances of the case, could fairly be regarded as her port of discharge, within the contemplation of the parties to the policy. The Courts, as the nature of the subject required, exercised great liberality of construction in forming a judgment on this point, guiding themselves rather by the nature of the risk and the intention of the parties, than by the strict and legal meaning of the term "port."

Hence, it was decided by Lord Ellenborough, that if a ship, "warranted free from capture and seizure in her port of discharge," once come within the danger of capture from the land, for the purpose, and with the intention, of discharging her cargo, she should be considered to be in her elected port of discharge within the meaning of this warranty; and this whether she come to an anchor in an open roadstead outside a harbour, the same being a place where ships of burden usually unload (*k*); or lie on and off in a river forming the

(*j*) Levy *v.* Merchants' Marine Ins. Co. (1885), 5 Asp. M. L. C. 407.

(*k*) Dalgleish *v.* Brooke (1812), 15 East, 295, the leading case on the

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estuary of a port, waiting for intelligence (*l*); provided in each case, that this be done for the purpose and with a design of discharging there; of which purpose and design the jury are the best, and, indeed, only proper judges (*m*). If, on the other hand, the ship be moored, not only outside the harbour, but in the open sea, outside the roadstead, in which ships usually discharge their cargoes, though she be there captured by a force from the shore, this is not a loss from which the underwriters are protected by the warranty (*n*).

Warranty to be free of confiscation in port of discharge.

904. Confiscation means more than capture, and imports "an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government, though the proceeds need not, strictly speaking, be brought into its treasury" (*o*). Hence, where a ship, "warranted free from confiscation by the government in the ship's port or ports of discharge," was boarded in Pillau roads (a Prussian port) by two parties, one of Prussian soldiers, the other, part of the crew of a French privateer, and was condemned by the Prize Court at Paris as prize to the French captors, and the property given up to them; this was held not to be a confiscation by the Prussian government, and therefore not a risk excepted by this warranty (*p*).

Warranty to be free of capture and seizure in port generally.

905. The Courts put a different construction on the warranty to be free of capture in the ship's "port of discharge," and on the warranty to be free of capture "in port or ports" generally (*q*). In the first case, they considered the intended

subject of this warranty; Oom *v.* Taylor (1812), 3 Camp. 204; Maydhew *v.* Scott (1812), *ibid.* 205.

(*l*) Jarman *v.* Coape (1811), 13 East, 394; *S. C.*, 2 Camp. 613.

(*m*) Keyser *v.* Scott (1812), 4 Taunt. 660; Reyner *v.* Pearson (1812), 4 Taunt. 662; Levin *v.* Newenham (1813), *ibid.* 722.

(*n*) Mellish *v.* Staniforth (1811), 3 Taunt. 499; Levy *v.* Vaughan (1812), 4 Taunt. 387; Keyser *v.* Scott (1812), *ibid.* 660; Levin *v.* Newenham (1813), *ibid.* 722.

(*o*) Per Lord Ellenborough in 15 East, 269.

(*p*) Levi *v.* Allnutt (1812), 15 East, 267.

(*q*) Per Lord Ellenborough in Jarman *v.* Coape (1811), 2 Camp. 614.

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place of unloading "the port of discharge," though an open roadstead, and not *infra præsidia portus:* in fact, as Bayley, J., expressed it, in Jarman *v.* Coape, the word "port" in such warranties was regarded as used in contradistinction to the high seas (*r*). On the other hand, they determined that a warranty against capture in port generally could not be available for the underwriters, unless the ship, at the time of capture, was actually within some port; and that it was not sufficient, under such a warranty, that she should then be in an open roadstead, where ships, in ordinary circumstances, sometimes lighten, but never discharge, their cargoes (*s*); nor within the headlands which form the mouth of a river. Hence, where a ship, insured from Rotterdam to London, and "warranted free from capture in port," was captured while lying at anchor off Ghoree, in the river Maes, within the headlands which form the mouth of that river, the underwriters were held liable (*t*).

The present Lloyd's form of this warranty (*u*) is as follows: "Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof, or of any attempt thereat, piracy excepted (*x*), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

This warranty in its earlier form, *i.e.*, before the words "arrest, restraint, or detainment" were expressly included therein, was held to have the effect of striking out arrests, restraints, and detainments (*y*), and also losses *ejusdem*

(*r*) Per Bayley, J., in Jarman *v.* Coape (1811), 13 East, 398.

(*s*) Brown *v.* Tierney (1809), 1 Taunt. 517.

(*t*) Baring *v.* Vaux (1810), 2 Camp. 541.

(*u*) For the history of the clause see the judgment of Atkin, L. J., in Britain SS. Co. *v.* The King, [1919] 2 K. B. at p. 692.

(*x*) See Republic of Bolivia *v.* Indemnity Mut. Mar. Ass. Co., [1909] 1 K. B. 785; *ante*, § 836.

(*y*) Miller *v.* The Law Accident Ins. Co., [1903] 1 K. B. 712. See also per Scrutton, L. J., in Leyland Shipping Co., Ltd. *v.* Norwich Union, Ltd., [1917] 1 K. B. at p. 896.

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generis (*z*), from the list of perils insured against in the policy.

"In the construction of this warranty," said Lord Fitzgerald, "it is observable that 'capture' and 'seizure' do not mean the same thing. 'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture,' and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession either by a lawful authority or by overpowering force" (*a*).

Rule of *causa proxima* applied to the warranty.

If a ship with such a warranty be lost under such circumstances that the proximate cause of loss is perils of the seas, though she be also captured and condemned, the underwriter will not be protected by the warranty (*b*). Thus in Ionides *v.* The Universal Marine Association (*c*), there was a policy on goods from Rio to New York "warranted free from capture, seizure and detention and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots or commotions." Civil war prevailed in the United States. The Confederates, in order to destroy the shipping of the Northern States, had put out a very important light long established on Cape Hatteras. The ship looked for the light, and would have seen it if it had been there, but grounded for want of it and became a total wreck, by reason

(*z*) Van Laun *v.* Thames & Mersey Mar. Ins. Co. (1903), unreported, Kennedy, J., and C. A. In the House of Lords only the question of deviation was considered: *ante*, § 382a.

(*a*) Cory *v.* Burr (1883), 8 App. Cas. at p. 405. This distinction seems hardly to agree with that drawn by Lord Ellenborough in Beale *v.* Thompson (1804), 4 East at p. 561, which, however, was not an insurance case. See also Horlock *v.* Beal, [1916] 1 A. C. at pp. 504, 505 (Lord Atkinson); and see further, as to the meaning of these words, *ante*, § 829, and cases there cited. As to "warlike operations," see also Robinson Gold Mining Co. *v.* Alliance Ins. Co., [1902] 2 K. B. at p. 500, per Collins, M. R.

(*b*) Hahn *v.* Corbett (1824), 2 Bing. 205; 9 Moore, 390.

(*c*) (1863), 14 C. B. N. S. 259; 32 L. J. C. P. 170, followed in Marsden *v.* City and County Ass. Co. (1865), L. R. 1 C. P. 232. See also Le Quellec *v.* Thompson (1916), 86 L. J. K. B. 712, and Nickels *v.* London, &c. Ins. Co. (1900), 6 Com. Cas. 15.

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whereof the goods were lost by a peril of the seas. It was held that the loss was not in consequence of the hostilities, inasmuch as the extinction of the light was too remotely connected therewith to bring it within the exception, and that the underwriters were therefore liable (*d*).

On the other hand, although she may have been severely damaged by sea perils, and thereby exposed to seizure, yet, if the capture and condemnation be the proximate cause of loss, the underwriter will be discharged (*e*).

Under a warranty to be free from capture or seizure, it matters not whether the act done be lawful or unlawful, whether by private individuals or persons armed with state authority: the underwriter is not liable (*f*).

The "f.c.& s." clause during the European war.

905a. The language of the "f. c. and s." clause, as it is commonly called, gave rise to much litigation during the recent European war, and was the subject of many decisions. Some of these decisions were on the exceptive clause itself, others on policies solely and expressly effected in order to cover the risks excluded by the exceptive clause, others on a

(*d*) Cf. Muller *v.* Globe & Rutgers Fire Ins. Co. (1917), 246 Fed. R. 759, a case which in some respects is similar to Ionides *v.* Universal Mar. Assoc. The action was on a policy on goods against war risks. The ship was on a voyage with a cargo of cotton from the United States to Sweden, and intended to call at Kirkwall. She encountered a British cruiser, and was ordered to proceed by night by the passage between the Orkneys and Shetlands, when the shore lights had been extinguished. An armed party was placed on board of her, and her course was laid by the master in consultation with the naval officer in command of the party. She ran ashore and became a total loss with her cargo. The Court of Circuit Appeals held that the cargo was lost in the continuing process of detaining the ship and cargo for purposes of search and possibly seizure, and that there was no intervening cause breaking the causal connection between the control assumed by the boarding party and the loss.

(*e*) Livie *v.* Janson (1810), 12 East, 648; Green *v.* Elmslie (1792), Peake, N. P. 212.

(*f*) Powell *v.* Hyde (1855), 5 E. & B. 607; Kleinwort *v.* Shepard (1859), 1 E. & E. 447; 28 L. J. Q. B. 147; Cory *v.* Burr (1882), 9 Q. B. D. 463; 8 App. Cas. 393; Johnston *v.* Hogg (1883), 10 Q. B. D. 432; Robinson Gold Mining Co. *v.* Alliance Ins. Co., [1904] A. C. 359; *ante*, § 829.

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corresponding provision occurring in a clause in a Government form of charter-party (known as T. 99), whereby marine risks were borne by the owners, but war risks by the Government (*g*). Many of these cases turned on a pure question of fact—what was the cause of the loss of the ship? Thus where a vessel received her death-blow from an enemy's torpedo, but was taken into port where she eventually sank owing to her failure in her crippled condition to resist a moderate amount of rough weather, the House of Lords held on the facts that the cause of the loss was the torpedoing of the vessel, and the assured failed to recover on a policy against marine risks containing the exceptive clause (*h*).

Missing ships.

There were a number of cases of missing ships, where there was and could be no direct evidence of the cause of loss. In some of them the vessel had never been seen or heard of since leaving port; in others, all that was definitely known of her was that she was safe up to a certain time or until reaching a certain part of the ocean, so that it was doubtful whether the loss was due on the one hand to ordinary marine perils or on the other to enemy action on the surface or under water by mine, torpedo, or other device. In such cases each side came to Court with the best materials available—for instance, with evidence of the weather conditions prevailing at the time and in the neighbourhood of the presumed course of the vessel; of the experiences of other vessels passing through the same or neighbouring areas about the same time; of the presence or absence of enemy activity in the neighbourhood, whether above or below the surface.

(*g*) It was held in Admiralty Commrs. *v.* Sir R. Ropner & Co., Ltd. (1917), 86 L. J. K. B. 1030, that this clause was not a policy of marine insurance within sect. 23 of the Mar. Ins. Act, 1906, as it did not specify the sum or sums insured; *semble*, also, on the ground that it was not a document between an insurer and an assured.

(*h*) Leyland Shipping Co. *v.* Norwich Union Fire Ins. Soc., [1918] A. C. 350; *ante*, § 822. See also Lobitos Oil Fields, Ltd. *v.* Admiralty Commrs. (1918), 34 T. L. R. 466; Moor Line, Ltd. *v.* King (1920), 4 Lloyd's List L. R. 286; *S. C.*, 36 T. L. R. 799.

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In these cases of missing ships, the Court had to determine what was the proper inference from the circumstances laid before it (*i*).

Onus of proof.

905b. With regard to the onus of proof, when the question is whether the loss was caused by marine perils or war risks, one general rule is that a plaintiff fails who merely proves a state of facts consistent both with liability and non-liability of the defendant (*k*). When, however, the claim in the case of a missing ship is against the insurers of the marine risks, if all that can be proved is that the vessel was lost at sea, effect may have to be given to the rule established by the old authorities whereby a loss at sea was presumed to be a loss by a peril of the sea. Another rule of general application is that the party who relies upon an exception must prove affirmatively that the loss was due to the excepted peril (*l*).

These cases, however interesting they may be in respect of the questions of fact involved, throw little or no light on the construction of the f. c. & s. clause, or on any question of principle. Of much greater importance to the lawyer are the cases in which the questions have been raised: What are hostilities or warlike operations? and, When is a loss shown to be in consequence thereof?

(*i*) The Court held that a loss by war risks was proved in the following reported cases: General Steam Nav. Co. *v.* Comm. Union Ass. Co. (1915), 31 T. L. R. 630; Macbeth *v.* King (1916), 86 L. J. K. B. 1004; Euterpe SS. Co. *v.* North of Eng. Protecting, &c. Assn. (1917), 33 T. L. R. 540; British & Burmese Steam Nav. Co. *v.* Liverpool, &c. War Risks Assn. (1917), 34 T. L. R. 140. In Compania Maritima of Barcelona *v.* Wishart (1918), 23 Com. Cas. 264, the cause of the loss was held to be a peril of the sea. In Munro, Brice & Co. *v.* War Risks Assn., [1918] 2 K. B. 78, Bailhache, J., held that the loss was by a marine peril, but in Munro, Brice & Co. *v.* Marten, [1920] 3 K. B. 94, another claim in respect of the same loss, the Court of Appeal overruled this decision on an inference of fact.

(*k*) Munro, Brice & Co. *v.* War Risks Assn., [1918] 2 K. B. 78; per Scrutton, L. J., British and Foreign SS. Co. *v.* The King, [1918] 2 K. B. 887.

(*l*) Munro, Brice & Co. *v.* War Risks Assn., [1918] 2 K. B. 78, Bailhache, J.

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What are "hostilities"?

905c. "The word 'hostilities,'" said Lord Wrenbury in the Petersham and Matiana cases (*m*), "does not mean 'the existence of a state of war' but means 'acts of hostility,' or (to use the noun substantive which follows) 'operations of hostility.' The sentence may be read, 'All consequences of operations of hostility (of war) or operations warlike (similar to operations of war) whether before or after declaration of war.' To attribute to the word the larger meaning, viz., 'all consequences of the existence of a state of war,' would give the expression a scope far beyond anything which one can conceive as intended."

It has been held that acts committed by a mere private individual on his own initiative, however hostile they may be, are not within the word "hostilities," as used in the clause. The acts, however, of a private individual done in furtherance of the settled policy of his own Government to avail itself of the efforts of all its subjects, whether combatant or non-combatant, to destroy enemy life and property as occasion offers, and done in this sense by him as agent for his Government, may be "hostilities" within the exception (*n*).

It has also been laid down by Lord Atkinson (*o*), that whereas the word "hostilities" connotes the idea of belligerency properly so called, *i.e.* of nations at war with one another, and is intended to describe operations whether of an offensive, defensive, or possibly protective nature in the actual conduct of the war, the term "warlike operations" has a wider meaning, and includes such operations as belligerents have recourse to in war, even though no state of war exists, as, for instance, where combative operations are undertaken

"Warlike operations."

(*m*) [1921] 1 A. C. at p. 133, *infra*, § 905d.

(*n*) Atlantic Mutual Ins. Co. *v.* King, [1919] 1 K. B. 307. In this case the loss was caused by an explosion in the hold of a ship of an infernal machine placed there at Bahia by a German who was not proved to have been appointed by the German Government as their agent.

(*o*) In the Petersham and Matiana cases, [1921] 1 A. C. at p. 114, *infra*, § 905d. See also per Atkin, L. J., in the same cases, [1919] 2 K. B. at p. 695.

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to suppress a rebellion against an allied or friendly power, or where the territory of a nation has, before declaration of war, been protected, in anticipation of attack, by such defensive measures as laying down mines.

A vessel may be lost in consequence of a warlike operation in which she is not herself engaged, as where a ship struck a mine in the Gulf of Finland which had drifted from a Russian mine field 28 miles distant (*p*). Further it has been held that an operation may be a warlike operation though it was undertaken in order to meet a non-existent danger, as where the master of a merchant ship, mistaking a floating object for a submarine, rammed it in intended self-defence, and thereby caused damage to his ship (*q*).

The Court of Appeal has held that a warship while on her way to a rendezvous to take up her duties as a convoying ship (*r*), and a patrol ship employed in searching for enemy submarines (*s*), were both engaged in warlike operations. Indeed, though, as Lord Wrenbury has remarked (*t*), a warship is not necessarily engaged at every moment in a warlike operation, yet it seems that almost any action or movement of a warship in the area of war in the course of its combative duties is a warlike operation (*u*).

The St. Oswald, the Petersham and the Matiana.

905d. The cases on this subject which require more particular attention are those of The St. Oswald (*x*), The Petersham (*y*), and The Matiana (*y*). The first two of these had

(*p*) Stoomvaart Maatschappij "Sophie H." *v.* Merchants' Mar. Ins. Co. (1919), 89 L. J. K. B. 834 (H. L.).

(*q*) Henry & M'Gregor, Ltd. *v.* Marten (1918), 34 T. L. R. 504.

(*r*) Richard de Larrinaga (Owners of SS.) *v.* Admiralty Commrs., [1920] 1 K. B. 700; 3 K. B. 65.

(*s*) Ard Coasters *v.* The King (1920), 36 T. L. R. 555.

(*t*) In The Petersham and Matiana cases, [1921] 1 A. C. at p. 133.

(*u*) Per Atkin, L. J., in the Petersham and Matiana cases, [1919] 2 K. B. at p. 695.

(*x*) British and Foreign SS. Co. *v.* The King, [1917] 2 K. B. 769; [1918] 2 K. B. 879.

(*y*) Britain SS. Co. *v.* The King, [1919] 1 K. B. 575 (Petersham); British India Steam Navigation Co. *v.* Green and Others, [1919] 1 K. B. 632 (Matiana); [1919] 2 K. B. 670; [1921] 1 A. C. 99.

Sect. 905d. reference to collisions between vessels navigating in time of war without lights; the last was a case of the stranding of a vessel while sailing under convoy.

The St. Oswald. In the case of The St. Oswald, the vessel, a transport employed in the evacuation of troops from Gallipoli, while steaming in the dark at full speed without lights, in pursuance of instructions from the Admiralty, collided with a French battleship, which was also steaming without lights, and sank. Neither vessel was to blame. The vessel was at the time in the service of the Admiralty under a charter-party in Form T. 99c, whereby the Admiralty took the risks of war, namely those excluded by the "f. c. and s." clause. The action was for a total loss by hostilities or warlike operations. The Crown admitted that the steaming without lights was a warlike operation, but contended that this operation was not the proximate cause of the loss. The Court of Appeal, agreeing with Rowlatt, J., held that the loss was a consequence of the admitted warlike operation. This case, however, turned partly on the above-mentioned admission by the Crown and is no authority as to the meaning of "warlike operations." Indeed, Scrutton, L. J., in his judgment expressly declined to decide that every collision where the vessels are steaming without lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation. In the House of Lords, in The Petersham case, Lords Cave and Atkinson appear to have thought that under the circumstances the admission by the Crown was properly made and that the decision of the Court of Appeal was correct. Lord Sumner treated the decision as resting entirely upon the admission, as to the correctness of which he expressed no opinion. Lord Wrenbury expressed grave doubt whether the decision was right (*z*).

The Petersham. In The Petersham, the vessel was under charter to the Admiralty under a similar form of charter-party (*a*), and while carrying a cargo of iron ore for the British Government

(*z*) See [1921] 1 A. C. at pp. 109, 116, 128, 134. (*a*) T. 99.

from Bilbao to Glasgow came into collision at night with a neutral steamship and sank. Both vessels were, in accordance with instructions from the Admiralty, navigating without lights. Neither ship had been negligent. The owners of The Petersham, alleging a loss by hostilities or warlike operations, claimed by Petition of Right for a total loss. **Sect. 905d.**

The Matiana. In The Matiana, the vessel, while homeward bound from Alexandria and while compulsorily sailing under convoy, struck a reef in calm weather and was thereby totally lost. The reef was in an area which was known to be dangerous to navigation and was for that reason usually avoided, and the master gave evidence that at the time of the stranding he believed that his vessel was some nine miles away from it. At the time of the casualty he was zigzagging on a course prescribed by the naval officer in charge of the escort. The judge who tried the case found that neither he nor the naval officer had been guilty of any negligence. The vessel was insured under a Lloyd's policy covering, *inter alia*, perils of the seas and stranding, but containing the usual "free of capture and seizure" clause, excluding among other war perils the consequences of hostilities and warlike operations. She was also insured under a policy covering war perils only, and in particular the consequences of hostilities or warlike operations. The action was brought against both sets of underwriters in the alternative, and the contest was whether her loss by stranding was or was not a consequence of hostilities or warlike operations.

905e. In The Petersham Mr. Justice Bailhache decided that the loss was not by war perils, and this decision was affirmed both in the Court of Appeal and in the House of Lords.

In The Matiana, however, there was a serious difference of opinion. Mr. Justice Bailhache decided that the loss fell on the war risk underwriters. This decision was unanimously reversed in the Court of Appeal (Lords Justices Warrington, Duke and Atkin). In the House of Lords the

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decision of the Court of Appeal was affirmed by a majority of three to two, Lord Atkinson, Lord Sumner and Lord Wrenbury holding that the loss was a marine risk, while Lord Cave and Lord Shaw thought that the loss was a consequence of a warlike operation (*b*).

Thus in the result the losses both of The Petersham and The Matiana have been decided by the ultimate Court of Appeal to have been due to marine risks, and not "consequences of hostilities."

In The Petersham the ground of the decisions appears to have been that both colliding vessels were engaged on a peaceful mission. Their desire was not to engage in, but to avoid warlike operations (*c*). A vessel is not engaged in a warlike operation merely because, in time of war, and as a precaution, she does not exhibit lights (*d*). "If the operation," said Lord Wrenbury (*e*), "is one which creates no new risk but only aggravates or increases an existing maritime risk by removing something which, but for the war, would have been a safeguard against the risk, then the risk is not a war risk."

In The Matiana, the dissenting members of the House (Lords Cave and Shaw) were of opinion that the warships escorting the convoy were engaged in a warlike operation and that the loss was due to the vessel's compulsory compliance with the orders of the naval officer prescribing the course of navigation. According to Lord Shaw the convoyed ships were also taking part in the same warlike operation. Of the majority, however, Lord Atkinson was of opinion that a merchant ship merely by sailing in convoy is not engaged in a warlike operation, and adopted the illustration given by

(*b*) The Petersham was followed by McCardie, J., in Harrison *v.* The Shipping Controller (1920), 36 Times L. R. 880, where the only additional fact of importance was that the vessel's stranding was due to the inefficient lights of the pilot escort.

(*c*) Per Lord Cave, [1921] 1 A. C. at p. 108.

(*d*) Per Lords Atkinson and Sumner, *ibid.* at pp. 115, 128.

(*e*) *Ibid.* at p. 135, Ionides *v.* Universal Mar. Ins. Co. (1863), 14 C. B. N. S. 259.

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Lord Justice Atkin in the Court of Appeal (*f*): "The merchant ships are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding." If there was any warlike operation, therefore, it must have been on the part of the attendant warships or their officers. But the loss was not a consequence thereof, the true result of the order being merely to expose the ship to a greater chance of suffering a loss from a marine peril.

Rule of proximate cause.

Lord Sumner expressed the view that the vessel, being in charge of her own officers, could not be said to be lost in consequence of the orders received from the naval officer commanding the escort, and that the vessel herself, as distinct from the warships, was not engaged in any warlike operation.

Lord Wrenbury agreed with the opinions of Lord Atkinson and Lord Sumner.

905f. The case of The St. Oswald, where the Court of Appeal held that the proximate cause of the collision was the steaming at full speed without lights, under order of the naval authorities, was followed by the same Court in two cases already referred to (*g*), in which there was a collision between a warship and a merchant vessel. In each case both vessels were sailing under orders without lights and no blame was attached to either. The Court held in both cases that the warlike operation in which the warship was engaged was the proximate cause of the collision.

Where a ship was damaged by running upon the submerged wreck of another vessel which had been torpedoed and sunk a few hours previously, Bailhache, J., held (*h*), that the damage was not proximately caused by a war risk. He intimated, however, that his decision would have been different if the ship had been deliberately sunk at the particular spot with the object of damaging passing vessels.

(*f*) [1919] 2 K. B. at p. 698.

(*g*) Ard Coasters *v.* The King: Richard de Larrinaga (Owners of SS.) *v.* Admiralty Commrs., *ante*, § 905c.

(*h*) Fenwick (William France) & Co., Ltd. *v.* North of Eng. Assn., [1917] 2 K. B. 522.

CHAPTER IV.

OF GENERAL AVERAGE.

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Definition of general average.

906. THE term "General Average" is used indiscriminately, sometimes to denote the kind of loss which gives a claim to general average contribution, and sometimes to denote such contribution itself; in order to avoid confusion, it would have been better to use the term general average loss when speaking of the former, and general average contribution when speaking of the latter. A general average loss is defined in the following terms in sect. 66 of the Marine Insurance Act, 1906:—

> Sub-sect. 1. A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
>
> Sub-sect. 2. There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure (*a*).

General average acts divided into two classes, but must in reality always be acts of sacrifice.

In all general average acts there is in reality a sacrifice: in the case of an extraordinary sacrifice the sacrifice is itself an immediate loss, whilst in the case of an extraordinary expenditure the sacrifice need not involve any present loss, but may only entail loss or expenditure in the future (*b*). A loss of the former kind is generally called a general average sacrifice; a loss of the latter kind is generally called a general average loss or expenditure. It is true to say that a general average sacrifice must be made at a moment of peril in order to secure safety. When, however, this is said of a general average expenditure, it must be remembered that the expenditure itself is usually not made until after all danger is over. It is not necessary that the actual expenditure of the money should be made at a moment of peril; it is only necessary that the ship and cargo should have been in peril at the time when the extraordinary measures were adopted which subsequently entailed the extraordinary expense.

907. It is proposed in the following pages to follow the ordinary division of general average losses into two classes, namely:—1. Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save both from perishing. 2. Those which consist in expenses incurred owing to extraordinary measures undertaken for the preservation of both ship and cargo.

Losses of the first class are those which are alone mentioned in the text of that Rhodian law which is generally regarded as the foundation of the whole doctrine of general

(*a*) There may be a general average act, although it may give rise to no claim for contribution because all the property engaged in the adventure belongs to one owner; see *infra*, § 1005.

(*b*) The sacrificial element in this case was clearly apprehended by Lopes, J., in Svendsen *v.* Wallace (1883), 11 Q. B. D. at p. 617:—"The putting into a port of refuge . . . is an act of voluntary sacrifice." So, also, throughout the judgment of Bowen, L. J., 13 Q. B. D. at pp. 83—95; and per Baggallay, L. J., at p. 81.

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average (*c*): but it is evident that expenses incurred by the owner of a part, owing to extraordinary measures adopted for the preservation (*d*) of the whole, give just as valid a claim to contribution in general average as any other species of loss intentionally incurred for the same purpose; and they have been accordingly admitted to give such a claim by the law and practice of all maritime states.

There is no difference in principle between these two classes of losses; but the application of the principle, as we shall see in the sequel, leads to different results in the two cases: and upon this ground it becomes of practical importance to bear the distinction in mind.

Definition of general average losses.

A general average loss has been authoritatively defined to be "a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the preservation of ship and cargo" (*e*).

(*c*) The bare text of that law, in fact, does not extend to the sacrifice even of part of the ship, and is confined in terms solely to the case of jettison:—"Jactus factus levandæ navis gratiâ."

(*d*) Instead of "preservation," earlier editions of this work had "joint benefit," or some such expression. See 2nd ed. p. 895. The editors have throughout this chapter, in accordance with the view of the Court of Appeal expressed in Svendsen *v.* Wallace (1884), 13 Q. B. D. 69 (which is confirmed by the language of sect. 66, sub-sect. 2, of the Mar. Ins. Act, 1906, *supra*), substituted the word "preservation" or "safety." They have also made corresponding alterations in order to make it clear that, although the expenses need not be incurred at a time when the interests are in peril, yet they must be necessitated by measures taken at a time of peril for the common safety.

(*e*) Per Lawrence, J., in Birkley *v.* Presgrave (1801), 1 East, 220, 228; adopted literally by the Court of Appeal in Svendsen *v.* Wallace. In order to make it clear that the extraordinary expenses need not necessarily be incurred at a time when ship and cargo are actually in peril, it is submitted that a better definition is "a loss consisting in extraordinary sacrifices made, or in expenses incurred in consequence of extraordinary action taken, for the preservation of ship and cargo." The expression attributed in the report to Lawrence, J., is "*all* loss"; the words "all loss" must, however, be read with some limitation. They ought not, said Barnes, J., in The Leitrim, [1902] P. at p. 266, to include losses which are the result of accidental circumstances affecting the loser. In Montgomery *v.* Indemnity Mutual Mar. Ins. Co., [1902] 1 K. B. at p. 740, it is suggested in the judgment of the Court of Appeal that a sacrifice made not for the safety of the property at risk but "in fear of death" may be general average. This view, however, is not supported by the Marine Insurance Act, 1906, nor by the previous authorities.

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Principle and definition of general average contribution.

908. The plainest principles of equity require that the sacrifices so submitted to should be made good (*sarciantur*), and the expenses incurred repaid, by a general contribution from all those benefited by either the one or the other, in proportion to the value of the property which those sacrifices and expenses have been instrumental in saving (*f*). Hence, a general average contribution may be defined to be a contribution by all parties in a sea adventure, to make good the loss which has been sustained by one or more of their co-adventurers from sacrifices made, or expenses incurred, for the preservation of the whole.

The general rules as to general average contribution, and as to the liability of the insurers in respect of general average losses are thus stated in sect. 66 of the Marine Insurance Act, 1906:—

> Sub-sect. 3. Where there is a general average loss, the party on whom it falls is entitled, subject to the condi-

(*f*) Æquissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas habuerint. Dig. lib. xiv. tit. 2. There have been differences of opinion as to whether the right to contribution arises out of an implied contract, or in some other way. Cf. Lowndes, 24—27. The present editors, while agreeing with Bowen, L. J., in Burton *v.* English (1883), 12 Q. B. D. 218, at p. 223, that the question is in most cases one merely of words, conceive nevertheless that in some cases it may be one of practical importance. The view best supported by judicial authority in this country is that the right arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as the law of the ocean. Cf. Burton *v.* English, *ubi supra;* also Milburn *v.* Jamaica Fruit, &c. Co., [1900] 2 Q. B. at pp. 546 and 550, per A. L. Smith and Vaughan Williams, L. JJ. See also per Watkin Williams, J., in Pirie *v.* Middle Dock Co. (1881), 4 Asp. M. L. C. 388. This view was not that of Lord Bramwell (see Wright *v.* Marwood (1881), 7 Q. B. D. 62), and was strenuously impugned by Maclachlan in the 6th edition of this work (p. 860). It is, however, the view which has been generally adopted in America (cf. The Roanoke (1893), 59 Fed. R. 161; The Eliza Lines (1896), 61 Fed. R. 308, 325; Marwick *v.* Rogers (1895), 163 Mass. 50), and commends itself as the better view to the minds of the present editors.

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tions imposed by maritime law (*g*), to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

Sub-sect. 4. Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

Sub-sect. 5. Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

Sub-sect. 6. In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

Adjustment of general average and liability of the underwriters.

Thus the amount paid by each of the co-adventurers, as his share of the contribution, is exactly proportioned to the value of his property as saved by the sacrifice (*h*); this sum is ascertained in most cases directly after the ship's arrival at her port of destination, and is there assessed upon each of the co-adventurers, who are in law primarily liable to the party who has suffered by the loss. The owner of the property sacrificed is then, if insured, reimbursed by his underwriters in respect of his loss. The latter then, by subrogation, become entitled to claim against the owners of the interests saved, who in their turn are, if insured, entitled to claim from their underwriters the same proportion of the sum insured in the policy as the amount assessed upon them by way of contribution bears to the whole value of their property, as saved by the sacrifice (*i*). In practice,

(*g*) See *post*, §§ 918, 920—923.

(*h*) There is, however, as regards contributing interests and values, a distinction to be drawn between cases of sacrifice and of expenditure. The point is discussed later, §§ 975—977.

(*i*) 1 Magens, Ins. 55.

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accordingly, whenever ship or goods are insured, general average losses, when their amount is once ascertained, are settled by the underwriters. The process by which the amount of damage is ascertained, and the different sums to be paid in contribution for it are assessed upon the parties interested, and made good to them by the underwriters, is called the adjustment of general average. It should, however, be remembered that the law of general average is part of the maritime law, and should always be studied as such independently of questions of insurance, however much they are mingled together in practice (*k*).

909. Having thus given a brief sketch of the doctrine of general average, let us proceed to examine it more in detail, and commence by inquiring into the characteristics of those losses which give a claim to general average contribution. The leading characteristic of a general (as distinct from a particular) average loss is, that it is the intentional result of the act of man (*l*), not the inevitable result of the perils

A general average loss must result from the act of man, as distinct from accident.

(*k*) See The Brigella, [1893] P. 195.

(*l*) According to the decision of the Supreme Court of the United States in Ralli *v.* Troop (1894), 157 U. S. 386, it must be the voluntary act of the master and of no one else (except in the case of his death, disability, or absence), done for the safety of the common interests entrusted to his care, and with no other object. It was stated to be doubtful whether even a pilot in command has such authority; much less a crew. See also Wamsutta Mills *v.* Old Colony Steamboat Co. (1884), 137 Mass. 471; Minneapolis, St. P. & B. SS. Co. *v.* Manister Transit Co. (1907), 156 Fed. R. 424. In Ralli *v.* Troop, two of the judges dissented, and Mr. W. R. Coe says that in America "the decision has been the subject of much adverse comment on the part of lawyers, adjusters, underwriters and others versed in matters of general average, who hold the view that, as the doctrine of general average is based on the highest principle of equity, the proper question by which to test a general average sacrifice should be not who authorized the act? but was the sacrifice for the *benefit* or *safety* of the adventure?": see Lowndes, Gen. Av. 5th ed. App. V. p. 725. The little authority there is in this country on the point does not support the decision in Ralli *v.* Troop. In Mouse's Case (1609), 12 Co. Rep. 63, the Court said that it was lawful even for a passenger to throw merchandise overboard for the salvation of the lives of men; but no question of general average arose in this case. In Price *v.* Noble (1811), 4 Taunt. 123, a jettison was held by the Court of Common Pleas to be general average, which

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insured against; it arises from damage purposely submitted to or directly effected by the agency and will of man, not accidentally caused by the agency of the wind and waves (*m*).

A storm arises, the ship is making water with every sea, or is drifting in upon rocks and breakers, and in imminent danger of being lost; if goods are thrown overboard to lighten her, or masts cut away to bring her up, the damage so sustained by the owner of the goods or of the ship is a loss which gives him a claim to general average contribution—in other words, is a general average loss. If, under similar circumstances, instead of being thus sacrificed for the common safety, the goods are washed out by the waves, or the mast snapped asunder by the wind, the loss falls entirely upon the party whose property was thus damaged—in other words, is a particular average loss.

The loss must be incurred for the general safety.

910. In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general safety of the ship, cargo and freight (*n*). The principle of the Rhodian law is,

was made when the ship was in the possession of a prize-master and crew, though made with the assistance and on the advice of the mate, who had been retained on board at the time of the capture. Where a ship on fire had been scuttled by the captain of the port, Mathew, J., held in Papayanni *v.* Grampian SS. Co. (1896), 1 Com. Cas. 448, that the loss was general average. In both cases the point was taken that the sacrifice was not ordered by the master, but by strangers to the adventure. In both the *ratio decidendi* seems to have been that the test whether the sacrifice was general average was simply whether it was made for the general safety. Carver (sect. 374), Benecke (p. 172), and Baily (General Average, p. 21; quoted with approval by Arnould, *infra*, § 914), express the opinion that a sacrifice necessary for the general safety is general average, even though made against the will of the master. Maclachlan (Arnould, 6th ed. p. 856) seems to think that the master alone can order a sacrifice. Phillips says (s. 1280): "The act should be that of the master or person in command. As a general rule, the crew have no authority, without orders, to make a jettison." The question is discussed in the 5th edition of Lowndes, Gen. Av. pp. 48—51.

(*m*) 1 Emerigon, c. xii. s. 39, p. 588.

(*n*) Phillips, however (Ins. vol. ii. s. 1273), is probably correct in pointing out that though the sacrifice must usually be on account of the

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ut omnium contributione sarciatur quod pro omnibus datum est (*o*). The loss, which is to entitle one of the co-adventurers to a contribution from all, must be suffered for the sake of all; and accordingly we find that the sea laws of the Middle Ages invariably required that the master, before he could claim a general average contribution, should swear that the sacrifice was made to save the ship, the cargo, and the lives and liberties of the crew (*p*).

Where the general safety is not imperilled, a loss incurred for the safety of part gives no claim to contribution.

So it has been held in this country that where the general safety is not imperilled, a loss occurred for the safety of a part thereof cannot give a claim to contribution in general average. Thus, where a mob in Ireland boarded a ship partly laden with corn, and would not leave her till they had compelled the captain to sell them the corn at a certain low rate, it was contended, on the part of the assured, that as the captain was thus obliged to let the people take the corn, in order to induce them to spare the rest of the cargo, this was a general average loss; but Lord Kenyon held that this was not so, because the other interests never were in jeopardy: for the persons who took the corn intended no injury to the ship, or any other part of the cargo, but the corn (*q*). Upon the same principle Benecke maintained that if the master of a neutral ship, who had secretly taken enemy's goods on board, should, from fear of having those goods confiscated,

entire interest at risk in ship, freight and cargo, yet contribution may be due from a part only of those interests when only a part is in peril so as to be benefited by the expenses or sacrifices. Cf. Hingston *v.* Wendt (1876), 1 Q. B. D. at p. 372. And a sacrifice or expenditure may, for some purposes at least, be treated as a matter of general as distinct from particular average, though the safety of some portion may never have been imperilled. See Oppenheim *v.* Fry (1864), 3 B. & S. 873; 5 *ibid.* 348; Phillips, s. 1274.

(*o*) Dig. lib. xiv. tit. 2, f. 1.

(*p*) "Pouf saufver leurs corps, la neéf, et les darreés." Jugemens d'Oleron, art. 8; Pardessus, Lois Mar. vol. i. p. 328. "Tho beholden ihr Liff, Schiff, und Gut"; Laws of Wisbuy, art. 22; Pardessus, Lois Mar. vol. i. p. 476. "Les personnes, et le haver, et tot quant aci ha"; Consolato del Mare, c. 54, of the original Catalan; Pardessus, Lois Mar. vol. ii. p. 104; c. 97 of the Italian translation.

(*q*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

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slip his anchor or throw those particular goods overboard, neither he nor the owners of these goods would have any claim to contribution upon the other parties to the adventure, because such sacrifice was made not to save the whole, but only a part (*r*). In the same way, where expenditures appear to have been made not on behalf of both ship and cargo, but on behalf either of the ship alone, or of the cargo alone, they can give no claim to general average contribution, but will be a charge on the owner of the particular interest preserved by the adoption of the course which necessitated such expenditures.

The general safety must be the object of the sacrifice.

911. The general safety must also be the motive for the sacrifice; and if made with any other object, it can give no claim to a general average contribution. Thus, no claim could be allowed in a case where the captain of a ship which was just on the point of capture threw overboard a quantity of dollars, not to save the ship and cargo, but merely to prevent the dollars from falling into the enemy's hands (*s*).

This rule has been laid down with great emphasis in the Supreme Court of the United States. The cargo in the hold of the "J. W. Parker" took fire while the vessel was moored in port at Calcutta, near other vessels. She was taken possession of by the port authorities, who eventually—in spite of the protests of the master, who believed it to be possible to save part at least of the cargo before taking any extreme measure—extinguished the fire by scuttling the vessel. The Circuit Court had found as a fact that the measures taken by the port authorities were the best available to extinguish

(*r*) Benecke, Pr. of Indem. 223.

(*s*) The case of Butler *v.* Wildman ((1820), 3 B. & Ald. 398) contains an *obiter dictum* to this effect by Holroyd, J., which was adopted by Shee, J., in the 8th edition of Abbott on Shipping (p. 479); and see 5th edition (p. 344) to the same effect. See also Royal Mail Steam Packet Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at p. 373, per Wills, J.; and Job *v.* Langton (1857), 26 L. J. Q. B. 97; Walthew *v.* Mavrojani (1870), L. R. 5 Exch. 116; Kemp *v.* Halliday (1865), 34 L. J. Q. B. 233; L. R. 1 Q. B. 520—which cases are more particularly noticed in §§ 967—969, *infra*.

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the fire and to save greater loss on the cargo, but did not find whether their purpose was to save this vessel and her cargo, or to save other vessels and property in the port; and the Supreme Court drew the inference that inasmuch as their sole office and duty was to protect the shipping generally, such had been their object in this particular case. It was held, therefore, that as the object of the sacrifice had not been to save this particular vessel and cargo, there could be no right to a general average contribution (*t*).

Need the sacrifice have been successful in averting the peril?

912. A question that has been much discussed is whether the peril must be averted by the sacrifice, in order to give a claim to general average contribution. In other words, must the sacrifice have been successful? The point may be raised under two different sets of circumstances. First, a sacrifice may be properly and judiciously made, and the remaining interests may be subsequently preserved, but such preservation may be in no sense due to the sacrifice, but to the intervention of other causes, *post hoc*, and not *propter hoc*. In such a case it is confidently submitted that though the sacrifice has produced no good results, and cannot therefore be called successful, it nevertheless gives claim to a general average contribution. The second case is where the peril has, in spite of the sacrifice, had its full effect, and the loss, which it was intended by the sacrifice to avert, has nevertheless been sustained. This case raises questions of nicety and doubt. It is clear, indeed, that if both ship and cargo entirely perish in spite of the sacrifice, there can be no contribution, because there is nothing left to contribute. The difficulty arises in cases where the ship is lost but the goods or part of them are

(*t*) Ralli *v.* Troop (1894), 157 U. S. 386. The case was also decided on the ground that the sacrifice was not a voluntary act of the master, but a compulsory one by the port authorities (see *ante*, § 909, n. (*l*)); and the Court seems also to have considered that the general safety must not only be an object, but the sole object of the sacrifice. On this point, however, the same Court in McAndrews *v.* Thatcher (1865), 3 Wall. at p. 370, seems to have taken a different view. See Royal Mail Steam Packet Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at p. 374, per Wills, J.

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saved; in such cases, does that which is saved contribute for that which has been sacrificed? The discussion of this question has been reserved to a later part of this chapter, inasmuch as it is here our object to enumerate only the undoubted requisites of a general average loss (*u*).

The loss must be submitted to under the pressure of imminent danger.

913. It is an undoubted requisite of a general average loss that it should have been incurred under the pressure of a real and imminent danger. The sacrifice may have been *bonâ fide* made with a view to the general safety; but it can give no claim to contribution unless that safety shall appear to have been really endangered (*x*). I am not bound to make good to another a loss he has intentionally incurred, with a view to my benefit, if such loss was one which a man of ordinary firmness and sound judgment would not, under the circumstances, have submitted to. The sacrifice must have been made under the urgent pressure of some real and immediately impending danger, and must have been resorted to as the sole means of escaping destruction (*y*).

"In order to give a claim," says Emerigon, "to a general average contribution, it is not enough that a jettison has been made: that measure must have been forced upon those resorting to it by the fear of perishing" (*par la crainte de périr*). "A panic terror," says the same great writer, "will not excuse the captain who has had recourse to a jettison without being forced to it by real danger" (*z*).

The sacrifice must be resorted to

914. The old sea-laws detail with great minuteness all the forms which ought to be observed by the captain, before

(*u*) Cf. §§ 979, 980, *infra*.

(*x*) It must also have been reasonably made: Mar. Ins. Act, 1906, s. 66 (2), *ante*, § 906. A different rule was laid down in The Wordsworth (1898), 88 Fed. R. 313. A situation of imminent danger to the whole adventure was reasonably thought to exist, and apparently required that the sacrifice should be made. It did not in fact exist, but Brown, D. J., held that the sacrifice must be treated as general average.

(*y*) See Société Nouvelle d'Armement *v.* Spillers & Bakers, Ltd., [1917] 1 K. B. 865. Though there must be a danger common to all the property at risk, it need not be equal danger: Willcox *v.* American Smelting and Refining Co. (1913), 210 Fed. R. 89.

(*z*) 1 Emerigon, c. xii. s. 39, pp. 587, 588.

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after such due deliberation as circumstances permit.

proceeding to make any sacrifice for the general safety (*a*). And in more modern times Stevens gave it as the practical rule to be observed, that the master should, if possible, consult the most experienced of the crew and the supercargo, if there be one on board; and then make an entry in his log-book, and immediately on arriving at the first port, note, and, if possible, extend, his protest (*b*).

It is obvious, however, that in those cases of desperate and urgent danger which allow no time for hesitation and discussion, no greater degree of deliberation should be required than may be necessary to rescue the measures resorted to from the reproach of rashness.

"The rule of consulting the crew," says Lord Kenyon, "is rather founded on convenience, and to avoid dispute, than on necessity" (*c*). "A consultation with the officers," remarks Story, J., "may be highly proper in cases which admit of delay and deliberation; but if the propriety and necessity of the act be otherwise sufficiently made out, there is an end of the substance of the objection" (*d*).

The test suggested by Baily seems a very sensible one; viz., that the act must be a judicious one with reference to the state of things at the moment of its performance (*e*). "From this principle," as he very justly observes, "it follows that a consultation between master and crew, or a want of uniformity in the opinions of the crew, does not materially

(*a*) Jugemens d'Oleron, arts. 8, 9; Pardessus, Lois Maritimes, vol. i. p. 328; Laws of Wisbuy, arts. 20, 21; *ibid.* p. 475; Consolato del Mare, arts. 97, 109, of the Italian translation, cc. 54, 56, of the original. See Pardessus, Lois Maritimes, vol. ii. pp. 104—112.

(*b*) Stevens, Average, 29. Many of the modern commercial codes require a consultation with the principal members of the crew and with the owners of the cargo or their representatives, if on board, before the master resorts to a general average sacrifice: see, *e.g.*, the Code de Commerce (art. 410); and the Codes of Spain (art. 813), Portugal (art. 655), and the Argentine (art. 933), in the Appendices to Lowndes' Gen. Av. The German Code (art. 700) throws the responsibility on the master alone: Lowndes, Gen. Av. 547.

(*c*) Birkley *v.* Presgrave (1801), 1 East, 228.

(*d*) In Columbian Ins. Co. *v.* Ashby (1839), 13 Peters, S. C. R. 331, 343.

(*e*) Baily, General Average, 19—23.

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affect the question; and that an act may give rise to general average even where the master orders it in opposition to the wishes of the crew, or a crew perform it in defiance of the orders of the master" (*f*).

The sacrifices and expenses must be of an extraordinary nature.

915. It remains to notice another principle, of great importance in determining whether a loss be or be not such as to give a claim to general average contribution, viz., that no such claim can be sustained unless the sacrifices and expenditures out of which it arises were of an extraordinary nature (*g*); in other words, unless they were something over and beyond those ordinary duties and ordinary expenses of the navigation to which the shipowner is bound by the nature of the contract between himself and the freighter, and for which he is to be remunerated by the freight. By the contract of affreightment the shipowner is bound to do all that is requisite, in the ordinary course of the voyage, for the safe transport of the goods to their port of delivery (*h*). All expenses, therefore, incurred, and all ordinary manœuvres rendered necessary, for the purpose of so transporting the goods, or keeping the ship in a fit state so to transport them, are a direct consequence of his contract with the freighters, and, being merely within the strict scope of his ordinary duty as shipowner, cannot entitle him to any recompense but that which was his consideration for undertaking such duty, viz., the freight (*i*).

What is extraordinary?

916. For instance, a large clipper ship with an auxiliary screw, while crossing the ocean with a cargo on board, was so injured by collision with an iceberg as to lose all power of sailing. The master made Rio by means of her auxiliary screw. Finding when there that complete repairs would cost

(*f*) Baily, General Average, 21. As to the acts of the crew performed against the will of the master, see *ante*, § 909, n. (*l*).

(*g*) Cf. Mar. Ins. Act, 1906, s. 66 (2), *ante*, § 906.

(*h*) 3 Kent, Com. 208 *et seq.*

(*i*) "En effet," says Boulay-Paty, "toutes ces mesures sont comprises dans l'obligation de transporter la cargaison." Comment. on Emerigon, vol. i. p. 610. See also 2 Phillips, Ins. s. 1281.

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several thousands of pounds more than in England, and would entail the unshipping of the cargo and considerable delay, he had sufficient repairs done to her in three days, without taking out the cargo, as would carry her home. He then sailed and arrived in England by means of her auxiliary screw, having purchased coals at Rio and again at Fayal at an extra cost to the owner of 1,472*l*. The Court held that the master had done no more than it was his duty to do, and that no part of the expense for coals could be allowed to be general average (*k*).

Blackburn, J., in the course of the judgment of the Court, said: "The shipowners by their contract with the freighters are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursements necessary for fuel for the steam engine. Now the disaster which occurred in this case no doubt caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature" (*l*).

Where, therefore, a vessel met with heavy weather which continued for many days, and the vessel in consequence strained and sprung a leak, and the supply of coals for the

(*k*) Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203. Accord. in respect of coals, Harrison *v.* Bank of Australasia (1872), L. R. 7 Ex. 39.

(*l*) L. R. 2 Q. B. 212.

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donkey engine, which would have sufficed for an ordinary voyage, was exhausted at the pumps, so that spare spars and part of the cargo were afterwards necessarily consumed in making steam for the pumps, and in saving the ship and cargo; this loss was held to be chargeable as general average (*m*).

In June, 1915, the master of a sailing ship, fearing attack by submarines, engaged a tug to tow her from Queenstown to Sharpness, so as to accelerate the voyage and thus minimise the danger. Sankey, J., held that the expense of the towage was not an extraordinary expenditure, as the risk of being attacked by enemies was not an extraordinary and abnormal peril upon a voyage of this kind in time of war (*n*).

Difficulty of distinguishing between what is ordinary and extraordinary.

917. It is often very difficult in practice to draw the line accurately between what shall be considered ordinary and what extraordinary expenses and sacrifices. Further instances of the application of this principle, and of the difficulty in applying it, will be found later on in this chapter; meanwhile it will suffice to cite the following as a good instance of that extraordinary kind of sacrifice which would everywhere be acknowledged to give a claim to general average contribution.

Sacrifice of boat in order to save ship and cargo from imminent capture.

The captain of a French ship, who had been chased all day by an enemy, who was rapidly gaining on him, at nightfall deliberately launched his long boat, fitted her with a mast and sail, fixed a lantern in her mast head, and set her adrift; at the same time he hauled down the ship's lights and altered her course. The long boat, followed by the enemy, drifted away before the wind and was lost; the ship, by means of this manœuvre, escaped. The loss of the boat under these circumstances was held to be a general average loss, having been an extraordinary sacrifice, intentionally made for the sake of saving the ship and cargo (*o*).

(*m*) Robinson *v.* Price (1876), 2 Q. B. D. 91; and in Court of Appeal at p. 295; Harrison *v.* Bank of Australasia, *ubi supra*.

(*n*) Société Nouvelle d'Armement *v.* Spillers & Bakers, Ltd., [1917] 1 K. B. 865.

(*o*) 1 Emerigon, c. xii. s. 61, p. 606.

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Where loss caused by fault of the claimant.

918. Another condition to the right to claim contribution is, that where the peril giving rise to the claim has been occasioned by the fault of the claimant or his servants, he cannot be permitted to recover from those whose property, though saved by his sacrifice, was yet imperilled by his wrongful act. Thus, if the loss was caused by the vessel's unseaworthiness at the commencement of the voyage, the shipowner cannot recover a contribution from the owners of cargo (*p*). But, as was held by the Privy Council with reference to a claim for jettison in consequence of a stranding occasioned by the negligence of the master, this doctrine bars only the claim of the wrongdoer, and not that of other innocent sufferers (*q*), and if the contract of carriage exempts the shipowner from liability for the negligence of his servants, his claim for contribution remains unaffected by such negligence (*r*).

Incorporation of the Harter Act.

Contracts for the carriage of goods on Atlantic voyages frequently incorporate the provisions of the "Harter" Act (*s*), a statute of the United States which prohibits clauses in freight contracts that relieve the shipowner from the duty to take care of the cargo and supply a seaworthy ship, but provides that if the shipowner has exercised due care to make the vessel seaworthy he shall not be liable for damage or loss arising from faults or errors in navigation, or in the manage-

(*p*) Schloss *v.* Heriot (1863), 14 C. B. N. S. 59; The Ettrick (1881), 6 P. D. 127, at pp. 135, 137; Greenshields *v.* Stephens, *infra;* Lindsay *v.* Klein, [1911] A. C. 194. To the same effect Cheraw & Salisbury Railroad Co. *v.* Broadnax (1885), 109 Penn. St. 432; Hurlbut *v.* Turnure (1897), 81 Fed. R. 208; The Irrawaddy (1897), 171 U. S. 187.

(*q*) Strang *v.* Scott (1889), 14 App. Cas. 601. Accord. Pacific Mail SS. Co. *v.* N. Y. Min. Co. (1896), 74 Fed. R. 564, a decision of the Circuit Court of Appeals in the United States.

(*r*) The Carron Park (1890), 15 P. D. 203; discussed and approved by the Court of Appeal in Milburn *v.* Jamaica Fruit, &c. Co., [1900] 2 Q. B. 540 (Williams, L. J., dissenting); and followed by the Court of Session in Klein *v.* Lindsay (1910), Sess. Cas. 231 (S. C. in H. of L., [1911] A. C. 194). The law on this point is the same in Germany and Italy (Lowndes, 5th ed. 547, 610), but seems to be different in France and Holland. See The Mary Thomas, [1894] P. 108 (Dutch law); Hick *v.* London Ass. Co. (1895), 1 Com. Cas. 244 (French).

(*s*) For the text of the Act, see Carver, s. 103a.

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ment of the vessel. The Supreme Court of the United States has held that this exemption from liability was not intended to have the further effect of entitling the shipowner to claim contribution for a general average loss caused by the negligence of his servants (*t*). It might be argued that the Act, when incorporated in an English contract, ought to have no greater effect attributed to it by the English Courts than is given to it in the American Courts, the result of which would be that, notwithstanding the decisions in The Carron Park and Milburn *v.* Jamaica Fruit Co. (*u*), the incorporation of the Act in an English contract would not have the effect of giving the shipowner the right to claim contribution. There is, however, high authority for saying that the legal effect, if the contract is expressed to be subject to the provisions of

(*t*) The Irrawaddy (1897), 171 U. S. 187. Where, however, the bill of lading contained a clause in the terms of the Harter Act, which further provided that in case of damage due to negligence of the crew, &c., the shipowner should be entitled to contribution for general average losses, the Supreme Court held, reversing the Circuit Court of Appeals, that the clause was valid, and that the shipowner had a right to contribution: The Jason (1912), 225 U. S. 32. For the text of the clause, see Lowndes, 5th ed. p. 733, n. (*l*). Following The Irrawaddy, it was held in The Strathdon (1899), 94 Fed. R. 206, on appeal (1900), 101 Fed. R. 600, that the mere fact that the shipowner being in fault can not sue the cargo-owner for contribution does not relieve him from liability to contribute towards the cargo-owner's loss; but, the loss being due to a fire caused by the negligence of the crew, for which, by statute, the shipowner was not liable, it was further held that if the cargo-owner claimed a general average contribution from the shipowner, the damage to the ship must be taken into account, otherwise the cargo-owner could, by selecting his form of proceedings, recover for losses for which the shipowner was not responsible. This decision was, however, overruled in The Jason (1910), 178 Fed. R. 414, in the Circuit Court of Appeals, where it was held that in cases under the Harter Act no claim for contribution could be maintained against the ship. This question was not dealt with in the Supreme Court. See Lowndes, 5th ed. pp. 732—736, where the difficulties caused by the decisions in The Irrawaddy and The Strathdon are discussed by Mr. W. R. Coe. Recently, in The Ernestina (1919), 259 Fed. R. 772, the contention was raised that the Harter Act applied in cases where there was no negligence in the navigation of the vessel, so as to preclude the owners of cargo jettisoned from recovering contribution against the shipowners; but the Circuit Court of Appeals held that the Harter Act had no application to such a case.

(*u*) *Supra*, note (*r*).

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the Act, is only the same as if the material clauses of the Act were written into the contract (*v*). It seems to follow that under such a contract the shipowner can claim contribution in this country, the incorporation of the Act being only equivalent to the insertion of a negligence clause in the terms of the Act.

Claim for contribution is not affected by inherent defect of claimant's property.

It is no answer to a claim for contribution, whether by the shipowner or cargo-owner, that the necessity for the sacrifice was occasioned by an inherent defect in the property sacrificed, unless there was some negligence or wrong-doing on the part of the owner which would make it inequitable for him to enforce a general average claim (*x*). Thus where a cargo of coal was damaged by water poured into the ship in order to extinguish a fire which had broken out in the hold by reason of spontaneous combustion, it was held by the House of Lords, affirming the decision of the Court of Appeal, that the inherent vice of the cargo was no answer to a claim by the owner thereof for contribution (*y*).

Recapitulation.

Upon the whole, then, it appears, that before a party interested in a sea-venture can establish his claim to a general average contribution, he must show that the loss he has

(*v*) Dobell *v.* SS. Rossmore Co., [1895] 2 Q. B. 408 (C. A.). "They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading": per Lord Esher, M. R., at p. 413.

(*x*) Greenshields *v.* Stephens, [1908] 1 K. B. 51, per Lord Alverstone, C. J., at p. 57; [1908] A. C. 431; followed in The William J. Quillan (1910), 180 Fed. R. 681.

(*y*) Greenshields *v.* Stephens, [1908] 1 K. B. 51; [1908] A. C. 431. Rule 3 of the York-Antwerp Rules, which were incorporated in the bill of lading, provides that no compensation shall be made for damage to such portions of a bulk cargo as have been on fire, and the claim was only made in respect of the coal which had not been ignited. Though Kennedy, L. J., limited his judgment to the case of cargo which had not been on fire, the rule laid down by Lord Alverstone, C. J. (in whose judgment Buckley, L. J., concurred), and by the House of Lords is of general application. Whether, therefore, apart from the York-Antwerp Rules, there ought to be contribution for damage to cargo which has actually been on fire is a question for the determination of which it is immaterial whether the fire was due to the inherent defect of the cargo or to some other cause. This question is discussed *infra*, § 936, n. (*k*).

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sustained has arisen, not from any accident, but from some—(1.) Intentional sacrifice, or voluntary expenditure; (2.) Purposely resorted to for the general safety; (3.) Under the pressure of real and imminent danger. It must also appear, (4.) That the sacrifice or the expenditure was judiciously incurred; (5.) That it is not included in those ordinary duties or expenses which are incidental to the navigation of the ship, and are paid out of the freight; (6.) That it was not due to any wrongful act, for which the claimant is responsible (*z*).

Division of general average losses.

919. Having ascertained the principles on which all claims to general average contribution are founded, the next step is to enumerate the different cases in which these claims may be made good; in other words, to specify the principal instances of general average loss.

All general average losses may be said to arise: 1. From SACRIFICES of part of the cargo, or of part of the ship, for the common safety; 2. From EXPENDITURES incurred with the same object. We will begin with considering those losses which arise out of sacrifices of part of the cargo, and take first the case of jettison, which is the simplest and most perfect instance of a general average loss. Jettison is defined in the Rhodian law to be *jactus mercium factus levandæ navis*

(*z*) The English law on the subject of general average differs materially from that of foreign countries. The main distinction is that whereas in England there can be no claim for contribution except where the actual physical safety of a particular interest has been in peril, it is sufficient on the Continent and in the United States if extraordinary expense has been incurred with the object of completing the intended adventure. With the object of securing uniformity in all countries, congresses have been held, the history of which will be found in Lowndes on General Average, App. V. (5th ed.). The result was the adoption in 1864 of a set of rules known as the York Rules. They were in many ways altered and added to in 1877 and 1890, and in their modified form are now known as the York-Antwerp Rules, 1890. These rules, which are set out in Appendix C., are of great importance, as they are usually incorporated in contracts of affreightment and in our policies of insurance. This chapter is, however, mainly concerned with the English law on the subject, apart from any agreement that any particular set of rules shall be taken to apply.

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gratiâ (*a*), a heaving overboard of the goods in order to lighten the ship. It is the most perfect example of a general average loss, and when made intentionally, for the sake of saving the other interests from immiment danger, is generally admitted as giving a claim to contribution.

Jettison of deck cargo. No contribution unless cargo so carried in accordance with custom of trade, or unless the shipowner and the owners of the rest of the cargo have agreed that there shall be contribution in such case.

920. An important exception to the rule of contribution after jettison is in the case of the jettison of goods carried on deck. This is on the ground that they are hindrances to the safe navigation of the vessel, and "their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety" (*b*). The exception, however, does not apply in cases where, according to the common usage and course of trade on the voyage for which they are shipped, such cargoes are permitted (*c*), nor does it apply where the parties from whom contribution is sought have agreed impliedly or otherwise to contribute in the ordinary way (*d*).

The above propositions appear to be deducible from various decisions, some of which seem at first sight difficult to reconcile with each other.

Thus, in Johnson *v.* Chapman (*e*), the defendant chartered the plaintiff's vessel to load a full and complete cargo of deals, including a deck load, for a voyage from Quebec to London. There was no custom authorising the carriage of deck cargo in such a voyage. The deck cargo was properly

(*a*) Dig. lib. xiv. tit. 2, f. 1.

(*b*) Strang *v.* Scott (1889), 14 App. Cas. at p. 609; see also Milward *v.* Hibbert (1842), 3 Q. B. 120.

(*c*) Gould *v.* Oliver (1837), 4 Bing. N. C. 135; *S. C.* (on claim by shippers against shipowners for the full value of the timber jettisoned), 2 M. & Gr. 208; and cf. Royal Exchange Co. *v.* Dixon (1886), 12 App Cas. 11.

(*d*) According to York-Antwerp Rules, 1890, however, the exception appears to apply to all cases:—"No jettison of deck cargo shall be made good as general average. Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel."

(*e*) (1865), 19 C. B. N. S. 563; 35 L. J. C. P. 23.

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jettisoned during the voyage, and the defendant claimed contribution. The Court of Common Pleas decided in favour of the claim, on the ground that the charter-party contemplated a deck cargo (*f*). "Then, immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average" (*g*).

921. This decision, however, including the passage above quoted, was explained in a later case in the Court of Appeal as only applying to cases where, the cargo-owner and the shipowner being the only parties concerned in, and benefited by, the jettison (such as the case where the shipper is also the charterer), an agreement can be implied from the circumstances of the case that in the event of jettison the ship shall contribute. In Wright *v.* Marwood (*h*) the ship was a general ship belonging to the defendants, who agreed to let to the plaintiffs the upper deck for the carriage of a cargo of cattle from New York to England. It was held by Lord Coleridge, C. J., and Bramwell and Baggallay, L. JJ., that the shipper was not entitled to recover a general average contribution from the defendants for the jettison of the cattle. The Court laid stress on the fact of the ship being

(*f*) In Miller *v.* Titherington (1862), 31 L. J. Ex. 363, the Court of Exchequer Chamber held on demurrer that a plea was good which alleged that by a custom at Liverpool known to the parties, the underwriter was not liable for general average arising out of the jettison of timber laden on deck.

(*g*) 19 C. B. N. S. at p. 583; 35 L. J. C. P. at p. 28. The mere knowledge, however, of the shipper that his cargo is being or will be carried on deck, in the absence of an established custom or positive contract to that effect, will not justify the shipowner in so stowing and carrying it. In the event of a jettison of any cargo so carried, however proper in itself the jettison may have been, the shipowner will be liable for the full amount of the loss. In such a case there is no question of general average contribution. Royal Exchange Co. *v.* Dixon (1886), 12 App. Cas. 11.

(*h*) (1881), 7 Q. B. D. 62.

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a general ship, and held it impossible to imply any agreement to pay contribution merely from the fact that the shipper and owner had agreed for cargo to be shipped on deck, and that apart from such an agreement there was no foundation for the shipper's claim.

The same point was referred to by Lord Watson in delivering the judgment of the Privy Council in Strang *v.* Scott (*i*). His Lordship said that the exception (*i.e.*, the non-liability for contribution in case of deck cargoes) did not apply either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted (*k*), or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship. It is submitted, nevertheless, that not only must the other owners of cargo have consented to such carriage, but they must also have consented under such circumstances as to justify the inference that they intended to take upon themselves the liability to contribute in case of jettison.

Rules as to contribution where deck cargo is jettisoned.

922. The rules properly deducible from the decisions already referred to appear to be as follows: First, that where a deck cargo is properly carried in accordance with a custom to that effect, a jettison will give the shipper a right of contribution not only from the shipowner, but also from the owners of cargo shipped below. Secondly, that where a cargo is so carried not in accordance with any custom, but merely by agreement between the shipper and shipowner, there is no such right of contribution in any case where the other shippers have not agreed to this mode of carriage. "Whatever may be the agreement between the shipowner and the owner of the deck load, the other cargo-owners are no parties to it, nor bound to inquire into it, or notice it, as they are bound to take notice of a custom" (*l*). Thirdly,

(*i*) (1889), 14 App. Cas. at p. 609.

(*k*) As to inland river voyages and coasting trips, see Apollinaris Co. *v.* Nord Deutsche Ins. Co., [1904] 1 K. B. 252, Walton, J.

(*l*) Wright *v.* Marwood (1881), 7 Q. B. D. at p. 68.

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in the case of a chartered ship where the shipper and the charterer are the same, the right of contribution for deck cargo against the ship no doubt exists unless it be clearly negatived by the contract (*m*).

Effect of statutory provisions or stipulations in contracts of carriage exempting carriers from liability. Do they affect claims for general average contribution?

923. An interesting point in this context arose in Burton *v.* English (*n*). This was an action by the shippers of a cargo of iron and wood from the Baltic to London, to recover from the shipowners a general average contribution for the jettison of the timber which, in virtue of a custom in the trade, had been carried on deck. The defence was that under a clause of the charter-party "the steamer shall be provided with a deck load if required at full freight, but at merchant's risk"; the shipowner was not liable. The Court of Appeal held, upon the construction of the document, that the words "at merchant's risk," having been introduced in favour of the shipowners, only limited their liability as carriers, and were not strong enough to absolve them from the claim for a general average contribution. Very similar points had previously been decided by Blackburn and Lush, JJ., in Schmidt *v.* Royal Mail SS. Co. (*o*), and by Lush, J., in Crooks *v.* Allan (*p*). In the former of these cases it was held that an exception in a bill of lading of fire on board, and its consequences, only relieved the shipowners from their obligation to deliver under the circumstances to which the exception related, and did not affect their liability to make a general average contribution. The latter case was to the same effect. In the former case the Court also held that the

(*m*) For the American law, see Wood *v.* Phœnix Co. (1881), 8 Fed. R. 27; The Mary and Eva (1881), 6 Fed. R. 628. The rule of the Association of Average Adjusters in this country is to allow contribution for the jettison of a deck load carried according to the usage of trade, and not in violation of the contracts of affreightment. There is an exception to this rule as to cargoes of cotton, tallow, acids, and some other goods. See Appendix.

(*n*) (1883), 12 Q. B. D. 218.

(*o*) (1876), 45 L. J. Q. B. 646, followed in The Santa Ana (1907), 154 Fed. R. 800.

(*p*) (1879), 5 Q. B. D. 38.

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provisions of the Merchant Shipping Act, 1854, s. 503 (*q*), which exempted shipowners from loss by fire happening without their actual fault, did not relieve them from liability to contribute to the loss. This decision was approved by the House of Lords (*r*).

Contribution for goods for which there is no bill of lading.

The fact that there is no bill of lading for goods jettisoned does not, by English law, make any difference to the right to contribution (*s*).

Rules as to contribution where part of goods is exposed in lighters.

924. Where, in the course of the voyage, in order to save a ship from foundering, to float her after stranding, or to enable her to make a port of distress, part of the cargo is put into boats and lighters, and lost before reaching the shore, such loss gives a claim to general average contribution (*t*); for it is regarded as though it were a jettison (*proinde si jactura facta esset*) (*u*), being an intentional exposure of the goods to imminent and extraordinary risk, with a view to the ship's safety (*x*).

If, however, the goods be thus hazarded in the ordinary course of the voyage, and not in order to rescue the ship from any extraordinary or impending danger, as where, in the usual course of the navigation, they are necessarily sent on in boats or lighters from the ship to the port of destination, their loss gives no claim to contribution (*y*).

(*q*) See now Merchant Shipping Act, 1894, s. 502.

(*r*) Greenshields *v.* Stephens, [1908] A. C. 431.

(*s*) Arnould (2nd ed. p. 904) stated the contrary, but only cited foreign codes in support of his statement. The practice here is as stated in the text.

(*t*) 1 Emerigon, c. xii. s. 41, p. 599; 4 Benecke, System des Assecuranz, 56, 57; Abbott on Shipping, 5th ed. p. 346; 13th ed. p. 630, cited by Cresswell, J., in Hallett *v.* Wigram (1845), 9 C. B. 580, 608, and by Mathew, J., in M'Call *v.* Houlder Bros. (1897), 2 Com. Cas. 129, 132. And see, too, Royal Mail Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at p. 372, per Wills, J.; Baily, 60; Lowndes, s. 15. Cf., however, the American case of L'Amérique (1888), 35 Fed. R. 835, where, under special circumstances, no contribution was allowed except for the expenses of unloading.

(*u*) Dig. lib. xiv. tit. 2, f. 4. (*x*) Benecke, Pr. of Indem. 178.

(*y*) 2 Valin, tit. des Avaries, 459; Benecke, Pr. of Indem. 178; Phillips, s. 1288.

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If, in the case first supposed, the boat employed for the purpose of taking out the goods itself belong to the ship, it must, as well as the goods, be contributed for, if lost (*z*).

Questions as to contribution in case of goods thus exposed.

If, however, in the same case, the ship and rest of the cargo be lost, no contribution is made in respect thereof by the goods thus exposed for the general welfare, even though they themselves arrive safe (*a*); for as the ship was not intentionally sacrificed to rescue the goods from peril, they cannot be liable to contribute to such loss (*b*). If the goods so exposed are properly jettisoned in their transit from the ship to the shore, their owners can claim contribution from the owners of the other goods similarly exposed, as well as from the ship and cargo remaining on board (*c*).

Goods given by way of composition to pirates, &c.

925. If goods be voluntarily and without fraud given up to pirates, &c. by way of composition, the loss thence arising is a general average loss; for the goods in such case are as much sacrificed for the general safety as though they were jettisoned (*d*). If forcibly taken by pirates or plunderers, it is, of course, otherwise, there being in such case no voluntary submission to loss (*e*).

Damage done by jettison.

On the ground that the accessory follows its principal, all damage necessarily caused to other goods, or to the ship, by the jettison, itself gives a claim to general contribution (*f*). Thus, if holes are cut in the ship in order to get goods or

(*z*) 1 Emerigon, c. xii. s. 41, p. 599.

(*a*) Code de Commerce, art. 427; Benecke, Pr. of Indem. 212, 213.

(*b*) Arnould (2nd ed. p. 906) here added, "neither, in case the ship is lost, but the cargo or a portion of it saved, can the portion so saved be liable to contribute for the goods transhipped," citing Benecke, Pr. of Indem. 213. This view, however, is not concurred in by the present editors.

(*c*) 2 Phillips, Ins. s. 1289.

(*d*) Hicks *v.* Palington (1590), Moore, 297. From Lowndes' Comparative Table, p. xxxiii, it appears that the Belgian Code is alone in treating such a loss as particular average.

(*e*) Nesbitt *v.* Lushington (1792), 4 T. R. 783.

(*f*) See, as to the practice in this country, Lowndes, 67. As to foreign countries, see Comparative Table, and passages in Lowndes' text there referred to. Cf. also 2 Phillips, s. 1286.

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stores out for the sake of lightening her (*g*); or if goods, after being brought up on deck, in order that other less valuable goods stowed beneath them, may be jettisoned, are themselves washed overboard or damaged by the sea, the loss is, in both cases, a general average loss (*h*).

Freight of goods jettisoned.

On the same principle the freight, which but for the jettison the shipowner would have received for the goods jettisoned, must be made good to him by a general average contribution (*i*).

Property in goods jettisoned.

Goods jettisoned still belong to their former owners, and, if recovered from the sea, may be reclaimed by them on paying the expenses of salvage. *Res jacta domini manet nec fit adprehendentis, quia pro derelicto non habetur* (*k*).

General average losses.—Sale of part of cargo.

926. In cases of absolute necessity, when the master, being in a foreign port, has no other means whatsoever of raising money, he may sell part of the cargo for the purpose of procuring funds.

When allowed.

This right is recognized and sanctioned alike by the earliest and most recent codes of maritime law (*l*), and by the jurisprudence of our own country (*m*).

Nature of the transaction.

In such cases, according to the expression of Lord Stowell, "a portion of the cargo is abraded for the common benefit"; and the transaction is considered to be in the nature of a compulsive loan from the owner of the goods so sold for the benefit of all concerned (*n*).

(*g*) Benecke, Pr. of Indem. 177, 178; Stevens on Average, 12; Lowndes, *ubi supra*.

(*h*) Benecke, Pr. of Indem. 213.

(*i*) Benecke, Pr. of Indem. 178; Phillips, Ins. s. 1287.

(*k*) Dig. lib. xiv. tit. 2, f. 8; 1 Emerigon, c. xii. s. 40, p. 596. For the amount of the contribution recoverable from the other interests, see *post*, § 981.

(*l*) See the Judgments of Oleron, art. 22, 1 Pardessus, Lois Maritimes, 339; Laws of Wisbuy, art. 39, cited as 44, in 1 Pardessus, 480; the Consolato del Mare, c. 105 of the Italian translation; c. 62 in the original Catalan; see 2 Pardessus, Lois Maritimes, 110; see also the Co. de Com. art. 234; Scandinavian Code, art. 49; Dutch, art. 372; Italian, art. 575; German, arts. 540, 541, 731.

(*m*) See the famous case of The Gratitudine (1801), 3 C. Rob. 240; Maclachlan, Shipping, 159 *et seq.*

(*n*) See the judgment of Lord Ellenborough in Powell *v.* Gudgeon (1816), 5 M. & S. 431.

Sect. 926. The loss arising out of such sale gives no claim to contribution where the sale is effected to supply the ordinary expenses of the voyage.

If the goods are sold by the shipowner merely to defray the expenses of those necessary repairs of the ship which he himself is in duty bound to provide by the very contract of affreightment, then, upon the principles already developed, the loss incurred by these sales cannot be made the subject of a general average contribution, but must be made good by the shipowner alone to the owner of the goods so sold.

Thus, where a ship was forced to put back into port to repair the accidental damage done to her by a storm, and the master, having no other means of raising money, sold part of the cargo to defray the expense of the repairs, the Court held, that the owners of the goods so sold could not recover against their underwriters a rateable proportion of the loss they had so incurred, but must make their claim against the shipowners (*o*).

Doubt as to whether loss by forced sale of cargo in order to do repairs in a port of refuge is or is not general average.

927. From this decision, together with the various authorities cited below, Arnould (*p*) gathered that a claim to general average contribution would be held to be established whenever the sale was manifestly resorted to with a view to repair losses which themselves come into general average, but not when the losses were themselves particular average (*q*). His view was that the sale of the goods to defray general average expenses is itself a general average sacrifice analogous to a jettison (*r*). An objection to this theory is that, as the sale takes place at a time when the property

(*o*) Powell *v.* Gudgeon (1816), 5 M. & S. 431; *S. P.* in Sarquy *v.* Hobson (1827), 4 Bing. 131; accord. Hallett *v.* Wigram (1845), 9 C. B. 580; 19 L. J. C. P. 281; Dobson *v.* Wilson (1813), 3 Camp. 479.

(*p*) 2nd ed. p. 909.

(*q*) Hallett *v.* Wigram (1845), 9 C. B. 580; Stevens on Average, 15; Benecke, Pr. of Indem. 261—275; and cf. the 22nd article of the Judgments of Oleron; Pardessus, vol. i. p. 339, which in this respect is followed almost verbatim by the Laws of Wisbuy, art. 39 (art. 44 of 1 Pardessus, Lois Maritimes. 480), and the Consolato del Mare, c. 105, of the Italian translation, 62, of Pardessus, vol. ii. p. 110. If the price of goods at the port of sale be higher than at the port of destination, the former is the sum at which they must be paid for. Richardson *v.* Nourse (1819), 3 B. & Ald. 237.

(*r*) Arnould, 2nd ed. vol. ii. p. 909. See, to the same effect, Stevens, p. 16; Benecke, p. 261; Carver, s. 432.

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concerned in the adventure is in safety, the sale cannot, on a strict application of the principle laid down in Svendsen *v.* Wallace (*s*), be itself a sacrifice. Again, if it be contended that the sale, though not itself a sacrifice, is a loss consequent on a preceding general average act, the answer may be that the necessity for the sale arose simply from the fact that the master had not the necessary funds to pay for the repairs and could not raise them in any other way. When the ship and the rest of the cargo have safely reached their destination, it seems, however, clear that the owner of the goods sold may claim the amount realized by their sale, if not from the parties who have to contribute to the cost of the general average repairs, from the shipowner as the party primarily liable for the repairs to his ship (*t*). If the goods have realized less than their value at their destination, it seems also that the owner of the goods may elect instead to be paid such value (*u*). Then, even if the shipowner be regarded as primarily the debtor, it is apprehended that in the adjustment he can add the loss on the sale to the cost of the general average repairs, as being the cost of raising the necessary funds to defray the expenditure.

If the ship and the rest of the cargo have subsequently been lost on the voyage, it seems inequitable that the owner of the goods sold, which presumably would have shared the fate of the other cargo, should receive any compensation for their sale; and if the sale is to be treated as analogous to a jettison, it follows that in this case there will be no contribution (*x*).

Sacrifice of part of the ship.

928. If part of the ship be sacrificed for the general safety, it is contributed for in general average (*y*). Thus, masts

(*s*) 13 Q. B. D. 69; 10 App. Cas. 404.

(*t*) See Hopper *v.* Burness (1876), 1 C. P. D. 137; Atkinson *v.* Stephens (1852), 7 Exch. 567; Richardson *v.* Nourse (1819), 3 B. & Ald. 237.

(*u*) See Hopper *v.* Burness, *supra;* Hallett *v.* Wigram (1850), 9 C. B. 580.

(*x*) *Post,* § 975.

(*y*) 1 Emerigon, c. xii. s. 41, p. 606.

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cut away, anchors heaved overboard, cables cut, guns and ships' stores jettisoned in order to save the whole adventure, are everywhere the subjects of general average contribution (*z*).

Masts or spars cut away.

If a mast be carried overboard by the wind, it is, of course, only a particular average loss; if, however, a mast or spar be snapt or sprung by the wind, and left hanging in the rigging, so that, in order to save the ship and cargo, it becomes necessary to cut away entirely both the mast and the rigging and throw both overboard, the damage caused by the act of so cutting them away is a general average loss, and is to be contributed for to the extent of the value of the mast and rigging as they lay after the accident (*a*).

Where what is cut away is mere wreckage, what claim for contribution?

929. There must, however, always be an intention to sacrifice something of value. Hence the cutting away of wreck, consisting, for instance, of undamaged rigging and sails attached to a mast which has been blown over the ship's side, is not allowed by adjusters as a general average sacrifice, unless it appears that had the wreckage not been cut away it might have been recovered and been of some value (*b*).

What is wreck?

"If," said Willes, J., "a mast were sprung and a part of it were to go overboard with a quantity of spars and sails attached to it, hanging on by a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the vessel, it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay down as a matter of pure law, that all cumber cut

(*z*) Marsham *v.* Dutrey (1719), Select Cases of Evidence, 58; Price *v.* Noble (1811), 4 Taunt. 123; Co. de Com. art. 400; German Code, art. 706; and see the laws of other foreign countries stated in the Appendices to Lowndes, Gen. Av.

(*a*) 1 Emerigon, c. xii. s. 41, p. 606; Benecke, Pr. of Indem. 183; Stevens on Average, 15.

(*b*) By York-Antwerp Rules, 1890 (rule iv), "Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, shall not be made good as general average." The matter is fully discussed by Lowndes (s. 27).

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loose is wreck. But what I say is, if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference of its doing great injury or not; but you cannot help losing it" (*c*).

In Shepherd *v.* Kottgen (*d*), the ship "Rollo," with a general cargo on board, bound for Hong Kong, encountered a heavy storm between Scilly and Lisbon, which caused parts of the rigging to give way. The mainmast in consequence began to lurch violently, and threatened to rip open the deck. In these circumstances the mate, by the master's orders, cut the mast, whereby its loss, which was already inevitable, was accelerated by a minute or two. The action was by the shipowners against the cargo owners for a general average contribution for the loss of the mast.

On appeal, Bramwell, L. J., said: "The mast was in such a state that it must have been lost, whether the vessel got safely to port or not. Consequently there was no sacrifice of it when it was cut away, and the plaintiffs have no claim for contribution."

Brett, L. J., in the same case, stated the proposition in the following alternative forms:—"If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average"; —or thus:—"Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own

(*c*) Johnson *v.* Chapman (1865), 35 L. J. C. P. 23, 26—29.

(*d*) Shepherd *v.* Kottgen (1877), 2 C. P. D. 578; and on appeal, *ibid.* 585. Cf. Montgomery *v.* Indemnity, &c. Co., [1901] 1 Q. B. 147.

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state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice";—or thus:—"There is nothing in respect of which a general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner" (*e*).

Wreckage of cargo.

930. The principle above illustrated has been said to be applicable to cargo when in a state of wreck—that is to say, when it is adrift in the hold, and consequently a source of such danger that it is necessary to throw part or the whole of it overboard. A very similar point arose in the case already referred to (*f*), where it was contended that no contribution should be allowed in respect of the jettison of certain timber loaded on deck which, having broken loose and become an impediment to the navigation of the vessel, had therefore been thrown overboard. The Court, however, held that inasmuch as the cargo was, except for a little wetting with salt water, just as valuable immediately prior to the jettison as it ever had been, and was at that time in no sense lost and irrecoverable property, there was nothing in its condition to disentitle its owner to contribution. On the same reasoning

(*e*) Shepherd *v.* Kottgen (1877), 2 C. P. D. 590. Other instances of losses which are disallowed on this principle by average adjusters in this country are given by Mr. McArthur (pp. 193—196). See, too, Iredale *v.* China Traders Ins. Co., [1899] 2 Q. B. 356; [1900] 2 Q. B. 515 (C. A.), where a claim for contribution in respect of loss of freight upon a cargo of coals was disallowed on the ground that the coals were in any event doomed to destruction, and could under no circumstances have been carried to their destination. It seems that with regard to wreck cut away in a storm, the rule in the United States differs from the English rule. In England there is no contribution when the wreckage, even if not cut away, would in the existing circumstances have been irrecoverable. In the United States the question seems to be whether the wreckage could have been recovered in the hypothetical case of the storm subsiding immediately. See May *v.* Keystone Yellow Pine Co. (1902), 117 Fed. R. 287; see also Lowndes, App. V. p. 742.

(*f*) Johnson *v.* Chapman, *ubi supra*.

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there would appear to be no ground for disallowing contribution in respect of cargo in the hold jettisoned under similar circumstances.

Cables cut or anchors abandoned.

931. If cables are cut or anchors abandoned in order to avoid any impending peril, as for the purpose of putting to sea in order to escape a lee shore in a gale of wind, this is a general average loss (*g*).

Loss incurred by anchoring in a foul bottom in an unusual place of anchorage.

Where the ship, in order to avoid capture, or a lee shore, casts anchor in a foul and rocky bottom in some unusual place of anchorage, and the cable is consequently chafed asunder by the friction, or the anchor so firmly wedged that it cannot be weighed, it was formerly a subject of great discussion, especially among the German lawyers, whether the damage thus occasioned was a general average loss. On principle, as the damage thus incurred was not intended or anticipated as the result of the act, as it was directly caused not by the agency and will of man, but by the force of the elements, Arnould (*h*) thought that it should not be considered a general average loss.

If, in similar circumstances, the ship is compelled to cut her cable, from the impossibility of weighing the anchor, the loss thence arising will, it seems, be either general or particular average, according to circumstances; if cut in order merely to enable the ship to pursue her voyage, and not under the pressure of any urgent peril, it is particular average; if in order to prevent her drifting on a lee shore, or to avoid capture, it is general average: the reason being that in the last case there is, and in the first there is not, an immediately impending danger to justify the sacrifice (*i*).

Loss arising from the appropriation of part of ship and

932. If any part of the ship or her tackle be applied for the common safety to some purpose different from its ordinary use, the loss thence arising is a general average loss, as if the

(*g*) 2 Phillips, Ins. s. 1295; Baily, General Average, 67; Birkley *v.* Presgrave (1801), 1 East, 220.

(*h*) 2nd ed. p. 911.

(*i*) Benecke, Pr. of Indem. 191; Phillips, Ins. s. 1295; Lowndes, s. 28.

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tackle to an extraordinary purpose.

engines of a steamship be damaged while being worked ahead and astern, in order to get the ship off a bank (*k*), or spars are cut up to construct a rudder, or sails and cordage used to stop up a leak (*l*), or to keep down a leak by using them as fuel for the donkey engine (*m*).

Thus, where, in order to prevent a ship which was lashed to the head of a harbour pier from being drifted thence by the fury of a storm, and sunk on the bar of the harbour, the master cut the cable of his best bower anchor, and with that fastened her to the pier, it was held that the damage thereby done to the cable was a general average loss (*n*).

Damage done to one ship in order to save another.

933. Arnould considered (*o*) that if, with a view to the general safety of ship and cargo, it becomes necessary to damage and destroy another ship, or any part thereof, the loss thereby incurred must be made good by a general average contribution. Thus, if a number of ships are lashed together, and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so sunk seemed to him to be a general average loss to which all those saved thereby must contribute; and

(*k*) The Bona (C. A.), [1895] P. 125. The shipowner was also held entitled to contribution for the extraordinary consumption of coal while the engines were so worked. The facts of this case are more particularly noticed *infra*, § 936. See also Internat. Nav. Co. *v.* Atlantic Mut. Ins. Co. (1900), 100 Fed. R. 304.

(*l*) Phillips, Ins. s. 1299; Baily, General Average, pp. 73, 74.

(*m*) Harrison *v.* Bank of Australasia (1872), L. R. 7 Ex. 39; Robinson *v.* Price (1876), 2 Q. B. D. 91, 295 (C. A.). And cf. Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203, the facts of which case are set out in § 916, *supra*. By the York-Antwerp Rules, 1890 (rule ix.)—"Cargo, ship's materials and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average." See also Lowndes, s. 14.

(*n*) Birkley *v.* Presgrave (1801), 1 East, 220.

(*o*) 2nd ed. p. 912, citing Casaregis, Disc. 46, No. 45; Ordinanzas di Bilbao, c. 20, art. 21; Azuni, Dritto Marittimo, c. iii. art. 2, vol. ii. p. 169, ed. 1795; and 2 Phillips, s. 1311.

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similarly if a crew, for the safety of their own ship, cut the cable of another.

Austin Friars SS. Co. *v.* Spillers & Bakers.

So far as this expression of opinion covers the case in which for the safety of a ship and cargo a measure is taken which causes damage to other property for which the owner of that property is entitled to recover compensation from the owners of the ship, it has been confirmed by the decision of the Court of Appeal in Austin Friars SS. Co. *v.* Spillers & Bakers (*p*), affirming the judgment of Bailhache, J. (*q*). In that case the facts were that a vessel stranded in the Severn and was seriously damaged, so that both ship and cargo were in imminent danger. She was towed off with the intention of beaching her at another spot, but as she was making water the master and pilot decided that the best course would be to take her into Sharpness Dock, though they contemplated that in entering the dock she would strike a pier and do some damage. She struck the pier as was anticipated, and damaged herself to the extent of about 1,600*l*. and the pier to the extent of about 5,000*l*. The held that in the circumstances putting into the dock was a general average act, and that the owners of the vessel were entitled to recover a contribution against the owners of the cargo, both in respect of the damage to the ship and the compensation they were liable to pay to the harbour authority for the injury to the pier, the damage being in each case the direct consequence of the general average act. One point taken on behalf of the defendants was that to run into the pier was as against the dock authorities a tort, and that as there is at common law no contribution between joint tort-feasors, the shipowner could not claim a contribution in general average; but it was held that, even assuming that the injury to the dock was a tort for which both the shipowners and the owners of the cargo were liable, the rule of the common law ought not to be extended and does not apply to contribution in general average.

(*p*) [1915] 3 K. B. 586. (*q*) [1915] 1 K. B. 833.

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There must be a community of adventure.

So far, however, as Arnould's view suggests that the sacrifice of property may give its owner a right to contribution against other property not engaged with it in a common adventure, it is opposed to the definition of a general average act in sect. 66 (2) of the Marine Insurance Act, and to the decisions of the Supreme Court of the United States in Ralli *v.* Troop (*r*), and in The J. P. Donaldson (*s*). In the latter case the facts were that a steam-tug, while towing two barges, was overtaken by a violent storm and driven with her tow on a lee shore, so as to be in imminent peril of being lost. Eventually the master of the tug was compelled to cut the tow-line, the result being that the barges were wrecked, but the tug was enabled to reach a port of safety. It was held that the barge-owners had no general average claim for the loss, inasmuch as there was no sacrifice of any common interest. The Court refused to consider that the contract of towage created such a connection between tug and tow as to make the two a single maritime adventure.

Sails let go to right a ship when on her beam ends.

934. Sails, deliberately let go in order to right a vessel when she is on her beam ends, ought, on principle, to be made good by a general average contribution, for the loss of the sails in such case is the direct, immediate, and intended result of extraordinary sacrifice made for the general safety as the only means of escaping from imminent danger (*t*).

Damage to sails or

But if sails or spars be carried away by the wind (*u*), in

(*r*) (1894), 157 U. S. 386.

(*s*) (1896), 167 U. S. 599. Cf. also Pacific Mail SS. Co. *v.* N. Y. Min. Co. (1896), 74 Fed. R. 564, with which should be contrasted the decision in Reliance Mar. Ins. Co. *v.* N. Y. Mail SS. Co. (1896), 77 Fed. R. 317.

(*t*) Benecke, Pr. of Indem. 185; Baily, Gen. Av. p. 64.

(*u*) According to the York-Antwerp Rules, 1890 (rule vi.)—"Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground, or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo and freight, or any of them, by carrying a press of sail shall be made good as general average." And a similar rule of practice has, apart from the York-Antwerp Rules, been adopted by the Association of Average Adjusters; see Appendix D.

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spars due to crowding a press of sail.

consequence of crowding sail to escape an enemy or a lee shore, this is not a general average loss in this country. A merchant ship had struck to a privateer, which, from the wind blowing fresh, was unable to board her: the merchantman, by hoisting an extraordinary press of sail, escaped, but in so doing was much strained and injured, and carried away her mainmast. The damage thus occasioned was held not to be a general average loss (*v*).

The Cour Royale of Rennes in the year 1822 came to the same decision in France, with regard to sails carried away in attempting to escape a lee shore. Boulay-Paty cites both cases with approbation, and gives the true reason on which they are founded—viz., that these manœuvres form part of those ordinary exertions to which the shipowner is bound by his duty to the freighters (*x*).

Damage done to a ship by fighting.

935. Upon the same principle it has been decided in England that damage done to the ship by fighting is not a subject of contribution. Thus, where a merchantman (carrying, however, six guns) was attacked by a privateer, and after a gallant resistance beat her off, but had two of her men killed, several wounded, and received besides great damage from the enemy's shot and expended a considerable quantity of ammunition: the Court held, that neither the expense incurred in curing the wounded sailors, nor the cost of repairing the damage so received, nor the waste of the ammunition so expended, was a subject of general average contribution (*y*). Gibbs, C. J., said, "The measure of resisting the privateer was for the general benefit, but it was no part of the adventure. No particular part of the property was voluntarily sacrificed for the safety of the rest (*z*); the

(*v*) Covington *v.* Roberts (1806), 2 B. & P. N. R. 378. Cf. Société Nouvelle d'Armament *v.* Spillers & Bakers, Ltd., [1917] 1 K. B. 815.

(*x*) Boulay-Paty on Emerigon, vol. i. p. 620. In more recent cases the French Courts have held that damage done by a press of sail is general average: see Lowndes, 5th ed. App. I. p. 513.

(*y*) Taylor *v.* Curtis (1816), 6 Taunt. 608; 2 Marsh. R. 309; *S. C.*, 4 Camp. 337; Holt, N. P. 192. (*z*) 6 Taunt. 623.

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loss fell where the chance of war directed it, and where, therefore, in point of justice, it ought to fall" (*a*): at Nisi Prius the same learned judge had said, "I cannot distinguish this from the case of a ship carrying a press of sail to escape an enemy" (*b*).

With regard to a ship of war, indeed, it is obvious that the damage caused by fighting is no more than an ordinary sea risk,—a loss caused by the perils insured against in the usual and ordinary course of the ship's duty as an armed vessel (*c*), and not an extraordinary measure resorted to for the general benefit; but with regard to a merchant vessel resorting to the measure of resisting a vessel of superior power as a desperate and only means of saving both ship and cargo from capture, the loss thence arising appears, on principle, a fair subject for general average contribution: it is a loss which is the direct and anticipated result of an extraordinary measure resorted to as the only means of saving the whole adventure from imminent peril; and ought not, it should seem, to be regarded as falling within the scope of those ordinary duties of the navigation to which the owner is bound by his contract with the freighter (*d*).

Abnormal use of engines and of coal.

936. The cases above cited, and the principles illustrated, were reviewed and discussed in a case where a steamship took the ground while leaving Galveston harbour, and was only rescued from a position of imminent peril by an abnormal use of her engines, coupled with an extraordinary consumption of coal. A claim was made for contribution in respect of the damage to the engines and the cost of the coal, against which it was argued, upon the authority chiefly of Covington *v.* Roberts (*e*), that there was nothing abnormal in the nature

(*a*) 2 Marsh. R. 319. (*b*) 4 Camp. 338.

(*c*) 1 Emerigon, c. xii. s. 41, p. 610.

(*d*) Stevens admitted that there should be a distinction made between the two cases, but considered that even in the case of a merchant ship the loss so incurred would be not general but particular average (Average, 36). Baily (Gen. Av. p. 80) agreed with Stevens, but Arnould (2nd ed. p. 914) took a contrary view.

(*e*) *Ante*, § 934.

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of the user of the ship's appliances, though the circumstances were no doubt extraordinary. It was held, however, that to use engines by working them ahead and astern while the vessel was fast on a bank, instead of being afloat, was a use for which they were never intended, and that the engines having been intentionally put to such a use in order to rescue ship and cargo from danger, both the injury to the engines and the extra coal consumed must be contributed for (*f*).

Loss of boats.

Boats, when cut away from the ring-bolts, or other usual fastenings, and heaved overboard, are a general average loss (*g*); but if cut away when lashed from the quarters or stern davits, it seems they would not be so, unless an usage were proved in the trade so to carry them (*h*), or under peculiar circumstances.

Damage done to ship or cargo in order to quench a fire.

Where a ship is scuttled in order to extinguish a fire, which threatens the destruction both of ship and cargo, the damage both to ship and cargo gives a claim to contribution (*i*). Similarly, too, where, in order to quench such a fire, water is necessarily poured into the hold (*k*). And in the Circuit

(*f*) The Bona, [1895] P. 125 (C. A.). Cf. Lowndes, General Average, s. 34. So, rule vii. of the York-Antwerp Rules, 1890, provides that "damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage."

(*g*) Stevens, Average, 14; Benecke, Pr. of Indem. 187.

(*h*) Blackett *v.* Royal Exch. Ass. Co. (1832), 2 C. & J. 244; see also Lenox *v.* United Ins. Co. (1802), 3 Johnson, N. Y. Cas. 178.

(*i*) Stevens, Average, 42; Benecke, Pr. of Indem. 243; Achard *v.* Ring (1874), 31 L. T. N. S. 647; Papayanni *v.* Grampian SS. Co., Ltd. (1896), 1 Com. Cas. 448, where the ship was scuttled by the captain of the port. The Supreme Court of the United States held in Ralli *v.* Troop (1894), 157 U. S. 386, that there could be no general average claim unless the act of scuttling were the act of the master, and done with the sole object of saving the particular ship and cargo. See *ante*, § 909, n. (*l*).

(*k*) Until the year 1874 the practice was to disallow claims for damage done by the water. The change was due to Stewart *v.* West India Co. (1873), L. R. 8 Q. B. 88, 362. Cf. also Schmidt *v.* Royal Mail Co. (1876), 45 L. J. Q. B. 646; Aspinwall *v.* Merchant Shipping Co. (not reported, but referred to in Schmidt's case); Pirie *v.* Middle Dock Co. (1881), 4 Asp. M. L. C. 388; and Whitecross Wire Co. *v.*

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Court of Appeals in America, damage to cargo caused by the voluntary flooding of a stranded steamer, in order to prevent a total loss from pounding upon a reef, was held to be a general average loss (*l*). But in a case where, in order to extinguish a fire, steam was turned into the hold, and it was impossible to distinguish between the damage due to the accidental fire and the additional damage occasioned by the application of the steam, it was held that no case for general average was made out (*m*).

Loss arising from voluntary stranding, where the ship is afterwards got off, is a general average loss.

937. Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding was considered by most of the earlier writers to be a matter for contribution. Emerigon, after exhausting all the learning that could be collected on the subject when he wrote, thus gives the result of the authorities he cites (*n*): "It sometimes happens that, in order to escape an enemy, or to avoid shipwreck, the ship is intentionally run

Savill (1882), 8 Q. B. D. 653. The history of the controversy on this subject is fully given in Lowndes, Gen. Av. § 13. The practice of English average adjusters is not to allow contribution in respect of the water damage done to packages which were on fire at the time when the water was thrown on them. Yet if the damage by fire has not rendered a package valueless, and the damage done by the water can be separately assessed, it seems more in accordance with principle to allow contribution than to follow the present practice. See the remarks of Channell, J., in Greenshields *v.* Stephens, cited in Lowndes, Gen. Av. 5th ed. pp. 91, 92. Under the York-Antwerp Rules, 1890, r. iii., *post*, App. C., no compensation is made for damage to such portions of a bulk cargo or to such separate packages as have been on fire. In Greenshields *v.* Stephens, [1908] 1 K. B. 51; A. C. 431, the contention that all the contents of one hold constituted one "portion" of a bulk cargo was rejected.

(*l*) Pacific Mail SS. Co. *v.* N. Y. H. & R. Min. Co. (1896), 74 Fed. R. 564.

(*m*) Reliance Mar. Ins. Co. *v.* N. Y. & C. Mail SS. Co. (1896), 77 Fed. R. 317.

(*n*) These authorities are—Consolato del Mare, c. 192, 193 (that is the 150th c. of M. Pardessus; see Lois Maritimes, vol. ii. p. 166); Roccus de Navibus, n. 60; Targa, c. 76, p. 317; Casaregis, Disc. 19, No. 18; Disc. 46, No. 61.

aground in what appears to be the least dangerous spot. The loss thence arising is a general average loss, because its object was the general safety" (*o*). Sect. 937.

The rule has been laid down in the same way by Lord Tenterden in this country (*p*), and by Chancellor Kent in the United States (*q*), where it has received the sanction of several decided cases.

Controversy on the subject.

938. Stevens, while admitting all authority to be against him, maintained the contrary, chiefly on the ground that the object in view is not the general safety of the whole adventure, but only the safety of the cargo purchased by the destruction of the ship (*r*).

Benecke, on the other hand, acknowledged that in every case but one the loss arising from voluntary stranding has all the characteristics of a general average loss—"imminent danger, voluntary determination, and a sacrifice" (*s*)—but in the excepted case—viz., where the situation of the ship at the time of the loss is so desperate as to leave no alternative—he thought the loss was not properly general average, because the stranding was inevitable, and therefore not voluntary.

To the objection of Stevens it is a sufficient answer that the intention is not to destroy the ship, but to place both her and the cargo in a situation of less peril, and that the loss is therefore voluntarily incurred for the common benefit.

Benecke's objection, in the case supposed by him, was criticized by Arnould (*t*) in the following terms: "If, indeed,

(*o*) 1 Emerigon, c. xii. s. 13, pp. 405, 600.

(*p*) Abbott, Shipping, 349, 5th ed.; p. 771, 14th ed.

(*q*) In the case of Bradhurst *v.* Columbian Ins. Co. (1812), 9 Johnson, N. Y. R. 9. See also the other cases cited in 2 Phillips, Ins. s. 1313; and The Star of Hope (1869), 9 Wall. 203. In Norwich & N. Y. Trans. Co. *v.* Ins. Co. of N. A. (1902), 118 Fed. R. 307, the master ran his vessel on what he believed to be sand, but which turned out to be mud, by reason whereof the ship was submerged and the cargo damaged. Adams, D. J., held that all the damage was general average. On appeal, his judgment was affirmed (1904), 129 Fed. R. 1006; 194 U. S. 637.

(*r*) Average, 34, 35.

(*s*) Pr. of Indem. 219.

(*t*) 2nd ed. p. 916.

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the act of stranding be in no degree the result of human agency, then, of course, *cadit quæstio;* but if the will of man was in any, even the least, degree contributory thereto, that is all which is required; and it makes no difference that the pressure of circumstances was such as to prevent that will from being reasonably exerted, except in one particular way. This forced volition ('*volonta violentata dall' accidente del pericolo*' (*u*)) is all that is required to give the party making the sacrifice a claim to contribution. Nothing more is requisite than that the act of man should have co-operated with the violence of the elements" (*x*).

Practice in this country otherwise.

In practice, the rule established in this country is to exclude this kind of loss from general average (*y*). Though the point has never been expressly decided in our Courts, there seems little doubt that they would hold in conformity with the great body of previous authorities, that, at all

(*u*) Targa, as cited 1 Emerigon, c. xii. s. 42, p. 588. And cf. the opinion of the Supreme Court of the United States in The Star of Hope (1869), 9 Wall. at p. 233. It is sufficient that the vessel should have been selected to suffer the common peril in the place of the whole of the associated interests. And the fact that the property cast away would inevitably have perished even if it had not been selected to suffer in place of the whole, makes no difference: Sousmith *v.* The J. P. Donaldson (1884), 21 Fed. R. 671.

(*x*) "Que le fait de l'homme ait concouru avec le cas fortuit": 1 Emerigon, c. xii. s. 42, p. 588. The case, in fact, exactly falls within that class of actions which the scholastic philosophy designated as mixed, *i.e.*, rather voluntary than involuntary, though partaking of the nature of both. Thus Aristotle, in treating of the question of free-will, expressly instances jettisons (τὰς ἐν τοῖς χειμῶσιν ἐκβολὰς) as falling within the class of actions that ought rather to be called voluntary than involuntary, because, although no one would resort to them unless forced by circumstances, yet they are objects of choice at the time they are resolved on, and the necessary steps taken towards carrying them into effect are acts of free volition: Ethics lib. iii. c. i.

(*y*) Baily, General Average, 41, 75, 76. One of the Rules of Practice adopted by the Association of Average Adjusters declares that "the custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding. This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire." Nevertheless, another of the rules provides "that damage caused to machinery and boilers of a stranded vessel in endeavouring to refloat for the common safety, when the interests are in peril, be allowed in general average."

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events, where the ship is subsequently recovered after a voluntary stranding, so as to be able to pursue her voyage, the loss arising therefrom gives a claim to a general average contribution.

Where the ship is lost by the voluntary stranding, but the cargo saved, is there any contribution?

939. Where, however, the ship is lost in consequence of the stranding, but the cargo saved, does that which is so saved contribute in general average for the loss of the ship?

This is a question on which there has been a great diversity of opinion among legislators and jurists (*z*). The Roman law provided generally that the goods saved should not contribute for the loss of the ship. *Amissæ navis damnum collationis consortio non sarciatur per eos qui merces suas naufragio liberaverint* (*a*). Voet, however, in commenting on this passage, expressly says: "That if the ship be voluntarily run ashore for the common safety, and thus has perished, the goods being saved, contribution is due" (*b*).

The Consolato del Mare (*c*), in case of the ship's being wrecked (*brisé*) by the voluntary stranding, provides that the goods saved shall contribute for the damage done to the ship.

The case is not expressly provided for by the other mediæval sea laws.

Emerigon, after laying down the general doctrine that in case of voluntary stranding the goods saved contribute for the damage done to the ship, adds to it this limitation: "Provided always that the ship shall have been set afloat again; for if the stranding be followed by the wreck of the ship, it is then *sauve qui peut*" (*d*).

(*z*) See an elaborate account of the state of the question in Pardessus, Lois Maritimes, vol. i. p. 140, and vol. ii. p. 21. See c. xii. Introduction to the Consolato del Mare.

(*a*) Dig. lib. xiv. tit. 2, f. 5.

(*b*) Voetius ad Pandect., *loc. cit.*

(*c*) Cap. 192 of the Italian translation; cap. 150 of the Catalan original; Pardessus, Lois Maritimes, vol. ii. p. 167.

(*d*) 1 Emerigon, c. xii. s. 41, p. 600.

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Bynkershoek disapproves of this doctrine, and holds that the loss of the ship, like the loss of her tackle, is a general average loss, where she has been sacrificed by a voluntary stranding for the common safety (*e*).

Law as finally settled in the United States.

940. The question was for some time variously decided in the American Courts, until it was finally set at rest, in 1839, by the judgment of the Supreme Court of the United States, delivered by Story, J., in the case of the Columbian Insurance Company *v.* Ashby (*f*),wherein, after an examination of all the learning on the subject from the Digest downwards, it was decided that a voluntary stranding, followed by a total loss of the ship, but with a saving of the cargo, constitutes, when designed for the general safety, a clear case of general average, in which the owners of the cargo are liable to contribute for the loss incurred by the ship and freight (*g*).

The facts of the case were these:—The brig "Hope," going down Chesapeake Bay, found the weather too bad to proceed to sea, and bore away for a projecting headland in the bay, called Sewell's Point, where she anchored. On the second and following day the gale increased in violence; the brig dragged her anchors from time to time, till finally she struck on the shoals, and, her head swinging round, brought her broadside to the wind and a heavy sea. In this situation the captain, finding no other possible chance of saving the ship and cargo, and preserving the lives of the crew, slipped his cables altogether, and ran the brig ashore, as far up the beach as possible, where, after the storm, she was left high and dry, and there was no possibility of getting her off. The cargo was saved. The Court held, that the owners of the cargo were bound to contribute to the owners of the

(*e*) Quæstiones Privati Juris, lib. iv. c. 22.

(*f*) 13 Peters, S. C. R. 331. In Iredale *v.* China Traders' Ins. Co., [1899] 2 Q. B. 356, 362, Bigham, J., said that he believed the English law to be the same as that laid down in this case by Story, J.

(*g*) Chancellor Kent, who as a judge had elaborately expressed a different opinion (in the case of Bradhurst *v.* Columbian Ins. Co.), in his Commentaries, states the law to have been finally settled in the United States by the judgment of Story, J. See 3 Kent, Com. 239, note.

ship and freight for the loss upon both interests caused by the stranding. Sect. 940.

In the course of a very elaborate judgment, Story, J., thus states succinctly the grounds of the decision:—"The intention is not to destroy the ship, but to place her in less peril, if possible, as well as the cargo. The act is hazardous to the ship and cargo, but is done to escape from a more pressing danger: it is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because, from inevitable calamity, the danger has exceeded the expectation or intention of the parties, the whole sacrifice should be borne by the shipowner, when he has thereby accomplished the safety of the cargo" (*h*).

941. In this country there has been no judicial decision on the point. Arnould (*i*) appears to have regarded the principle established in the judgment just referred to as correct.

Lowndes' view on voluntary stranding.

The whole question of voluntary stranding has, however, been exhaustively discussed by Lowndes (*k*). Not only are the arguments on all sides carefully explained and considered in his treatise, but there is an interesting history of the controversy during the early part of the nineteenth century, showing especially what was the old practice at Lloyd's, and how the practice was changed in deference principally to the arguments of Stevens so long ago as 1813. And the views of Benecke, Arnould, and of the American Courts are also carefully weighed. It is impossible here to do very much more than briefly summarise the conclusions arrived at.

Ultimate loss of vessel is immaterial.

The ground may be cleared by pointing out that Lowndes fails to see any principle by which the ultimate loss of the

(*h*) This case is well worth consulting in the original report. Those, however, who have not the means of so referring to it, will find the judgment of Story, J., given at length in the 2nd ed. of Phillips, Ins. vol. ii. pp. 111—114. (Not given in the 3rd or 4th eds., see vol. ii. s. 1313.)

(*i*) 2nd ed. p. 919.

(*k*) General Average, § 36. The question whether the ultimate loss of the ship makes any difference is more particularly dealt with in pp. 166—168, 5th ed.

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vessel should be allowed to make any difference to the right to contribution. Judge Carver (*l*) agrees in this view. So do the present editors.

Lowndes' classification.

Dealing with the general question, Lowndes classifies the cases of voluntary stranding which may arise under three divisions: (1) Where it is certain that the vessel must ground somewhere, and the master selects the place where she will suffer the least hurt: (2) Where it is certain that the vessel must, unless stranded, be lost, owing, however, to the imminence of some other peril than that of stranding, such as that of sinking in deep water, burning, capture: (3) Where the vessel is, from some cause or other, in great danger, but loss is not certain. The first case Lowndes regards as one not involving any sacrifice, because no part of the ship or cargo is in a worse position or exposed to a greater peril by being placed on a soft or smooth bed, rather than on one rockier or more uneven or more exposed to the weather. For this reason he would not allow contribution. The second case, and *à fortiori* the third, he regards as cases of sacrifice, for which contribution should be made.

The editors' view.

942. It is submitted that Lowndes' reason for not allowing contribution in the first class of cases, viz., that nothing is placed in a worse position than before, is unsound. The same argument might, indeed, be used in many undoubted cases of general average to negative any right of contributions; *e.g.*, when a ship is on fire at sea and will inevitably be burnt unless the fire is checked. The fact that some stranding was unavoidable does not necessarily, as even Lowndes admits, prevent the actual stranding from being voluntary; and it is difficult to see why the principle of general average should not apply when a ship has been deliberately run ashore to avoid a worse mishap, and one part of the property at risk has thereby been lost or damaged and the rest placed in safety. As pointed out by another modern writer (*m*), the difficulty seems to be one not so much

(*l*) Carriage by Sea, s. 387. (*m*) McArthur, Mar. Ins. 194, note.

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of principle, as of the application of the principle to circumstances. It may often be a nice question of fact to determine whether in a particular case the stranding was a voluntary one (*n*). And a further nice question may often arise, as to the extent to which a vessel has been sacrificed by the stranding. Clearly only the damage due to the stranding should be contributed for; her condition, therefore, before she was run ashore must be taken into account. If at this time she was virtually a wreck, it appears that the damage to be contributed for should be little or nothing (*o*). But the existence of difficulties of fact such as these is not a conclusive argument against the adoption of what appears to be the true principle.

As to the actual practice followed, we have already noticed that, except in the case of fire, the average adjusters of this country allow no general average contribution for damage resulting from a voluntary stranding. The York-Antwerp Rules, 1890 (*p*), seem to steer a middle course between the English practice and the view expressed in our text.

York-Antwerp Rules.

Foreign codes appear to be generally in accord with the principle here supported (*q*).

General average losses—extraordinary expenditures for the common benefit.

943. Having enumerated those cases of general average loss which arise out of sacrifices, we will now proceed to consider those which are founded on expenditures.

The same principles apply to cases of general average

General principles the

(*n*) As to what amounts to a voluntary stranding, see The Star of Hope (1869), 9 Wall. 203 (United States Supreme Court); and cf. Shoe *v.* Low Moor Iron Co. (1891), 49 Fed. R. 252.

(*o*) See Shepherd *v.* Kottgen (1877), 2 C. P. D. 578, 585.

(*p*) Rule V.: "When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average."

(*q*) See Lowndes' Appendices. The Belgian rule is apparently the same as that of the York-Antwerp Rules: Lowndes, 5th ed. p. 460.

Sect. 943. same both as regards sacrifices and expenditures. But in case of expenditures the application of those principles is different.

expenditure as to those of general average sacrifice, and in particular (1) the expenditure must have been of an extraordinary nature, that is to say, something more than one of those ordinary disbursements which are necessary for keeping the ship in a proper condition to transport the cargo; and (2) the expenditure must be due to a voluntary act in the nature of a sacrifice made for the preservation of ship and cargo. It should be borne in mind, however, that there is this peculiarity in cases of expenditure, *i.e.*, that an expenditure as such is not necessarily made in order to save anything; that which procures safety is usually the prior adoption of some extraordinary measure, which involves or leads to expenditure out of the common course because the measure itself was out of the common course. Instead of dividing general average losses into sacrifices and expenditures, it would, as Lowndes (*r*) points out, be more accurate to say that a general average loss must be the result of a sacrifice, which may either be of the cargo or ship, or may consist in the adoption of some extraordinary course leading to an increased expense. In dealing therefore with extraordinary expenditures, we do not consider whether the expenditure itself was incurred for the joint safety of ship and cargo, but whether the extraordinary course which led to the expenditure was adopted for that purpose.

The expenditure must be strictly due to the general average act.

944. Another point to be specially noticed in dealing with extraordinary expenditures is that the particular item of expenditure for which contribution is claimed must flow from the extraordinary measure of sacrifice adopted, as effect flows from cause. This matter was discussed in Svendsen *v.* Wallace, where the question was as to what items should be allowed as items of a general average expenditure, which had been incurred at a time when the hour of danger and sacrifice was over. Only those, said Bowen, L. J. (*s*), which can be shown to be part of the loss entailed by some antecedent act of sacrifice.

(*r*) Gen. Av. § 37.

(*s*) 13 Q. B. D. at p. 89.

Sect. 944. General rule as to losses and expenditures consequential on general average act.

The general rule, applicable alike to sacrifices and expenditures, is that those losses, and those only, are recoverable as general average, which are the direct consequences of a general average act. Thus, according to Ulrich, general average includes all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or, in other words, was its necessary consequence (*t*). An example of this principle is given in "Abbott on Shipping" (*u*) in a passage cited with approval by Cresswell, J., in Hallett *v.* Wigram (*x*). "So if to avoid an impending danger, or to repair the damage occasioned by a storm, the ship be compelled to take refuge in a port to which it was not destined, which it cannot enter without taking out a part of her cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also being occasioned by the removal of the goods for the general benefit must be repaired by general contribution" (*y*).

Port of refuge expenses.

945. One of the most difficult questions in connection with general average expenditure is as to the incidence of expenses occasioned in consequence of the necessity of taking a ship into a port of refuge, whether for repairs or for shelter merely. There are several points in relation to this subject which cannot yet be said to be finally determined (*z*).

(*t*) Ulrich, Grosse Haverei, p. 5, cited with approval by Bigham, J., in Anglo-Argentine Live Stock Agency *v.* Temperley Shipping Co., [1899] 2 Q. B. 403, 410, and by Bailhache, J., in Austin Friars SS. Co. *v.* Spillers & Bakers, [1915] 1 K. B. at p. 836; affirmed in C. A. [1915] 3 K. B. 586.

(*u*) 5th ed. p. 346, 14th ed. p. 457.

(*x*) 19 L. J. C. P. 281; 9 C. B. 580.

(*y*) In McCall *v.* Houlder (1897), 2 Com. Cas. 129, Mathew, J., applied this doctrine so as to make shipowners liable to contribute in respect of damage to cargo occasioned by sea-water which had found its way into the vessel through a broken air-pipe while the vessel was tipped for repairs to her propeller, although nobody knew that the air-pipe was broken when the vessel was tipped.

(*z*) In practice, the importance of the subject is hardly commensurate with its difficulties. This is due to the prevalence of the custom

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Assuming that a vessel, in consequence of injuries sustained at sea, is obliged, for the safety and preservation of ship and cargo, to put into a port of refuge, expense may be incurred in entering the port, while there, and in leaving it, which may be briefly summarized as follows:—

1. Expense of making and entering the port.
2. Expense of unloading the cargo.
3. Expense of warehousing the cargo.
4. Expense of repairing damage to the vessel.
5. Expense of re-shipping the cargo.
6. Expense of leaving port, outward dues, &c.
7. Expense of crew's wages and provisions while in port.

Perhaps the best way of indicating the difference in principle between the various views on the subject generally will be, before discussing each of the above heads of expenditure severally, to refer shortly to the history of the controversy.

Difference of opinion amongst average adjusters.

946. Until about the year 1878, it had been for a long time the practice of English average adjusters, in adjusting losses in cases where ships had put into port to refit, to treat the expenses of putting into port, and of discharging the cargo, as general average, the expense of warehousing it as a particular charge on the cargo, and the expense of the re-shipment of the cargo, outward pilotage and port charges, and other expenses incurred in order to enable the ship to proceed on her voyage, as a particular charge on freight. Whether the necessity of putting into port was itself due to a prior general average act, or to particular average loss or damage, or otherwise, was not deemed to be a material consideration; in all cases the expenses above referred to were similarly treated.

In 1876, however, an eminent average adjuster promulgated the view that the practice above described was wrong in principle, and that all these expenses up to the time when the ship resumed her voyage ought to be adjusted as general average. The result of this opinion was litigation which took shape in the cases of Atwood *v.* Sellar, and Svendsen *v.* Wallace, the former case reaching the Court of Appeal in 1880 and the latter the House of Lords in 1885.

of inserting into contracts of carriage a provision whereby general average is to be settled in accordance with York-Antwerp Rules. See Appendix C., rules x., xi. and xii. These rules are much more liberal in matters of general average than is the law of this country, especially in having regard to the prosecution of the voyage rather than the safety of the interests as the criterion.

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Alteration of practice owing to Atwood *v.* Sellar, and Svendsen *v.* Wallace.

947. In consequence of these decisions, the Rules of Practice of the Association of Average Adjusters were altered to their present form, which is as follows:—

"That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average, and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average. (See Atwood *v.* Sellar.)

"That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight. (See Svendsen *v.* Wallace.)"

On comparing the old practice with the new rules as above set forth, it will appear that they agree in including under general average, under all circumstances, all expenses incurred as far as, and including, the discharge of the cargo, and that as regards subsequent expenses they agree as to cases where the necessity of putting into port is occasioned by particular average damage, but differ as to cases where the damage occasioning such necessity was itself the subject of general average.

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948. Before proceeding to discuss the various debatable points that arise in connection with this difficult subject, it may be as well to unburden ourselves of those which may now be considered to be settled beyond the reach of controversy.

Expenses of entering port of refuge.

It is undoubted (*a*) that whenever the ship is obliged to put into a port of refuge for the safety and preservation of ship and cargo, however such necessity may have arisen, all inward expenses, such as towage, pilotage and harbour dues, are chargeable to general average. This is because, from all points of view, the peril which *ex concessis* necessitated the putting into port must also necessarily be continuous until the port of safety is reached.

Expense of repairs in a port of refuge.

It is also well established that the question as to the incidence of the expense of the repairs which made it necessary for the ship to seek a port of refuge, must be determined according to the nature of the damage or loss which rendered such repairs necessary. If such damage was in itself a general average loss, the cost of repairing it will be so too. But the cost of repairing damage accidentally caused to the ship by perils of the sea cannot give a claim to contribution, for to pay the cost of such repair is a duty imposed on the shipowner by the very contract of affreightment whereby he has pledged himself to maintain the ship in a fit state for transporting the cargo to its destination (*b*).

(*a*) See Svendsen *v.* Wallace (1884), 13 Q. B. D. 69.

(*b*) Benecke, Pr. of Indem. 194; Arnould, 2nd ed. p. 922. And cf. Hallett *v.* Wigram (1850), 9 C. B. 580; 19 L. J. C. P. 281; Walthew *v.* Mavrojani (1870), L. R. 5 Ex. 116. There may possibly be exceptional cases, as where it is necessary for the preservation of the cargo in a port where there is no place where it can be stored, to keep it on board during the repairs, whereby the cost of the repairs is increased. In such a case extra cost in doing so at a particular port might be general average. Cf. *ibid.*; Svendsen *v.* Wallace, 13 Q. B. D. at p. 85, per Bowen, L. J.; McCall *v.* Houlder (1897), 2 Com. Cas. 129. It sometimes happens that in order to save expense, only such temporary repairs are done at a port of refuge as will enable the ship to complete her voyage. In a case of this kind, although the cost of unloading and warehousing the cargo was saved, the Court of Queen's Bench expressed a strong opinion that no part of the cost of the temporary repairs could have been charged to general average: Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203.

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A doubt did once arise on this point. It is said (*c*) that the doubt was mainly due to a misconception of the case of Plummer *v.* Wildman (*d*). From Lord Ellenborough's language in this case it was not unfairly inferred that the rule established by the case was that the expense of repairs done to a ship in a port of distress, in so far as they are no more than just sufficient to enable the ship to keep the sea until she completes her voyage, and are of no permanent benefit to the ship *ultra* that voyage, give a claim to general average contribution, quite irrespective of the nature of the loss which induced the necessity of repairing. In this country, however, Plummer *v.* Wildman must be considered either to be overruled, or at all events not to be an authority for the rule deduced from it (*e*). In Power *v.* Whitmore (*f*), a case decided very soon afterwards, by the same Court, Lord Ellenborough referred to Plummer *v.* Wildman as decided on the ground that the repairs in that case were rendered necessary by a sacrifice of part of the ship for the general safety (*g*), and plainly intimated that the expense

(*c*) Arnould, 2nd ed. p. 923.

(*d*) (1815), 3 M. & S. 482.

(*e*) See per Wilde, C. J., in Hallett *v.* Wigram (1850), 9 C. B. at p. 603; Lord Campbell, C. J., in Job *v.* Langton (1856), 6 E. & B. at p. 793; Brett, J., in Walthew *v.* Mavrojani (1870), L. R. 5 Ex. at p. 118; Cleasby, B., in Harrison *v.* Bank of Australasia (1872), L. R. 7 Ex. at p. 50; Bowen, L. J., in Svendsen *v.* Wallace (1884), 13 Q. B. D. at p. 90. See also Wilson *v.* Bank of Victoria, *supra*, n. (*b*). In the United States the rule laid down in Plummer *v.* Wildman, as reported, has been followed, and temporary repairs of particular average damage at a port of refuge where permanent repairs cannot be effected are allowed in general average when necessary to enable the ship to prosecute her voyage: see Phillips, s. 1300; Lowndes, 5th ed. 742; Hobson *v.* Lord (1875), 92 U. S. 397, 407; Bowring *v.* Thibaud (1890), 42 Fed. R. 794, 796.

(*f*) (1815), 4 M. & S. 141.

(*g*) This explanation of Plummer *v.* Wildman seems to the editors an impossible one, unless the report in 3 M. & S. is erroneous from beginning to end. A more probable explanation is that when Power *v.* Whitmore was heard, Plummer *v.* Wildman had not yet been reported, and that Lord Ellenborough was speaking with an imperfect recollection of the case.

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of repairs can only be a subject of general average contribution when rendered necessary by a general average loss. Power *v.* Whitmore, said Arnould, appears to have restored the law of England on this subject to that which on principle seems to be the true rule, viz., that the expense of repairs rendered necessary by particular average losses sustained by the ship does not give a claim to a general average contribution, but that such claim can only be sustained when the damage to be repaired was in itself a general average loss (*h*).

Warehousing charges, &c.

949. So far there is little difficulty. But as regards other items of expense there has been, and still is, great difference of opinion, and it becomes necessary to consider carefully what are the principles established by Atwood *v.* Sellar and Svendsen *v.* Wallace.

Facts of Atwood *v.* Sellar.

In Atwood *v.* Sellar (*i*) the "Sullivan Sawin," while on a voyage from Savannah to Liverpool, encountered such severe weather that her master was compelled, for the safety of ship and cargo, to cut away the foretopmast. The vessel in consequence of this loss had to put into Charlestown for repairs, in order to effect which it was necessary to discharge a portion of the cargo. After the repairs were completed, the cargo was reshipped and the vessel proceeded on her voyage. The plaintiffs, her owners, claimed that the whole of the expenses of discharging, warehousing, and reshipping the cargo, and of pilotage, &c. in leaving the port were general average expenses. The defendants, the owners of the goods, while willing to treat the expense of discharging as general average, and themselves to bear the expense of warehousing as particular charges on the cargo, contended that the subsequent expenses were particular charges upon the freight. The

Judgment of Court of Appeal in Atwood *v.* Sellar.

Court of Appeal (Bramwell, Baggallay, and Thesiger, L. JJ.) decided in favour of the plaintiffs' claim, holding that it came within the principle underlying the whole doctrine of general

(*h*) Subject only to n. (*b*), *supra*.

(*i*) (1880), 4 Q. B. D. 342; 5 Q. B. D. 286.

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average contribution—namely, that the loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship and freight, should be borne by all. It was argued for the defendants that the common danger—*i.e.*, the physical danger to which the goods, as well as the ship, were exposed—was at an end as soon as the goods were unloaded, and that as general average ceases at the point of time when the common danger comes to an end, there could be no general average liability for anything that took place after the goods were put out of the ship. The Court, however, seems to have considered that under the expression "common danger" was included not merely danger threatening the physical safety of the ship and cargo, but also the danger of the vessel with her cargo being prevented from prosecuting her voyage. The judgment then continues (*k*): "The going into port, the unloading, warehousing, and reloading of the cargo and the coming out of port, are at all events part of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit, and properly to be regarded as continuous. The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose, being *ex hypothesi* consequent upon a damage voluntarily incurred for the general advantage, should legitimately be the subject of general average contribution, or, to use the language of Lord Tenterden in his work on shipping, 'if the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal.'" The earlier authorities were then reviewed, and declared to be unanimous in favour of the view that in such a case as the present, at any rate where the original cause of loss was itself a voluntary sacrifice, all the expenses claimed in the action were a matter for general average contribution.

(*k*) 5 Q. B. D. at p. 290.

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Facts of Svendsen v. Wallace.

950. The facts of Svendsen *v.* Wallace (*l*) were as follows:—A Norwegian vessel in the course of a voyage from Rangoon to Liverpool sprang a dangerous leak. The captain, in order to save ship and cargo, took refuge in Mauritius and repaired the damage. When in port it was necessary in order to repair the ship, but not otherwise necessary, to land and warehouse the cargo. When the repairs were completed, the cargo was reloaded and the vessel continued her journey to Liverpool. The plaintiffs were the shipowners, and brought their action against the owners of cargo for a general average contribution. The defendants admitted their liability to contribute to the expenses of unloading, also to pay the whole of the warehouse rent: but the plaintiffs, in addition to what the defendants admitted, claimed contribution in respect of the reloading, and of the port charges, pilotage, and other claims subsequent to the reloading. Lopes, J., before whom the action was tried, gave judgment for the plaintiffs for all the disputed items on the authority of Atwood *v.* Sellar, by which he considered the case was governed (*m*). But this decision was reversed by a majority of the Court of Appeal (*n*), and in the House of Lords (*o*) the decision of the Court of Appeal, so far as it declared that the cargo-owner was not liable to contribute towards the reloading expenses, was affirmed. The other points raised in the action were left undecided in the House of Lords.

Svendsen v. Wallace in the Court of Appeal. Opinion of Baggallay, L. J.

The judges in the Court of Appeal were Brett, M. R., and Baggallay and Bowen, L. JJ. Of these, Baggallay, L. J., adhered to the judgment pronounced in Atwood *v.* Sellar, and, being of opinion that the principles there laid down applied to the case under consideration, delivered a dissenting judgment in favour of the shipowners' claim on all points. It is important to notice that the learned Lord Justice

(*l*) (1883), 11 Q. B. D. 616; 13 Q. B. D. 69; 10 App. Cas. 404.
(*m*) 11 Q. B. D. 616.
(*n*) 13 Q. B. D. 69.
(*o*) 10 App. Cas. 404.

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emphatically rejected the idea that there was any materiality in the distinction drawn between the two cases as to the nature of the injury which made it necessary for the vessel to put into port. In either case the material act of sacrifice is the act of putting into port, however the necessity of doing so may have arisen (*p*).

Opinions of Brett, M. R., and Bowen, L. J., in Svendsen v. Wallace.

952. The opinions, however, of Brett, M. R., and Bowen, L. J., were to a different effect. The basis of both judgments was the definition of general average by Lawrence, J., in Birkley *v.* Presgrave (*q*): "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo." Accepting this criterion, both learned judges (*r*) proceeded to show that by English law, which differs herein from that of America and the Continent, a general average sacrifice must consist of an act done at a time when both ship and cargo were in peril, and for the preservation of both from such peril—a statement of the law which, as we have seen (*s*), agrees with the definition of a general average act in sect. 66 (2) of the Marine Insurance Act. The proposition put forward on behalf of the plaintiffs, that it was sufficient to show that the object of the sacrifice or of the expenditure was "the benefit of the whole adventure," was expressly disapproved (*t*).

"Preservation of ship and cargo"

"Exceptional cases," said Bowen, L. J. (*u*), "such as those suggested in the judgments delivered in Job *v.* Langton (*x*)

(*p*) Per Baggallay, L. J., 13 Q. B. D. at p. 81. A similar view was expressed by Lopes, J., in the Queen's Bench Division (11 Q. B. D. at p. 617), and these opinions have never been expressly dissented from, though Brett, M. R., and Bowen, L. J., do appear to have thought that there might be some justification, on the score of established usage or otherwise, for the distinction. See 13 Q. B. D. at pp. 80, 95. In the House of Lords the point was noticed, but no opinion was expressed: 10 App. Cas. at p. 420.
(*q*) (1801), 1 East, 220.
(*r*) Brett, M. R., at pp. 72—76; Bowen, L. J., at pp. 84—87.
(*s*) *Ante*, § 906.
(*t*) 13 Q. B. D. at p. 74 (Brett, M. R.), at p. 85 (Bowen, L. J.).
(*u*) *Ibid.* p. 85.
(*x*) (1856), 6 E. & B. 779.

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and Walthew *v.* Mavrojani (*y*), may be imagined in which the safety of the ship and cargo and the safety of the common commercial enterprise would be almost convertible terms; and with reference to such cases it is possible to conceive that expenses after the ship and cargo were in safety from the sea might, on the ground of a physical danger common to both, be brought into general average. But (exceptional cases apart) it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner."

953. Starting from this standpoint, both judges declare that when once ship and cargo are in a position of physical safety, there can be no further liability for general average, unless it can be shown that a subsequent expenditure was a necessary consequence of a prior general average act (*z*), and they maintain that every item claimed must be specifically dealt with by application of the principles laid down to the particular circumstances of the case. The cost of unloading will be a general average sacrifice "if necessary for the common preservation of ship and cargo": otherwise "it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice."

How, if "preservation of ship and cargo" is the test, can any

"The goods having been landed (*a*), there is an end of all danger common to ship and cargo. The contest between the parties in the present instance turns wholly on items of ex-

(*y*) (1870), L. R. 5 Ex. 116.

(*z*) This is in reality rather Lord Justice Bowen's way of putting the case. Brett, M. R., says that in order to justify liability for such subsequent expenditure, the act entailing such expenditure must be shown to be "part of another act which is a general average act" (13 Q. B. D. at p. 77). He then enunciates the opinion that whenever a ship goes into port to effect repairs which cannot be done without landing the cargo, the discharge is part of the "act of going in to repair," and recoverable as such in general average. This view is criticised *infra*, § 958.

(*a*) 13 Q. B. D. at p. 89, per Bowen, L. J.

penditure subsequently incurred. These cannot be brought into general average on the ground that they are general average sacrifice in themselves, for the hour of danger and of sacrifice is over. They can only become so chargeable, if it can be shown that they are part of the loss which some antecedent act of sacrifice entails. The first item in controversy which we are asked to consider relates to the warehousing of the cargo. Now, *primâ facie*, warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may, conceivably, in some cases have been rendered necessary by an antecedent sacrifice, so as to fall within the definition of the loss caused thereby. But the only antecedent sacrifice in the present case was the putting into port for refuge, and it is difficult to see how, as between ship and cargo, the warehousing of the cargo was caused by the mere putting into port. The defendants have admitted their liability to bear the charge in full. In my opinion there is no reason to treat the warehousing in the present case as other than a charge on cargo. We come next to the reloading. Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Is it then caused by any act of sacrifice, or is it part of the loss, in other words, which an antecedent act of sacrifice involves? Where, for example, a ship has cut away a mast and has put into port to repair the damage so caused, and has been compelled, in order to repair this special damage, to unload and to reload the cargo, it may follow, according to the decision in Atwood *v.* Sellar, that such expenses are all part of the loss involved in the original sacrifice. But in the present instance the only sacrifice has been the putting into port, and the reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship and to unload and reload the cargo for that purpose. The charges of reloading in such a case ought in principle to fall upon the freight, or else upon the freight and the ship together if the two interests are severed.

Sect. 953. expenses be allowed which are incurred after ship and cargo are safe?

View of Bowen, L. J. as to warehousing cargo.

Reloading.

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Outward charges.

954. "I come next to the charges outward, and this seems to me to raise a more difficult question. Expenditure of this description is not in itself a general average sacrifice, but may it not be said that it has been caused by one, on the ground that a ship which goes into port will have to come out again, and that the former operation directly causes the latter? If strict theory is to be applied there might seem to be a difference between the cases in which the vessel has done nothing in the port of refuge beyond availing herself of a temporary shelter, and the cases where she puts in in order to repair damage and because it was not safe for her to continue her voyage without such repairs. In the former case, where shelter alone is sought, the vessel might plausibly be said to come out simply because she previously went in. In the latter case, where she puts in for repairs, the proximate cause of her coming out is not that she put in—for she could not have resumed her voyage had not the necessary repairs been effected upon her while in harbour—but that the master when in harbour decided, in the discharge of his duty and in the interest of his owners, on repairing the ship, reloading the cargo, and carrying on the voyage. The outward expenses ought therefore, as it seems to me, in the present instance to fall on freight."

Decision of Court of Appeal in Svendsen *v.* Wallace.

955. These principles being applied to the facts of the case before the Court, it was held first, that the expenses of reloading (*b*) the cargo after the ship had been repaired were not general average expenses. For clearly the cargo was not in any physical danger immediately prior either to the warehousing or to the reloading. Nor could it be said that either operation had been necessitated by, or formed part of, any prior general average sacrifice. The prior general average act had been simply, according to Bowen, L. J., the putting into port for safety, and on the attainment by ship and cargo

(*b*) Warehousing expenses are also similarly dealt with in the judgment of Bowen, L. J. But these were not in dispute, as the cargo-owner, rightly or wrongly, admitted liability. In so far, therefore, as the judgment covers expenses of this nature, it is an *obiter dictum*.

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of a position of safety, the object of the sacrifice was achieved. "The reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship and to unload and reload his cargo for that purpose, and ought in such a case to fall upon the freight, or upon the freight and the ship together if the two interests are severed."

Secondly, it was held that the outward expenses ought also in the present instance to fall on freight. Bowen, L. J., however, as may be seen from a passage which we have quoted, suggested that there might perhaps be a distinction between the cases in which a vessel has done nothing in the port of refuge beyond availing herself of a temporary shelter and cases where she puts in for repairs, without which it was not safe for her to continue her voyage (*c*).

Svendsen *v.* Wallace in the House of Lords.

956. In the House of Lords the judgment of the majority of the Court of Appeal was affirmed, but the only point decided was as to the expenses of reloading, which were held not to be the subject of contribution. Upon the more difficult question as to the expenses of leaving port, it was considered unnecessary to express a formal opinion. The judgment of the House, delivered by Lord Blackburn, adds little to that of the Court of Appeal. Atwood *v.* Sellar seems to be treated rather as a decision upon the particular facts of the case, than as laying down any principles differing from those enunciated by Brett, M. R., and Bowen, L. J. "If I thought (*d*) it was the state of the case before the House," that the going into port, the unloading, warehousing, and reloading, were parts of one operation carried through for the common safety and benefit, and properly to be regarded as continuous, "I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as parts of the expense of repairing the damage, and therefore in a case where the cause of the damage was such that the expense of repairing it ought to be

(*c*) 13 Q. B. D. at p. 90. (*d*) 10 App. Cas. at p. 420.

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borne by all, as was the case in Atwood *v.* Sellar, to be borne by all, but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this inquiry."

Effect of Atwood *v.* Sellar, and Svendsen *v.* Wallace.

957. By these judgments it is submitted that the following propositions of law may now be considered as established:—*First*, that there can be no act of general average unless it has been done with the object of attaining physical safety for ship and cargo. Both must have been in physical danger at the moment when the loss or expenditure was incurred, or the loss or expenditure must be the result of such an act. *Secondly:* the "benefit of the adventure" has nothing to do with the matter, unless by "benefit" we mean physical safety or preservation, and by "the adventure" we understand ship, freight and cargo. Where a vessel necessarily puts into a port of refuge for common safety of ship and cargo, this is a general average act only in so far as the object is the common safety: when once the ship is there, the liability to contribute ceases unless the danger continues, or unless subsequent expenses are necessarily due to the earlier general average act. *Thirdly:* it is submitted that there is no difference in principle between a case where the necessity of putting into the port of refuge was itself occasioned by a general average sacrifice, and a case where it was occasioned by a peril of the sea. But in the former case it may be easier to make out a causal connection between the general average act and the expenses subsequently incurred than in the latter. And to every case the same test must be applied.

Application of the decisions.

958. Having determined to the best of our ability the general principles underlying this subject, we now propose to consider how they should be applied to the different heads of expenditure (other than those already dealt with) which commonly occur in ports of refuge.

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1. *The Cost of Discharging Cargo.*

Cost of discharge.

This operation may be rendered necessary in various ways. As Bowen, L. J., points out (*e*), no universal rule can be laid down; each case must be considered according to its peculiar circumstances. The necessity may have arisen owing to a leak in the ship, which, if not stopped, would cause the vessel with her cargo to go down. This is clearly a case of general average. Or, the discharge may be simply in order to preserve the cargo, as where the injured ship is safe, but the cargo is perishable, if wetted (*f*): in this case the expenses would fall on the cargo alone. A more common case is where the object of the discharge is to enable the vessel to be repaired. This case presents difficulties. Brett, M. R. (*g*), was of opinion that the expenses under such circumstances should always be general average; but Bowen, L. J., thought that theoretically this would not be so, unless either necessary for the preservation of ship and cargo or directly occasioned by some antecedent act of general average sacrifice (*h*). Carver (*i*), in agreement with the latter view, considers that the cost of discharge is to be regarded as part of the cost of repairing. Hence where the cost of repairs is a general average expenditure, as where the necessity of repairing is due to a prior general average act, the cost of discharging in order to enable these repairs to be done is also a general average expenditure (*k*); but where the repairs are particular average on ship, so is the cost of discharging.

View of Brett, M. R., criticized.

A decision of Lord Alverstone, C. J. (*l*), seems to be

(*e*) Svendsen *v.* Wallace (1884), 13 Q. B. D. 77, 78.

(*f*) Svendsen *v.* Wallace, 13 Q. B. D. at p. 76, per Brett, M. R.

(*g*) Svendsen *v.* Wallace, 13 Q. B. D. at p. 78.

(*h*) At pp. 87, 88. He apparently had no wish to disturb the practice of charging the unloading expenses in all cases to general average. He says: "Nor is it necessary to discuss a practice which may have become inveterate and which is found adequate": p. 87.

(*i*) Carriage by Sea, s. 408.

(*k*) Cf. Plummer *v.* Wildman (1815), 3 M. & S. 482; Hall *v.* Janson (1855), 4 E. & B. 500; 24 L. J. Q. B. 97.

(*l*) Hamel *v.* P. & O. Steam Nav. Co., [1908] 2 K. B. 298. The claim made in this action was not actually in respect of the cost of

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founded on the view put forward by Bowen, L. J., and it is submitted that as between that view and the one expressed by Brett, M. R., that of Bowen, L. J., is best supported by principle, although in practice the rule favoured by Brett, M. R., has hitherto been followed by adjusters (*m*). The Master of the Rolls defended this rule on the theory that the general average act, where a port of refuge is entered, is not the mere act of putting into port, but is the complex act of putting into port *for repairs* (*n*). Inasmuch, then, he argues, as it is necessary for the full performance of this complex act that the cargo should be discharged, it may well be said that the discharge is occasioned by such act of putting into port *for repairs*. This view, accepted as a solution of the difficulty by Lowndes (*o*), is criticized with effect by Carver (*p*), who points out that the act of putting into port is only a general average act so far as it is done in order to secure the common safety, and if it is done with any further or other object, then, so far at least, it is not a general average act.

Accepting, therefore, the view of Bowen, L. J., in preference to that of Brett, M. R., it seems to follow that Carver is correct in holding that the expenses of discharging, where the discharge is necessary to enable the repairs to be done, ought to be treated in the same way as those of repairing.

2. *The Cost of Reloading Cargo.*

Reloading charges.

959. It is clear that the object of this operation can never be in order to rescue ship and cargo from actual peril (*q*).

discharging the cargo. It was the claim of a cargo-owner against the shipowners for a general average contribution in respect of damage done to the cargo in unloading; and Lord Alverstone held that as the cargo had never been in peril, there was no general average act before the unloading to which the unloading was incident, and the unloading was not in itself a general average act.

(*m*) See Lowndes, General Average, § 49.
(*n*) 13 Q. B. D. at p. 77.
(*o*) General Average, § 49.
(*p*) Law Quarterly Review, July, 1892.
(*q*) See per Bowen, L. J., 13 Q. B. D. at p. 89: "Reloading *is* not

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But it is said that the cost may be incidental to a prior general average sacrifice, and therefore recoverable as a general average expenditure. Thus, in Atwood *v.* Sellar, Cockburn, C. J., and Mellor, J., in the Queen's Bench Division, and the Court of Appeal (*r*), held that where the unloading of the cargo was due to the necessity of doing general average repairs, the cost of the reloading occasioned merely by the unloading must be deemed to be a part of one act or operation, and therefore recoverable as a general average expenditure. And this is the rule now followed by the Association of Average Adjusters. The practice was noticed by Bowen, L. J. (*s*), but the circumstances of the case before him did not make it necessary for him to express either approval or disapproval. The judgments, however, in Atwood *v.* Sellar, on which the practice of the adjusters is based, were unfavourably commented on by Lord Blackburn in the House of Lords, in Svendsen *v.* Wallace (*t*), but, the facts being different, it was not necessary actually to overrule the earlier decision. It may be doubted, however, whether it is possible logically to reconcile the rule with the opinion of the Court of Appeal and of the House of Lords in Svendsen *v.* Wallace, to the effect that (at any rate where the repairs necessitating the unloading were due to perils of the sea) the expenses of reloading were not general average, but particular charges on freight (*u*). Nor does it seem possible to argue logically that the expenses of reloading must necessarily be borne in the same way as those of discharging. For instance, suppose that a vessel, having started a leak caused by a peril of the sea, puts into a port of refuge for repairs, and that it there becomes necessary, in order to prevent her going down with her cargo, to discharge the latter. The cost of discharge

an act of sacrifice, for long before it occurs both ship and cargo are safe."

(*r*) 4 Q. B. D. 342; 5 Q. B. D. 286.
(*s*) In Svendsen *v.* Wallace, 13 Q. B. D. at p. 89.
(*t*) 10 App. Cas. at pp. 417 and 419.
(*u*) 13 Q. B. D. 69; 10 App. Cas. 404.

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is, as we have seen, a general average expenditure. But can the subsequent operation of reloading be said to follow upon the prior operation of discharging as effect follows cause, or is it not more correct to say that the reason for the reloading is to enable the shipowner to perform his contract and earn his freight? It is submitted that the decision in Atwood *v.* Sellar on this point is irreconcileable with true principle as laid down in Svendsen *v.* Wallace, and that the result of adopting the criterion of Bowen, L. J., and testing the real object of each operation in accordance therewith, compels the conclusion that reloading expenses can never, apart from special circumstances, be anything else than particular charges on freight, however the original damage may have been caused which drove the ship into the port of refuge. Where freight has been, wholly or in part, paid in advance, the practice of adjusters is to debit the whole or a proportionate part of the expenses of reloading to the cargo-owners. Carver, however, points out that the cargo-owner has not, by paying freight in advance, undertaken to bear any part of the cost of bringing the goods to their destination, nor has the accident which gave rise to the expenses altered his right to have the voyage completed. He is, therefore, probably correct in his contention that expenses which would clearly be payable by the shipowner as particular charges on freight where freight is payable at the end of the voyage, should none the less be wholly borne by the shipowner where freight is paid in advance (*x*).

3. *Warehousing Charges.*

Cost of warehousing cargo.

960. In Atwood *v.* Sellar (*y*) the Court of Appeal held that, the repairs themselves being general average, the cost of warehousing, while the repairs were being done, followed

(*x*) See Law Quarterly Review, July, 1892. Lowndes, General Average, § 53, is to the same effect, and such also appears to have been the view of Lord Blackburn in Svendsen *v.* Wallace, 10 App. Cas. at p. 416.

(*y*) 5 Q. B. D. 286.

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suit. In Svendsen *v.* Wallace, where the repairs themselves were particular average on the ship, this point was not in dispute, as the cargo-owner admitted his liability to pay the whole cost of warehousing. The expressions, therefore, of Brett, M. R. (*z*), that these expenses were not general average expenses, and of Bowen, L. J. (*a*), that they were a charge on cargo, were not necessary for the decision of the case. Accepting, as we do, Bowen, L. J.'s, general view of the law as embodying the true principles applicable to the circumstances of every case, we find it difficult to avoid the conclusion that, whatever may have been the cause of the damage to the vessel, and whatever may have been the motive for the discharge of the cargo, in all cases the question ought to be what interests are benefited by the warehousing. Bowen, L. J. (*b*), considered that the cargo was alone benefited by the warehousing, and it is the practice of average adjusters, in accordance with his opinion, to charge all such warehousing expenses on the cargo alone, when the repairs are particular average. It is, however, arguable that in many cases the freight is also benefited, as where the cargo, if not warehoused, would be liable to perish from exposure to the weather, or to be diminished by pilfering, and that the warehousing expenses should in such cases be a charge on cargo and freight. It may even be argued that the expenses of keeping the cargo in safety until it can be reshipped are incurred for the benefit of the shipowner, and ought to be a particular charge on freight (*c*). Carver, on

(*z*) 13 Q. B. D. at p. 78.

(*a*) At p. 89.

(*b*) 13 Q. B. D. at p. 89.

(*c*) In Rose *v.* Bank of Australasia, [1894] A. C. 687, the House of Lords held that expenses incurred for the safety of the cargo before the shipowner had made up his mind to carry out the adventure could not possibly be a particular charge on freight; and Lord Herschell (p. 696) seemed to consider it impossible to treat them as such. The alternatives suggested were to treat them as general average, or as a particular charge on cargo, or as a charge on cargo and freight; but it was not necessary, said Lord Herschell, to decide which of these alternatives was the correct view.

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the other hand, thinks (*d*) that it follows from Svendsen *v.* Wallace that they are a particular charge on cargo even when the repairs are general average, unless they can be regarded as a general average loss of the cargo-owner. There thus appear to be several possible views on this point.

4. *Wages and Provisions of Crew during Delay in Port.*

Wages, &c. of crew.

961. In Atwood *v.* Sellar the Court of Appeal clearly seems to have considered that these charges might, under the circumstances, have been claimed as general average: "It is (*e*) extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our Courts, as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average" (*f*). No question, however, respecting such expenses was before the Court. In practice they are always debited in this country to ship; probably, however, rather as a particular charge on freight than on ship. This practice appears to be in accordance with most of the earlier authority on the point (*g*). Lowndes, however, urges strong reasons in support of his

(*d*) Carriage by Sea, s. 413.

(*e*) Per Thesiger, L. J., delivering the judgment of the Court, 5 Q. B. D. at p. 291. See also per Barnes, J., in The Leitrim, [1902] P. 256, 268.

(*f*) The only case in which such charges were expressly allowed seems to be Da Costa *v.* Newnham (1788), 2 T. R. 407. This case, however, turns rather on peculiar facts, and has been much shaken by subsequent decisions. Cf. Brett, M. R., at p. 80, and Bowen, L. J., at p. 90 of 13 Q. B. D. In support, however, of Thesiger, L. J.'s view, cf. Abbott, Shipping, 5th ed. p. 350; 14th ed. p. 776. They are allowed in general average under the York-Antwerp Rules.

(*g*) Cf. Power *v.* Whitmore (1815), 4 M. & S. 141; Eden *v.* Poole (1785), Park, 117; Robertson *v.* Ewer (1786), *ibid.*, and 1 T. R. 127; and De Vaux *v.* Salvador (1836), 4 A. & E. 420. In America, however, cf. Hobson *v.* Lord (1875), 92 U. S. 397, where the Supreme Court appears to have allowed such expenses as general average. See also The Star of Hope (1869), 9 Wall. 236; Barker *v.* Baltimore & Ohio Railroad Co. (1871), 22 Ohio St. 45. Wages, &c. during detention by an embargo are not general average: Robertson *v.* Ewer, De Vaux *v.* Salvador, *ubi supra;* Arn. 2nd ed. p. 929. Nor are expenses of delay by quarantine, or while waiting for convoy: 2nd ed. p. 930.

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view that, at least where the repairs are themselves to be contributed for in general average, the wages and provisions of the crew during the time occupied in repairing should be similarly treated (*h*). In nearly all foreign countries contribution is allowed in all cases, irrespectively of the nature of the loss or damage which is being made good or repaired (*i*).

5. *Expenses of coming out of Port.*

Outward expenses.

962. It is submitted that, like the costs of re-shipping cargo, these ought on principle in all cases to be a particular charge on freight. In practice they are now treated as general average, in accordance with the decision of the Court of Appeal in Atwood *v.* Sellar, in cases where the original loss was a general average loss, and as a particular charge on freight, in accordance with the judgment of the Court of Appeal in Svendsen *v.* Wallace, where the original loss was occasioned by fortuitous perils of the sea. It is doubtful, however, whether, if the general reasoning of Bowen, L. J. (*k*), in the latter case is to be regarded as sound, such a distinction can be supported. When Svendsen *v.* Wallace was in the House of Lords (*l*) this point was left undecided.

Substituted expenses.

963. Before leaving the subject of expenses at a port of refuge, it may be well to notice a class of expenses which are called "substituted expenses" (*m*).

(*h*) Lowndes, General Average, § 57. See also per Barnes, J., in The Leitrim, *ubi supra*. In that case the learned judge held that a loss of time freight, resulting from detention during repair of general average damage, ought not to be allowed in general average.

(*i*) See Lowndes' Appendices.

(*k*) Bowen, L. J. (13 Q. B. D. at p. 90), does suggest, but does not decide, that different considerations may apply to this class of charges in cases where the vessel has put in for temporary shelter merely and in cases where she has put in for repairs. "In the former case the vessel might plausibly be said to come out simply because she previously went in," and therefore the cost of going out would be chargeable in the same way as that of going in—*i.e.*, as general average. But is not this to confuse *post hoc* with *propter hoc?*

(*l*) 10 App. Cas. 404.

(*m*) Lowndes, General Average, § 55.

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These are expenses resulting from a course adopted at a port of refuge, primarily for the benefit of one interest, which are in practice allowed as general average, because they save expenses which, if incurred, would have been treated as general average or a particular charge on another interest. For instance, if by towing a damaged ship to her destination and repairing her there, the expense of unloading and warehousing the cargo be saved, but the cost of the towage and repairs exceeds the sum which would have been paid for repairs at the port of refuge, the excess is divided in proportion to the saving of expense occasioned to each interest (*n*).

Salvage, and similar services.

964. The remuneration by the shipowner of all those services, which are made necessary by a regard to the common safety, gives a claim to general contribution, if they are rendered under circumstances of an extraordinary nature, and on occasions when both ship and cargo are alike placed in jeopardy (*o*).

(*n*) See the Rules of Practice of the Association of Average Adjusters for other cases in which the same principle is applied. Whether the practice can be supported has not been decided; but in Wilson *v.* Bank of Victoria (1867), L. R. 2 Q. B. 203, 212, the Court incidentally expressed the opinion that apart from the possible custom of a particular trade, there is no legal principle on which expenses can be apportioned according to what might have been the facts if a different course had been pursued. Cf. Lee *v.* Southern Ins. Co., *ante*, § 874. In the United States there have been some decisions which leave the law in an uncertain state, and, says Mr. Coe, point to the advisability of obtaining the agreement of the parties interested before adopting a substituted course: See Lowndes, 5th ed. pp. 756—759; and Shoe *v.* Craig (1911), *ibid.*, *addendum*, reported 189 Fed. R. 227; affirmed on appeal (1912), 194 Fed. R. 678.

(*o*) Thus in Rose *v.* Bank of Australia, [1894] A. C. 687, the House of Lords held that where a ship had gone ashore, and the shipowner reasonably employed experienced persons to act in his place in the interest of the whole adventure, their remuneration was an expenditure chargeable in general average. In Woods *v.* Olsen (1900), 99 Fed. R. 451, the expense of obtaining the release of a vessel, seized with her cargo as prize of war, was held to be general average. For a rule of the Association of Average Adjusters dealing with a shipowner's remuneration in average for services, see Appendix D.

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If such services, on the other hand, are not extraordinary, or are required for the safety of the ship alone or the cargo alone, their remuneration will give no claim to contribution.

Towage.

For instance, ordinary towage in or out of port falls on the shipowner alone, as being a usual incident of the voyage which he has contracted to perform. But the imminence of danger may make it necessary to hire a steamer to tow, when under ordinary circumstances this would not be necessary; and the remuneration of such towage, or rather salvage services, would be a matter for contribution. It is unnecessary, after the attention we have devoted to Svendsen *v.* Wallace, to cite authorities for the existence of the principle. But it is necessary to consider certain cases as to its application. And the main question for discussion in this context appears to be: In what cases is money paid to third parties, or are expenses incurred by a shipowner, in respect of salvage operations, properly to be regarded as a general average expenditure?

"Salvage charges," properly so called, are the charges recoverable by a salvor under maritime law, and do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril (*p*).

Relation of salvage to general average.

Carver very clearly points out that salvage proper cannot be general average for the simple reason that the shipowner never becomes liable to pay the salvors for saving the cargo (*q*). The salvors have a lien on the ship for its proportion of the whole sum to which they are entitled, and likewise a separate lien on the cargo for its proportion. If the shipowner pays the whole, in order to release the lien on the cargo and proceed with the voyage, this is not according to English law a case of general average, inasmuch as English law takes no account of payments made merely for the benefit of the adventure (*r*). He recovers the cargo's proportion, indepen-

(*p*) Mar. Ins. Act, 1906, s. 65, sub-s. 2, *ante*, §§ 863—865.
(*q*) The Raisby (1885), 10 P. D. 114.
(*r*) See Svendsen *v.* Wallace (1884), 13 Q. B. D. at p. 74.

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dently of general average principles, as money paid to the use of the cargo-owner (*s*). The true view appears to be that salvage charges must always fall solely on the interest against which they are assessed, and be recoverable as such, as a loss by the peril insured against. Nevertheless, the practice of adjusters is to treat them, and of underwriters to pay them, as general average, although, as Carver observes (*l*), the policy may be free of particular average, and although salvage charges do not come within the sue and labour clause (*u*).

Salvage under contract.

965. The expenses, however, of services in the nature of salvage rendered either by the assured, or by persons employed by him under contract, are on a different footing. Such expenses may, where properly incurred, and where incurred for the preservation of ship and cargo, be charged as general average (*x*). In such a case, however, care must be taken to see that an unfair burden is not being put upon the cargo. If, for example, a ship with her cargo on board is submerged, and the two are in fact raised together by one operation, the cargo will not be held liable to contribute more than it would have cost to raise it by itself (*y*). Nor is the cargo-owner

(*s*) See Carver, Carriage by Sea, ss. 394, 395. He very aptly quotes Story, J., in Peters *v.* Warren (1841), 1 Story, at p. 468. The editors, however, do not agree with one of Carver's reasons for thinking that salvage is not general average, viz., that salvage falls immediately upon the different adventurers, whereas general average expenditures are only contributed for by the interests which complete the voyage, and according to their arrived values. The view of the editors is that liability to contribute towards general average expenditure, like salvage, does attach immediately. See *post*, § 977, where this point is discussed; see also McArthur on this point, p. 171, n. (*e*).

(*t*) Carriage by Sea, s. 393, n.

(*u*) Aitchison *v.* Lohre (1879), 4 App. Cas. 755. The Marine Insurance Act, 1906, confirms this view by providing in sect. 65 that salvage charges may be recovered as a loss by perils insured against.

(*x*) Mar. Ins. Act, 1906, s. 65, sub-s. 2; *ante*, §§ 863—865. The shipowner is primarily liable to the salvors for the whole of their charges—both in respect of ship and of cargo—where the services have been rendered for an agreed sum. The Prinz Heinrich (1888), 13 P. D. 31, distinguishing The Raisby (1885), 10 P. D. 114.

(*y*) See Kemp *v.* Halliday (1865), 34 L. J. Q. B. at p. 243, with

necessarily bound to contribute to the whole amount which the shipowner may have agreed to pay the salvors, if, for instance, such amount exceeds the sum which would have been awarded in a salvage action (*z*). Sect. 965.

Akin to salvage services of this nature, and likewise recoverable in general average, is money paid by way of ransom to an enemy, which, though formerly prohibited in this country by express law (*a*), is now legal unless affected by Order in Council under the Naval Prize Act, 1864. So, too, money paid to rescue ship and cargo from pirates and other plunderers, or by way of carrying out a compromise between neutrals and belligerents (*b*). Ransom, &c.

Complex salvage operations.

966. Difficult questions have arisen as to how the expenses of what Lowndes calls complex salvage operations should be borne and apportioned. Operations of this nature are most common in cases of stranding. Thus, where a vessel strands on a beach with cargo on board, and a series of separate operations is necessary, it often happens that the cargo or part of it is put into a position of safety in the first instance, the ship with perhaps the rest of the cargo remaining in danger from which they are only saved by the continuance of the operations. The questions for consideration then are, first, are the expenses of the earlier operations general average, or a particular charge on the cargo saved? and secondly, are the subsequent operations, which save the ship and the rest of the cargo, general average, to the expense of which the cargo originally saved contributes, or is such expense to be borne merely by the interests to which the operations directly relate? This appears to be another of those cases, which are so common in questions of marine insurance, where there is little difficulty in the enunciation of the principle to be applied,

General average or particular charges.

which compare the case of The Vancouver Mar. Ins. Co. *v.* China, &c. SS. Co. (1886), 11 App. Cas. 573; and Anderson *v.* Ocean SS. Co. (1883), 13 Q. B. D. 651; 10 App. Cas. 107.

(*z*) Anderson *v.* Ocean SS. Co., *ubi supra*.

(*a*) 22 Geo. 3, c. 25, repealed by the Naval Prize Act, 1864.

(*b*) Stevens, Average, 26; 2 Phillips, s. 1337.

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but great difficulty as to its actual application to particular circumstances. The principle is simply that laid down generally in Svendsen *v.* Wallace, and more particularly in the cases to which we are about to refer, that expenses incurred for the general safety are to be contributed for, but expenses incurred on behalf of a particular interest are to be borne as particular charges upon such interest.

Joint operations where both ship and cargo are in danger.

967. In Job *v.* Langton (*c*), the "Snowdon" by perils of the sea ran ashore in Malahide Bay, on the coast of Ireland, and in order to get her off it became necessary to discharge the whole of the cargo and ballast. Afterwards, by a separate operation, the vessel was got off at great expense and was towed to Liverpool for repairs. It was argued on behalf of the shipowner that the whole of these expenses must be contributed to, on the ground that they were all incurred in pursuance of one operation undertaken for the purpose of saving the whole. This argument, however, was rejected by the Court of Queen's Bench, and the claim for all expenses incurred after the cargo was saved was disallowed. The Court, however, appears to have considered that the expenses of the discharge of the cargo were general average, and not a particular charge on the cargo (*d*).

Moran *v.* Jones.

In Moran *v.* Jones (*e*) the "Tribune" ran aground in a gale on the East Hoyle Bank, near Liverpool, with 800 tons of ballast on board and some goods outwards for Callao. As soon as the weather moderated steps were taken to get her off: the ship's materials and goods were sent to Liverpool in lighters; the ship was then scuttled, 300 tons of ballast thrown overboard, and at last she floated. She was then taken to Liverpool and repaired, the goods were re-shipped, and the voyage to Callao was completed. The Court held that the landing of the goods was not a separate transaction, as in Job *v.* Langton, but part of the continuous operation

(*c*) (1856), 26 L. J. Q. B. 97; 6 E. & B. 779.
(*d*) 6 E. & B. at p. 791.
(*e*) (1857), 26 L. J. Q. B. 187; 7 E. & B. 523.

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of getting the ship off in order to enable her to complete her voyage to Callao with the goods; and that the whole expenses of getting her off, including those incurred after the goods were landed, must be contributed for in general average (*f*).

Walthew *v.* Mavrojani.

968. In Walthew *v.* Mavrojani (*g*) it was held that where a ship with her cargo on board had been driven ashore at Calcutta by a cyclone, and after her cargo and rigging had been unshipped, the vessel herself was dug out at an expense of 2,300*l.*, this expense should not be allowed as general average, the cargo being already in safety before it was incurred. And in Royal Mail Steam Packet Co. *v.* English Bank of Rio (*h*) a steamer carrying, amongst other cargo, a quantity of specie ran aground on a coral reef and lay in a dangerous position. The specie was taken ashore in the ship's lifeboat, and soon afterwards the master, under stress of weather, jettisoned part of the remaining cargo. The vessel was got off, and completed her voyage with such cargo as was still left on board. The specie was forwarded to its destination by another vessel, but it was agreed that for the purposes of the case it should be treated as having arrived in the original steamer. Under these circumstances, the shipowners claimed that the expenses of the jettison, and all other extraordinary expenses incurred in getting the vessel off and in landing and protecting the specie, were general average for which they were entitled to a contribution from the defendants, the owners of the specie. The defendants contended that all these expenses were particular charges, either on the specie or on the vessel, and that there was no case for contribution at all. The judgment of the Court (Wills and Grantham, JJ.) upheld the defendants' contention, on the ground that the removal of the specie was effected not in

(*f*) This decision, however, cannot now be supported on these grounds. See Svendsen *v.* Wallace (1884), 13 Q. B. D. at p. 60. The expenses would now be considered as particular charges falling on the shipowner.
(*g*) (1870), L. R. 5 Exch. 116 (Ex. Ch.).
(*h*) (1887), 19 Q. B. D. 362.

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order to secure the common safety of the ship and cargo, but simply for the purpose of saving the specie itself. "I think, therefore," said Wills, J., "that when the general average loss was incurred . . . it had ceased to be at risk, and that upon no reasonable view of the facts can its removal be considered as a part of the means taken for saving any common adventure. I am consequently of opinion that it is not liable to contribute to the jettison, or to any of the expenses of getting the ship off the ground incurred after it was landed" (*i*).

Difficulty usually one of fact, rather than of law.

969. The difficulty of laying down any rigid rule for the solution of all questions of this nature is clearly apprehended by the learned judge: "Cases, no doubt, may occur in which it may be difficult to say whether the purpose for which goods are removed is that of lightening the ship or of saving the goods, and there will no doubt from time to time be instances in which it is impossible to separate the one purpose from the other. The mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet if it is also done for the purpose of lightening the vessel and as a means of causing her to float, and of saving her from the common peril, will not necessarily divest the transaction of its character as an act performed for the joint benefit of ship and cargo (*k*). . . . The question will be one of circumstance and degree, and each case must depend upon its own facts" (*l*).

To the same effect are the observations of Blackburn, J., in Kemp *v.* Halliday: "I do not mean to say that in every case where a ship with a cargo is submerged and the two are in fact raised together by one operation, the expenditure incurred must necessarily be for the common

(*i*) 19 Q. B. D. at p. 375.

(*k*) This is a quotation from McAndrews *v.* Thatcher (1865), in the Supreme Court of the United States, 3 Wall. at p. 370.

(*l*) Per Wills, J., 19 Q. B. D. at p. 374.

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preservation of both. I think it is in every case a question of fact whether it was so" (*m*).

Carver (*n*) and Lowndes (*o*), while accepting the principle as above laid down, and agreeing that every case must be considered according to its own circumstances, suggest various tests in order to facilitate the determination of the question whether a particular operation was undertaken for the sake of a particular interest, or whether such particular operation should more properly be regarded as part of a continuous operation for the safety of all. The tests suggested (for particulars of which the reader is referred to their valuable treatises) are undoubtedly valuable as indicating considerations which may be usefully taken into account in any case that may arise, but it does not appear possible to regard them in any higher light. The circumstances of each case must vary, and no one test can suffice for the solution of all. On one point Carver, with whom Lowndes agrees, is emphatic: "The two operations of taking out the cargo and getting the ship off, may be regarded as separate transactions for the benefit of the parts, or as constituting one whole transaction for the benefit of the whole. The first operation is only a general average act when both have that character, and the same is true of the second. One or other view should be adopted throughout; the ship should not contribute to the cargo unless the cargo also contributes to the ship, and *vice versâ*" (*p*). This view is inconsistent with the judgment

(*m*) 34 L. J. Q. B. at p. 243. And cf. also the American cases of Coast Wrecking Co. *v.* Phœnix Ins. Co. (1881), 7 Fed. R. 236; and Reliance Marine Ins. Co. *v.* N. Y. & C. Mail SS. Co. (1896), 77 Fed. R. 317. The rule in the United States as to whether contribution ceases with common danger is apparently laxer than in England (*ibid.*).

(*n*) Carriage by Sea, s. 398.

(*o*) General Average, §§ 40—42.

(*p*) Carver, s. 400. Where, after all attempts to save the ship have been given up, expenses are incurred with the object of saving the cargo and of forwarding it so as to enable the shipowner to earn freight, questions may arise as to the apportionment of such expenses between cargo and freight. As to these, see the judgment of Lord Herschell in Rose *v.* Bank of Australasia, [1894] A. C. 687. See also McArthur, 173—177.

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in Job *v.* Langton (*q*), and on principle the circumstance that the cargo, being in safety, may not be obliged to contribute to the expense of refloating the ship, is not a sufficient reason why the ship should not contribute to the cost of an antecedent operation necessary for its own preservation.

What contributes to general average.

970. Having thus enumerated the losses for which a general average contribution is to be made, let us inquire upon what property such contribution is to be levied.

Everything contributes which has been at risk at the time of the loss, and is ultimately saved.

All which is ultimately saved out of the whole adventure (*i.e.*, ship, freight, and cargo) contributes to make good the general average loss, provided it have been actually at risk at the time such loss was incurred. Hence goods landed, or sold for the necessities of the ship, before a jettison, do not contribute (*r*); "because they were not exposed at the time of the jettison to a community of risk, and were not saved thereby" (*s*). So neither, for the same reason, "do goods taken on board after the jettison" (*t*).

That which has been sacrificed contributes equally with that which has been saved.

That which has been sacrificed contributes in general average equally with that which is saved (*u*).

By the civil law only the goods actually saved were to contribute (*x*); but by the Consolato del Mere, which has been followed in this respect by the uniform practice of later times, the contribution is to be made equally upon the property saved and the property sacrificed (*y*); "and this," observes Boulay-Paty, "is very equitable, for if the goods jettisoned did not contribute, the owner thereof, receiving their total value, would suffer no loss by the sacrifice, while the other owners would" (*z*). The same reasoning applies also to

(*q*) *Ante*, § 967.
(*r*) 1 Emerigon, c. xii. s. 42, p. 629.
(*s*) 3 Pardessus, Droit Com. p. 233.
(*t*) Benecke, Pr. of Indem. 306.
(*u*) Cf. Royal Mail Co. *v.* English Bank of Rio (1887), 19 Q. B. D. at pp. 371, 372.
(*x*) Id tributum servatæ res debent. Dig. lib. xiv. tit. 2, f. 2.
(*y*) Consolato del Mare, c. 94 of the Italian translation, c. 51 of Pardessus, Lois Maritimes, vol. ii. pp. 101, 102.
(*z*) Boulay-Paty, Comment. on Emerigon, vol. i. p. 632.

goods which have been sold for the joint benefit of ship and cargo (*a*), and also to the freight, which would have been payable in respect of such goods; for as this freight is contributed for, the shipowner would suffer no loss by the sacrifice of freight in the goods jettisoned or sold, unless he also contributed in respect thereof (*b*).

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Freight of goods jettisoned contributes.

Rule where successive jettisons or sacrifices.

971. Where there have been two jettisons on two distinct occasions, the goods first jettisoned are for the purposes of contribution deemed to have continued on board, and to have been subject to the fortunes of the voyage. They contribute, therefore, not only to the loss arising from their own jettison, but also to that occasioned by the subsequent jettison, although they were then no longer on board, provided always that their destination was not reached when such subsequent jettison was necessitated. And the rule is the same when the second sacrifice is not a jettison, but a general average loss of some other nature; for instance, port of refuge expenses, to which such goods would have been liable to contribute had they not been jettisoned. Similarly, where after a jettison the goods remaining on board are accidentally damaged, and it can be shown that the jettisoned goods would inevitably have similarly suffered had they remained on board until arrival at their destination, the latter are deemed to have been likewise damaged in fact, and are to be contributed for at such damaged value (*c*).

Do passengers' luggage, jewels, &c. contribute?

972. According to Lowndes (*d*), the whole of the property on board ought to contribute to general average. The lives preserved, however, are not within this rule, nor are the wages of the crew (*e*). The only exemption which he recog-

(*a*) Cleirac, 88, No. 4; 2 Emerigon, Contrats à la Grosse, c. iv. s. 9, p. 475.
(*b*) Stevens, Average, 61.
(*c*) Lowndes, 5th ed. 338. *Aliter*, however, Arnould (2nd ed. pp. 934, 935), citing Emerigon and Benecke.
(*d*) S. 76, p. 375, 5th ed.
(*e*) As to passengers' luggage, and for a discussion in America of the whole subject, see Heye *v.* North German Lloyd (1887), 33 Fed. R.

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nises is the luggage and personal effects of the passengers and crew, and other small items which are only excluded owing to their comparative insignificance of value (*f*). Unconsumed provisions are brought into contribution, being included in the value of the ship.

Though there is much to be said in favour of the principle which regards everything saved as liable to contribute, it is not in accordance with the law as declared in Brown *v.* Stapyleton (*g*). In that case it was held that provisions belonging to the charterer at the end of a voyage did not contribute. "It is not," said Best, C. J., "every object of value which has been held liable to a contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce, and the practice shows that this has been the understanding of all times. Magens, Molloy, Beawes, Stevens, and other writers all expound the word *merces* in this way; all in terms exclude provisions. They concur in saying that things of light weight, but of considerable value, must contribute if they belong to the cargo, but not if they belong to the passengers." The rest of the Court concurred in disallowing the claim for contribution (*h*). Arnould said, on the authority of Peters

60; 36 Fed. R. 705. The Judge of the District Court of New York, in the course of a learned and exhaustive judgment, came to the conclusion that passengers' luggage stored in the luggage compartment of a steamship was both liable to contribute, and was entitled to receive contribution, in general average. *Secus*, however, as regards baggage not so stored but in daily use. On the question as to the right to receive contributions, this judgment was affirmed in the Federal Court of Appeal, and it was generally approved.

(*f*) The personal effects of the passengers on some of the large modern steamships often have a considerable value, and the question whether they ought to contribute has lately been the subject of discussion. For the practical difficulties in enforcing contribution, see Lowndes, 5th ed. 378; see also Brown *v.* Stapyleton, *infra*. The exemption of personal effects is almost universal: see Lowndes, Comparative Table and Appendices.

(*g*) 4 Bing. 119; 12 J. B. Moore, 334.

(*h*) Bingham's report of the case leaves it doubtful whether Park, J., intended to concur in the general principle laid down by Best, C. J.;

v. Milligan (*i*), that gold, silver, jewels, precious stones, and other small articles of value are liable to contribute, unless ordinarily carried about the person or forming part of the wearing apparel. It is not clear that this case decides anything more than that where such articles admittedly contribute, they do so on their full value. In practice, however, valuables which remain in the passengers' own care are not made to contribute, and the practice agrees with the ground of the decision in Brown *v.* Stapyleton (*k*). Sect. 972.

In practice articles carried under a mail contract are not made to contribute (*l*). Mails.

973. Bank notes, it appears, should not contribute, being, as Phillips (*m*) maintained, not so much property as evidence of property. Arnould (*n*), however, was of a contrary opinion. Bank notes.

but Moore's report makes it clear that he agreed with the principle. "Provisions," he says, "have always been held to be excepted from the rule of contribution, which only applies to merchandise put on board for the purpose of traffic. In the term merchandise is included jewels and other articles of like nature, not being the wearing apparel or ornaments of the passengers, but the subject of traffic."

(*i*) (1787), 1 Park, 296.

(*k*) The text-writers are generally agreed that jewellery and articles of value intended for the personal use of passengers do not contribute, though they are not altogether agreed as to the extent of the exemption. See 2 Phillips, s. 1394; 1 Magens, 63; 1 Park, 293; Abbott, 5th ed. 356; 2 Marshall, 548.

(*l*) Lowndes, 5th ed. p. 382, where a case is mentioned in which deposits were exacted in South Africa from the receivers of registered parcels in respect of a claim by the shipowners for general average, which was afterwards abandoned. The Hamburg Court of Appeal held in 1912, in the case of The Goeben, that mails are not liable to contribute, partly on the ground that the secrecy of the post must be maintained, partly on account of the practical difficulty of enforcing a lien; and this judgment was in 1913 affirmed by the Court of Final Appeal, the Imperial Court at Leipzig.

(*m*) 2 Phillips, s. 1397.

(*n*) 2nd ed. p. 936. The loss of a bill or note or other negotiable instrument does not put an end to the obligation of which it is evidence (Common Law Procedure Act, 1854, s. 87; Bills of Exchange Act, 1882, ss. 70, 89); and it is submitted that when the loss of the instrument does not necessarily involve a pecuniary loss, there can be no right to contribution.

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Deck goods contribute, whether or not they would, if jettisoned, be entitled to a contribution.

Goods belonging to government contribute.

Goods belonging to government by the old laws did not contribute (*o*). Valin, however, thought they ought to do so (*p*); and Emerigon seems to have been of the same opinion (*q*). And it was held by Story, J., in the United States, after a most masterly examination of the principles of the supposed exemption, that there was no ground for it, either in law or practice, and that goods belonging to government are as liable to contribute as any other part of the cargo saved by the sacrifice (*r*). The practice among adjusters is to make them contribute.

Principles of general average adjustment, and their application to different kinds of general average losses.

974. It remains to be considered how the amount to be paid in contribution is first estimated, and then apportioned on the respective interests subject thereto. The process by which this is ascertained is called the adjustment of general average.

The leading principle of general average contribution, to whatever kind of loss it may be applied, is this: That all the parties interested in the adventure, whose property it was intended to preserve by the general average act, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no farther; and this object can only be attained when the party whose property has been sacrificed, whose money has been disbursed, or whose credit has been pledged, is placed by the adjustment exactly in the position he would have stood in had the sacrifice been made, the expense incurred, or the credit pledged, not by himself, but by some other of his co-adventurers.

Suggested difference in adjusting sacrifices and expenditures.

Clear, however, as is this principle, difficulties have arisen as regards its application which have led to a difference of opinion amongst those who have studied the subject. The

(*o*) Cleirac, cited by Emerigon, *ubi supra;* Jugemens d'Oleron, art. 8.
(*p*) Tit. des Avaries, art. 11, No. 2.
(*q*) Emerigon, c. xii. s. 42, p. 642.
(*r*) The United States *v.* Wilder, In re Schooner Jasper (1838), 3 Sumner, 308, cited 2 Phillips, Ins. s. 1345.

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question is whether, after a general average loss, the adjustment ought to be regulated by the state of facts existing at the time when the loss takes place, or by the state of facts existing at the termination of the adventure; or thirdly, by the state of facts existing at the one time or at the other time, according as the loss consists of a general average expenditure or a general average sacrifice.

Practice of adjusters hitherto.

975. Generally speaking, the practice of adjusters hitherto has been to regard solely the state of facts existing when the adventure is determined (*s*). The result of this practice is that where, after a general average sacrifice or expenditure, a part of the property remaining at risk has been lost or damaged by a peril of the sea or otherwise, the owner of such part has in respect thereof either escaped contribution altogether, or has only been deemed liable to contribute on its reduced damaged value. But this practice has not been uniformly adopted. Some adjusters, while agreeing that the state of facts existing at the termination of the adventure is to be regarded where the loss consists of a sacrifice of an actual part of ship or cargo, hold that where the loss consists of an expenditure incurred, the time to be regarded is the time when the outlay was made.

Adjustment of losses arising from sacrifices.

As regards actual sacrifices of a part of ship or cargo, it will be observed that the adjusters are in agreement with one another; and in their agreement with one another they are also in agreement with the law, the object of which is to secure that the owner of the property sacrificed shall be neither in a better nor in a worse position than he would have been in if the sacrifice had fallen upon someone else. In order to secure this double object, the property sacrificed is correctly regarded as though it had never been lost, but actually constituted a portion of the whole mass of property upon which the contribution is assessed at the time the adjustment is made; its supposed value is estimated, and in proportion to

(*s*) An exception, however, to this practice is allowed in cases of expenditure, where both ship and cargo are totally lost. Lowndes, 308.

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the amount at which it is estimated it takes its full share with the remaining interests, for whose benefit it was sacrificed, in contributing to the loss thereby incurred.

Thus, to take a very simple instance, suppose property, the value of which, if saved, would have been 100*l*., to have been sacrificed for property the value of which, as saved, is 900*l*. The whole sum upon which the contribution is to be levied will be the aggregate value of the property sacrificed and that saved, viz., 1,000*l*.; the amount to be made good being 100*l*., or the tenth part of 1,000*l*.; the property saved contributes a tenth, or 90*l*., and the property sacrificed also a tenth, or 10*l*., making together the whole amount lost, or 100*l*.

It is clear that this is the only equitable way in which this kind of loss can be adjusted, for if the property sacrificed did not contribute like the rest, the owner of such property, receiving its total value, would be better off than the rest of the co-adventurers, and would not be in the same condition in which he would have been if their property had been sacrificed instead of his.

No contribution due for sacrifices where nothing is saved.

Conversely, it is also clear, that where after the sacrifice the whole of the rest of the adventure utterly perishes, no contribution can be due, for in such case, even if the property had not been sacrificed, there is no reason to suppose that it would not have perished like the rest: its owner is in no worse position than he would have been in had it been made by some one else on board, and not by himself. The condition of all the co-adventurers is precisely equal: all is lost; there is nothing to contribute from, and nothing to contribute for (*t*). Hence the rule with regard to sacrifices for the general benefit is, that they are not contributed for where nothing is saved.

Adjustment of expenditures.

976. As regards sacrifices, then, the law is clear. But in the case of expenditures attention must be paid to some

(*t*) Emerigon, c. xii. s. 41; Phillips, s. 1317; Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375, is a direct authority for the principles above enunciated.

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different considerations. A general average expenditure consists in the payment of money (*u*) by the shipowner on account of all interests. It seems obvious that this should give him a personal and absolute claim against all the parties interested in the adventure, in respect of the money thus laid out on their behalf, and that from the moment the advance has been made. It is equally obvious, on the true principles of adjustment, that they are bound in equity to liquidate this claim in full, whether any part of the property, for whose benefit the outlay was made, be ultimately saved or not. Were this not so, the object to be had in view in every adjustment of general average would not under all circumstances be attained, for in those cases where the ship and goods, after being relieved by the expenditure, wholly perish before arriving at the port of destination, the party making the advance would, if no contribution were to be made, be worse off than the other parties on whose behalf it was incurred, as he would not only have lost, like the rest, his own property, but moreover would remain burdened with a debt contracted on their account, or be the loser of a sum of money laid out for their safety.

Hence, the long-established rule used to be that disbursements for the general benefit must be fully reimbursed in general average, whether the ship and cargo be eventually saved or not (*x*).

Criticism of present practice.

977. Notwithstanding these considerations, however, the general practice of adjusters is, as we have already observed, not to give practical effect to this distinction, but to allow contribution, and to assess the contributory values, in all

(*u*) Either in immediate cash, or as the result of the incurring of a debt to be defrayed subsequently.

(*x*) Benecke, Pr. of Indem. 251; Stevens, Average, 20, 5th ed. So, 2 Phillips, s. 1374: "In case of expenditures which are absolutely reimbursable, the value at the time of incurring them ought to contribute: this being the proportion in which the several parties are interested." And see The Mary Thomas, [1894] P. 108, where Barnes, J., on similar reasoning to that contained in the text, held that the doctrine of Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639, applied only to cases of sacrifice, and not to expenditures; and the judgment of Barnes, J., was approved by the Court of Appeal (*ibid.*).

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cases with respect to the state of facts as existing at the port where the adventure is terminated, whether the claim for contribution arise out of sacrifices or expenditures. In neither case, therefore, does any property contribute which does not ultimately arrive, and such property, moreover, only contributes on its arrived value. This practice has the support of Carver (*y*) and of McArthur (*z*); but it is nevertheless submitted that there is substance in the distinction, and that the older rule was more in accordance with legal principle. The former puts, as an extreme case, that of a ship which has arrived at her port of destination, but with her cargo made worthless by perils met with after a general average expenditure at a port of refuge, and maintains that in such a case the ship alone has reaped the benefit of the extraordinary expenditure, and that the shipowner alone should therefore bear it. Whether or not, in answer to this argument, it is fair to contend that under such circumstances the cargo has actually reaped a benefit—consisting, that is, in the deliverance from a peril and the acquisition of a further chance of ultimate safety—may be doubted. The cargo-owner has undoubtedly had this advantage: but the argument would perhaps lead too far, so as to be equally applicable in support of the immediate accrual of a right to contribution, irrespective of ultimate safety, in a case of jettison or other similar sacrifice; which right clearly does not exist. The real answer to Carver is, that, where money has been properly expended by one person on behalf of another, it is immaterial to consider whether or not such other person has derived benefit from the expenditure. As he himself points out, there is one obvious distinction between all cases of sacrifice of property during a voyage, and of expenditures. In the former cases something is given for the rest which would otherwise itself have had to share in the subsequent risks of the voyage: in the latter case, that which is given is something which never could be exposed to those risks; the repay-

(*y*) Carriage by Sea, s. 428. (*z*) Insurance, p. 205 (2nd ed.).

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ment, therefore, of which ought not to be contingent in any way upon those risks. Carver admits that an exception to the principle which he supports is established by the existing rule of practice (which he approves) whereby, in the case of a total loss of both ship and cargo, the shipowner is not compelled to bear the whole expense himself, but is entitled to a contribution from the owners of the various interests as those interests existed at the place where the expenditure was made; and he would extend this rule to cases where the value of what is ultimately saved is less than the amount of the expenditure, so as to make all interests as they existed at the place of the expenditure contribute towards such deficiency. It is also clear that Carver's principle cannot be applied to expenditures by the master in reward of salvage operations, in cases where these are general average. But is it possible to allow such important exceptions, and yet at the same time maintain the alleged rule which they infringe? Perhaps the best excuse for the present practice is the practical difficulty, where goods have been subsequently lost, in determining what their value was at an intermediate port for which they were never destined, but where the expense may have been incurred (*a*).

Rule of adjustment in case of goods sold. Are goods sold contributed for as sacrifices or expenditures?

978. In the case of goods sold by the master to raise funds in a foreign port, there is much controversy amongst the older authorities as to whether the loss thence arising should be adjusted in the same manner as the loss arising from sacrifices, or as that arising from expenditures used to be contributed for; whether, that is, in case the whole adventure subsequently perishes, the owner of the goods sold is or is not entitled to contribution. There has been no

(*a*) This subject is exhaustively discussed by Lowndes (Gen. Av. § 61), who supports the view here adopted. See also The Mary Thomas, [1894] P. at pp. 117, 118, and in the Court of Appeal, pp. 122—127, the reasoning in which case is strongly in favour of the same view; and cf. Benecke, Pr. of Indem. 298; and in America, Douglas *v.* Moody (1813), 9 Mass. R. 518; Spafford *v.* Dodge (1817), 14 Mass. R. 79; and 2 Phillips, ss. 1374, 1377.

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express decision on this subject, either in our own Courts or those of the United States (*b*), and the foreign authorities are exceedingly conflicting.

The point does not appear now to be of so much importance as it was in old times, when the facilities for communicating with owners at home, and so obtaining funds, were not so abundant. It appears clear, however, that where the goods are sold in order to defray expenses for which the shipowner, by his contract of affreightment, is bound to provide funds, the cargo-owner obtains an absolute claim against the shipowner from the moment of their sale; and this claim must doubtless be liquidated, whatever may be the issue of the adventure (*c*). Where, however, the goods are sold in order to defray general average expenses, Arnould was of opinion that they were not to be contributed for unless something was finally saved (*d*), on the ground that their sale is to be regarded as a sacrifice analogous to a jettison. On this theory, as is pointed out by Carver (*e*), the goods sold are, as in cases of jettison, to be regarded as though they had remained on board, exposed to the vicissitudes of the voyage. It also appears to follow, if this view be correct, that where a partial loss occurs of the goods remaining on board, the probability that the goods sold would themselves have participated in such loss should be taken into account in estimating at what value such goods should be contributed for.

Rule of adjustment

979. There is another question on which there has been a great diversity in the positive regulations of foreign states

(*b*) Cases bearing on the point are Powell *v.* Gudgeon (1816), 5 M. & S. 431; Richardson *v.* Nourse (1819), 3 B. & Ald. 237; Atkinson *v.* Stephens (1852), 21 L. J. Ex. 329; 7 Exch. 567; Hopper *v.* Burness (1876), 1 C. P. D. 137; and Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426. See Lowndes, § 64.

(*c*) Cf. Duncan *v.* Benson (1847), 1 Exch. 537; Benson *v.* Duncan (1849), 3 Exch. 655; Hopper *v.* Burness, *supra*. See *ante*, § 927.

(*d*) 2nd ed. pp. 940—942, where the old authorities are reviewed. See *ante*, § 927.

(*e*) Carriage by Sea, s. 432.

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and the opinions of jurists; viz., where the ship perishes by the agency of the very peril to avert which the sacrifice was made, but the cargo, or part of it, is saved from the wreck, does that which was saved contribute for that which was sacrificed?

On the one hand, the civil law expressly decrees that in such case no contribution shall be made, but that the merchants shall save all they can on their own account *tanquam ex incendio* (*f*). Similarly the Code de Commerce provides that if the jettison does not save the ship no contribution takes place. If, however, the ship, after having been saved from the particular peril which gave rise to the jettison, should be lost by a subsequent accident during the voyage, the goods saved are to contribute according to their value in the state in which they may be, after deducting salvage expenses (*g*). The Codes of Spain and Portugal, Italy and Holland, provide that if the ship be lost in the same peril, there is no contribution. The German Commercial Code does not allow contribution unless part, both of the ship and of the cargo, has been saved (*h*); the Scandinavian Code, on the contrary, allows contribution, even though either the ship or the cargo has been entirely sacrificed (*i*). In America there have been decisions both ways (*k*), but since the Supreme Court decided in Columbian Insurance Co. *v.* Ashby (*l*) that a voluntary stranding,

(*f*) Dig. lib. xiv. tit. 2, *f.* 7; Pardessus, Lois Maritimes, vol. i. p. 108.

(*g*) Art. 423. It seems, however, that if a sacrifice saves the cargo, though the ship be lost, there will be contribution: see Lowndes, 5th ed. pp. 500, 507.

(*h*) Mr. Oscar Schwarz suggests in the Appendix to Lowndes, Gen. Av. 5th ed. p. 545, that the party whose property has been sacrificed may have a claim to compensation under art. 812 of the Civil Code against those whose property has been saved thereby. Art. 812 provides that anyone who, by an act done by another person or in any other manner, acquires something without legal ground at the expense of that other person, is obliged to make restitution to him.

(*i*) This information as to foreign law has been mainly derived from the Appendices to Lowndes' work on General Average.

(*k*) See decisions cited in 2 Phillips, s. 1318.

(*l*) (1839), 13 Peters, S. C. R. 331, *ante*, § 940.

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followed by a total loss of the ship, is the subject of general average, the view has prevailed that if some of the property be saved there must be contribution (*m*).

As to text-writers, Marshall (*n*), Stevens (*o*), and Kent (*p*) agreed with the rule as laid down in the Code de Commerce. Weijtsen, however, an early and esteemed writer upon average, adopted the contrary view, for the reason that if the goods jettisoned had not been so sacrificed their owners might have saved or recovered them, all or in part, as the other owners have (*q*).

Benecke, after examining all the authorities on the subject (*r*), and Phillips (*s*) both adopt the view of Weijtsen. So, also, does Carver (*t*). Lowndes, citing Gourlie (*u*), maintains that the loss of the ship, even by the accident which led to the sacrifice, makes no difference to the right to contribution.

Conclusion as to the law and suggestion of a practical rule.

980. In our Courts there has been no decision on the subject, and in the absence of binding authority the question would have to be determined on principle alone. In this view the argument of Weijtsen undoubtedly appears to have great force. There is, at all events, a probability in the case supposed that the goods sacrificed might, if not so sacrificed, have been saved like the rest. If, therefore, they are not contributed for, their owner, in consequence of the jettison, is worse off than he probably would have been if the goods sacrificed had belonged not to him, but to someone else on board. Arnould (*x*) considered that in practice it would be a

(*m*) See Lowndes, Gen. Av. 5th ed. 727.
(*n*) 2 Marshall, Ins. 541.
(*o*) On Average, 8.
(*p*) Com., vol. 3, pp. 234, 235.
(*q*) Traité des Avaries, art. 33.
(*r*) 4 Benecke, System des Assecuranz, 18—23, and also in his Pr. of Indem. 178—181.
(*s*) Ins. vol. ii. s. 1318.
(*t*) Carriage by Sea, s. 372.
(*u*) Lowndes, Gen. Av. 4th ed. 607, 5th ed. 726.
(*x*) 2nd ed. p. 944.

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sensible rule that, where either the whole or the greater part of the cargo was saved, contribution should be made, even though the ship perished at the time; but that no contribution should be due where the goods saved were either small in quantity or greatly damaged in condition. A more logical view, however, appears to be that of Carver (*y*), viz., that in all cases after a jettison, whether the ship be wrecked or not, property saved contributes. "But the value to be contributed to is estimated with reference to the risks the jettisoned goods would have run, had they continued on board. And if they would in that case have been lost their value is reduced to nothing."

Where the ship is saved at the time, but ultimately perishes in the after part of the voyage.

But whatever diversity of opinion may exist with regard to the point just discussed, there is no doubt whatever about this position: that if the ship survives the peril, to avert which the sacrifice was made, and is ultimately wrecked in the after part of the voyage, all that is saved from the wreck must contribute to make good that which was previously sacrificed; for without such previous sacrifice nothing would have been saved at all (*z*).

Mode of estimating the amount of loss for the purposes of general average adjustment.

981. Supposing the case to be one in which contribution is due, the first step to be taken towards adjusting the general average is to ascertain the value at which the property sacrificed and the loss incurred ought to be estimated for the purposes of the contribution.

Loss arising from jettison of goods.

As a general rule, goods jettisoned are to be contributed for on the same value at which they contribute, which is the net value they would have sold for at the port of adjustment on the day of discharge, deducting freight, duty, and landing

(*y*) Carriage by Sea, ss. 372, 418. Cf. Fletcher *v.* Alexander (1868), L. R. 3 C. P. at p. 383; and *post*, § 981.

(*z*) 1 Emerigon, c. xii. s. 41, p. 602. Boulay-Paty says that, in order to apply the rule, the storm which occasioned the jettison must have been entirely at an end, and the ship have proceeded on her voyage again in the ordinary course. Comment. on Emerigon, *ibid.* 604. Cf. Phillips, s. 1318.

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Where the average is adjusted at the port of departure.

expenses (*a*). The port of adjustment is, in nearly all cases, the port of destination (*b*). Where, however, the ship does not reach the port of destination, the adjustment is settled at the port where the voyage is terminated by agreement or necessity (*c*).

Where it is adjusted at an intermediate port.

Arnould said that where the jettison takes place very near the outset of the voyage, so that the ship puts back into the port of departure, the adjustment may be settled there (*d*), but it is submitted that unless the voyage is broken up there (*e*), such an adjustment would be contrary to the principle laid down in the English decisions just cited (*f*). Moreover it would have the unfair result of making goods lost in the subsequent course of the voyage contribute.

Valuation of damage occasioned by jettison.

Where, after the jettison, the rest of the cargo arrives in port in a damaged state, owing to causes which would equally have affected the goods jettisoned had they remained on

(*a*) Benecke, Pr. of Indem. 288; Phillips, s. 1371. Cf. York-Antwerp Rules, 1890, rule xvi. in Appendix C.

(*b*) Simonds *v.* White (1824), 2 B. & C. 805.

(*c*) Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375; Mavro *v.* Ocean Mar. Ins. Co. (1875), L. R. 10 C. P. 414 (Ex. Ch.); Hill *v.* Wilson (1879), 4 C. P. D. 329. If the shipowner exercises his right of transhipment at a port of refuge, and has the cargo carried on to earn the freight, the voyage is deemed to continue until the cargo reaches the port of destination: per Lindley, J., *ibid.* p. 333.

(*d*) He cited the opinion of Benecke (Pr. of Indem. 289) to that effect; Phillips, s. 1365; and the American case of Tudor *v.* Macomber (1833), 14 Pickering, 34. This was the case of a cargo of ice shipped at Boston, bound for Charleston, jettisoned near Cape Cod. The ice would have fetched a high price at Charleston, and was utterly valueless at Chatham, the port near Cape Cod into which the ship put after the jettison. At Boston its value was the cost of cutting, storing and shipping; this was taken as the contributory value. The whole cargo was jettisoned, and the adventure therefore came to an end when the ship had only performed a small part of the voyage, and before she put into any port.

(*e*) As was the case in Fletcher *v.* Alexander, *supra*. In this case the Court held that if the goods jettisoned would (if saved) have been carried to their destination in the ship, their value to be contributed for at the port of departure was their value on board, so that the increase in value due to the payment of shipping charges, insurance and advance freight was to be taken into account.

(*f*) See n. (*c*), *supra*.

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board, the amount at which the goods jettisoned should be contributed for, is the net sum they would have realized in a damaged state (*g*). The amount of damage done to goods by the jettison is to be estimated, for the purposes of adjustment, by deducting their net proceeds, as damaged, from their net proceeds, if sound (*h*). If the goods jettisoned were subject to leakage or breakage, the ordinary leakage and breakage ought, it seems, to be deducted in estimating the value at which they are to be contributed for (*i*). Where goods which have been jettisoned are recovered before the adjustment takes place, the amount at which they are to be contributed for is the amount of the damage done to them by the jettison, and the expenses of recovering them (*k*).

Where they are recovered after the adjustment, the amount which has been paid for them in contribution over and above what is necessary to cover these two items is to be refunded to the several parties on whom the contribution has been assessed (*l*).

Valuation of jewels, &c. packed as articles of inferior value.

982. Where jewels, or other valuables, are denominated in the bill of lading as articles of inferior value, they are to be contributed for as of such inferior value (*m*); so if they are packed up in a box without any intimation to the master of their value, and this box be thrown overboard, it is decreed by the Laws of Wisbuy, and stated by foreign jurists, that they shall be contributed for only upon the value of the box, or of the goods the master might reasonably suppose it to contain (*n*).

Valuation of freight sacrificed.

The amount payable in contribution for freight is the gross

(*g*) Benecke, Pr. of Indem. 293. This rule was adopted by the Court of Common Pleas in Fletcher *v.* Alexander, *ubi supra*.

(*h*) Benecke, Pr. of Indem. 292.

(*i*) 2 Phillips, s. 1366.

(*k*) 1 Emerigon, c. xii. s. 40, p. 597.

(*l*) Code de Commerce, art. 429.

(*m*) Benecke, Pr. of Indem. 294.

(*n*) Laws of Wisbuy, art. 43; Weijtsen, s. 33; Casaregis, Disc. 46, No. 49; and see 2 Phillips, Ins. s. 1372. Cf. Lebeau *v.* Gen. Steam Nav. Co. (1872), L. R. 8 C. P. 88.

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freight which would have been earned on arrival, less any charges which the shipowner would have incurred in order to earn such freight, but has, in consequence of the sacrifice, not incurred. In case of loss of freight by jettison of goods, allowance must also be made for the freight of any cargo which the shipowner has been able to obtain in substitution for the goods jettisoned (*o*).

Loss arising from sacrifices of part of ship.

Damage purposely inflicted on the ship for the general safety is to be estimated, for the purposes of adjustment, at the cost of the repairs, with deductions in proper cases for the old materials (*p*); where no repairs have been made, the damage must be a subject of estimation (*q*).

Where the value of the whole ship is to be contributed for, as in the case of her total loss by voluntary stranding, with a saving of the cargo, the measure of the loss, for the purposes of adjustment, was considered by Phillips to be the value of the ship to her owner at the time she ran aground (*r*).

Loss incurred by goods sold for the general benefit.

The amount at which goods sold for the general benefit are to be paid for in contribution is, if the voyage is subsequently completed, the net value they would have fetched at the port of discharge, or, at the option of the owner of the goods, the sum actually realized at the intermediate port: if the voyage is not subsequently completed, the latter amount (*s*).

Loss by raising money on credit, &c.

When money is raised abroad, by bills or otherwise, for the sake of defraying expenses of the nature of general average,

(*o*) Lowndes, Gen. Av. 5th ed. 340.

(*p*) See the Rules of Practice of the Association of Average Adjusters, Appendix C. As to deductions from cost of repairs according to York-Antwerp Rules, 1890, see Rule XIII. (Appendix D.).

(*q*) As to which see Henderson *v.* Shankland, [1896] 1 Q. B. 525 (C. A.). It is doubtful, however, whether the decision of the Court as to disallowance of the deduction of one-third new for old can be logically justified; see *post*, § 1025.

(*r*) 2 Phillips, Ins. s. 1369; and see Henderson *v.* Shankland, *ubi supra*.

(*s*) Phillips, Ins. s. 1363. See Depau *v.* Ocean Ins. Co. (1825), 5 Cowen, 63; Richardson *v.* Nourse (1819), 3 B. & Ald. 237; Atkinson *v.* Stephens (1852), 7 Exch. 567; 21 L. J. Ex. 329; Hopper *v.* Burness (1876), 1 C. P. D. 137; Pirie *v.* Middle Dock Co. (1881), 44 L. T. 426. Benecke, however, dissents (Pr. of Indem. 274).

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the amount actually expended is the amount to be contributed for, including interest, both marine and ordinary, and all loss by discount on bills and by the rate of exchange (*t*).

Mode of estimating the value of the property saved for the purposes of general average adjustment.

983. Having thus seen the mode in which the property sacrificed is to be valued for the purposes of general average adjustment, let us now see what valuation is put, for the same purposes, upon the property saved; in other words, let us inquire what is its contributory value. The general principle of valuation is simply this (*u*): "that the value of the property to its owners, as saved by the sacrifice or the expenditure, is the value upon the footing of which it ought to contribute towards making good the loss"; or, as the rule is frequently given, "the contributory value of the different interests is their value to their owner at the time and place to which the apportionment relates."

The rule of computation should differ in case of sacrifices and expenditures.

Simple, however, as this principle is, its practical application has given rise to considerable difficulties, which have chiefly arisen from not sufficiently bearing in mind the distinction, already noticed, between the mode of adjustment adopted in the case of sacrifices, and that which ought to be pursued in the case of expenditures.

In the case of expenditures, we have shown our reasons for thinking that contribution is due from the moment of the outlay, and is payable in all events, whatever may be the subsequent fate of the adventure: in these cases, therefore, the time and place to which the apportionment relates should be the time and place of the disbursement, and the contributory value, therefore, of the property saved, should be the sum it was worth to its owner at the time and place at which the expenditure was incurred (without reference to any subsequent deterioration which may have taken place before its arrival in port (*x*).

It is different, however, in the case of sacrifices. There, as

(*t*) Benecke, Pr. of Indem. 250; 2 Phillips, Ins. ss. 1359, 1360.

(*u*) Cf. York-Antwerp Rules, 1890, rule xvii. (Appendix C.).

(*x*) See *ante*, § 977.

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we have also seen, the property at risk when the sacrifice was made is not considered as saved, so as to be subject to contribution, until its arrival at the place of adjustment. This place ought, whenever practicable, to be the port of discharge, and the time that of the ship's arrival there. Hence the rule, that in case of losses arising from sacrifices, the contributory value of the different interests saved thereby is their net value in the state in which they actually come into their owner's hands at the port of destination (*y*).

Accordingly, where the loss to be adjusted has arisen partly from sacrifices and partly from expenditures, the contributory value of the property saved ought, in theory, to be estimated on two different principles. Phillips considered, indeed, that this is the true rule to be followed in practice (*z*). Arnould (*a*) considered that to do so would involve a degree of difficulty and embarrassment inconsistent with the exigencies of actual business. Lowndes (*b*), however, does not see where any such practical difficulty lies. Nevertheless the ordinary practice amongst average adjusters in this country is to regard only the state of affairs existing at the time and place of adjustment, whether in dealing with cases of sacrifice or expenditure; but this rule is not universally followed (*c*).

Ordinary practice of adjusters.

In what follows, unless otherwise expressed, the loss to be made good by the contribution is assumed to be loss arising from sacrifices.

Principle of valuation of ship for the purposes of contribution.

984. Agreeably to the principles already laid down, we shall find it everywhere acknowledged that the ship is to be estimated for the purposes of contribution solely with reference to her value as finally saved by the sacrifice, that

(*y*) Stevens, Average, 49.

(*z*) 2 Phillips, Ins. s. 1377.

(*a*) 2nd ed. p. 951.

(*b*) Lowndes, Gen. Av. 312, n. (*c*), 5th ed.: "There must be one adjustment, but there can easily be two apportionments, on different contributory values, followed by a balance of account or a simple sum in addition. Much greater complications than this are often dealt with by adjusters without difficulty."

(*c*) Lowndes, 301, 5th ed.

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is, her worth to her owner at the time and place of adjustment (*d*).

Difficulty of fixing a practical rule.

There is no dispute about the general principle: but there has been great difficulty in adopting any practical rule of valuation, a difficulty arising principally from the fact that the ship, generally speaking, is not, like the goods, actually sold at the port of destination. The method of valuation, in the absence of a sale, has been very generally, but very variously, fixed by the positive laws of almost all mercantile states (*e*), but in our own country we have no fixed rule upon the subject. The adjuster must ascertain the figure as well as he can—either, where there is a market for similar vessels, by estimation of her market value, or, where there is not, by considering her first cost, and then making proper allowances for wear and tear, changes in the cost of construction, materials and the like, which might either enhance or diminish her value at the date of adjustment (*f*).

Principle on which freight contributes in general average, and by which its contributory value is ascertained.

985. The principle upon which freight is to contribute in the case of general average is, that it was one of the things at hazard at the time when that sacrifice was made which produced the general average loss (*g*): and the principle upon which its contributory value is assessed is the same as

(*d*) Stevens, 63; Benecke, Pr. of Indem. 311; 2 Phillips, s. 1379; Baily, Gen. Average, 141—144. If, however, repairs have been done before the adjustment, the value of such repairs must be deducted. And where the sacrifice in respect of which contribution is to be made was a sacrifice of ship, the amount allowed in general average in respect of such sacrifice must be added. See Carver, s. 422; Lowndes, § 69; and cf. Henderson *v.* Shankland, [1896] 1 Q. B. 525. Where the ship is actually sold, the price she fetched is *primâ facie* evidence of her contributory value (Bell *v.* Smith (1806), 2 Johnson, R. 98); but the saleable value is not necessarily conclusive—*e.g.*, in the case of vessels of a peculiar build, and designed for a particular trade, for which, therefore, there is no market. Cf. Grainger *v.* Martin (1862), 31 L. J. Q. B. 186; 4 B. & S. 9.

(*e*) See Comparative Table at the beginning of Lowndes' work on General Average, and Appendices at the end.

(*f*) See Lowndes, General Average, § 69; cf. Stevens, Average, 53; 2 Phillips, s. 1379.

(*g*) Per Lord Ellenborough in Cox *v.* May (1815), 4 M. & S. 159.

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in the case of the ship, viz., that the amount to contribute is the amount eventually saved by the sacrifice.

From these two principles it follows: 1. That freight, in order to be contributory at all, must have been pending at the time of the sacrifice; 2. That the true contributory value of freight is the actual sum finally received as freight by the shipowner after deducting such of the expenses of earning it as would have been saved if the vessel had been lost at the time of the sacrifice (*h*).

The shipowner only contributes in respect of freight pending at the time of the sacrifice, and saved thereby.

986. From the first principle it follows, and has been decided in the United States, that if the cargo or a part of it has been delivered before the sacrifice took place, the freight due in respect thereof does not contribute (*i*). Freight paid in advance, not to be recovered back by the shipper in any case, does not contribute *quâ* freight, because it is not at risk. But a contribution in respect of the amount so paid in advance is levied upon the shipper or consignee of the goods, either directly, in respect of the interest called advance freight, or indirectly, in respect of the extent to which the value of the goods is by such payment in advance deemed to be enhanced (*k*). If the ship is wrecked near the port of loading, so that the goods are taken back there and the general average is there adjusted, the advance freight, being

(*h*) Stevens, 63; 2 Phillips, Ins. s. 1385; Lowndes, §§ 71, 75; The Brigella, [1893] P. at p. 196. As regards freight at the risk of a charterer, it is provided by a rule of the Association of Average Adjusters that no deduction shall be allowed for wages and port charges except in the case of charters in which the wages or port charges are payable by the charterer.

(*i*) Dunham *v.* Commercial Ins. Co. (1814), 11 Johns. 315; Strong *v.* New York Fireman's Ins. Co., *ibid.* 323, cited 2 Phillips, Ins. s. 1385.

(*k*) Frayes, or Trayes *v.* Worms (1865), 19 C. B. N. S. 159; Lowndes, § 71. Carver thinks that in such a case the contribution is paid in respect of an interest in the cargo rather than in the freight: Carriage by Sea, s. 440; and this view was adopted by the Circuit Court of Appeals in Maldonado *v.* British & Foreign Mar. Ins. Co. (1910), 182 Fed. R. 744, the Court holding that contribution was payable on the basis of the market value at the port of destination, without deducting freight payable in any event. It also seems to underlie the judgments in Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375.

totally lost, will not contribute at all. Cargo belonging to a shipowner will contribute in respect of its enhanced value by having been carried up to the point where the general average act took place (*l*). If only freight *pro ratâ itineris* is earned, that alone contributes (*m*). On the same principle, where a ship was chartered at so much a month to sail on successive passages, and the general average loss happened in the course of the last passage, it was held in the United States that the freight on which contribution was to be assessed was that earned in the last passage only, as that alone was the freight which would have been lost but for the sacrifice (*n*).

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Where a ship is chartered for an entire voyage out and home, what freight contributes?

In Williams *v.* London Ass. Co. (*o*), a ship was chartered for the voyage out and home, under a stipulation that no freight was to be paid for the homeward voyage unless she performed her voyage out and home, and arrived at her original port of departure in safety. An insurance was effected on the ship for the outward voyage only, and in the course of this outward voyage a general average loss was incurred: before the trial the ship had arrived at her home port of departure and earned full freight. The question for the Court was whether under these circumstances the whole freight was liable to contribute for the general average incurred on the outward voyage: the Court held that it was, on the ground that the whole freight payable under the charter-party was one entire and indivisible sum, payable for the use of the ship out and home: therefore, when ultimately earned, having been put to hazard and saved by the measures taken for the general benefit, it ought to contribute (*p*).

This decision, after undergoing much criticism (*q*), was

(*l*) Lowndes, § 71.

(*m*) Maggrath *v.* Church (1803), 1 Caines, 196.

(*n*) Spafford *v.* Dodge (1817), 14 Mass. R. 66; 2 Phillips, Ins. s. 1387.

(*o*) (1813), 1 M. & S. 318.

(*p*) Williams *v.* London Ass. Co. (1813), 1 M. & S. 318. See per Bayley, J., 327.

(*q*) See Benecke, Pr. of Indem. 316; 2 Phillips, Ins. s. 1387; Baily, Gen. Av. 150—153; Arnould, 2nd ed. p. 956. It was supported by

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approved and followed by the Court of Appeal in a case where a vessel was chartered to sail from Fleetwood to Savannah, and thence bring a cargo of cotton to a home port, freight to be paid on right delivery of the cargo. On her outward voyage in ballast a general average sacrifice became necessary. She proceeded to Savannah, loaded her cargo and delivered it, and received the freight. It was held that the chartered freight was liable to contribute to the general average sacrifice, on the ground that it was no less at risk during the outward voyage, when the sacrifice was made, than during the voyage homewards (*r*).

Where the freight is apportioned in the charter-party between the outward and homeward parts of the voyage, it would seem that the whole or a part should contribute according as the general average loss occurred on the outward or homeward passage. *A fortiori* it would be so if the outward and homeward passages were separate voyages, whether under the same charter-party or not.

Contribution of chartered freight to general average.

987. The question of the liability of chartered freight to contribute to general average is carefully discussed by Lowndes. He divides charter-parties for this purpose into three classes:—First: Where the vessel is chartered to fetch or carry cargo belonging to the charterer. In this case his view is that the chartered freight contributes, whether or not there is any cargo on board at the time of the general average act. If, as is often the case, the charter-party provides that the ship shall go to a foreign port to bring home cargo for the charterer, and liberty is granted to the shipowner to ship an outward cargo for his own benefit instead of sending the vessel out in ballast (*s*), Lowndes was of opinion that the

Lowndes, Gen. Av. § 71, and by the present editors, Arnould, 7th ed. § 986. Carver, s. 438, asks what should have been done if the average had been adjusted at the end of the outward voyage. But the answer seems to be that the proper place for adjustment was where it actually took place, *i.e.*, at the home port.

(*r*) SS. Carisbrook Co. *v.* London and Provincial Mar. Ins. Co., [1901] 2 K. B. 861; [1902] 2 K. B. 681 (C. A.).

(*s*) See the cases cited in the preceding section.

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chartered freight should contribute, as well as the freight of the outward cargo. The practice of English adjusters in such a case is to make the outward freight only contribute (*t*), and this practice can be justified on the ground that the common adventure, so far as the outward cargo is concerned, comes to an end at its port of discharge, whereas the ulterior chartered freight is not earned on that adventure (*u*).

Secondly: Where the charterer hires the ship for a voyage, intending to make what he can out of the adventure by letting out her space to shippers to the best advantage. In this case the chartered freight is the subject of contribution until an insurable interest is acquired in the cargo which it is intended to carry; afterwards it is the actual bill of lading freight contracted for (*x*).

Thirdly: Where the vessel is hired for time, or for a series of voyages, by a charterer who proposes to work her for his own profit as owner. Here Lowndes' view is that the chartered freight, unless the contract is a peculiarly beneficial one for the shipowner, is in reality all part of the value of the ship. A ship is meant to be sailed and to earn freights, and whether or not she is enhanced in value by her future engagements, or whether or not her owner loses anything in addition to her value by losing his ship, depends on what the nature of her future engagements may happen to be. It is only in respect of such enhancement in value, if any, that the

(*t*) See No. 34 of the Rules of Practice, *post*, App. D.

(*u*) See Lowndes, Gen. Av. 5th ed. 365, n. (*a*). In Moran *v.* Jones (1857), 7 E. & B. 523, the liability of the homeward chartered freight to contribute to a general average loss on the outward voyage seems not to have been disputed.

(*x*) This is in accordance with the practice of average adjusters. But if the bill of lading freights were to amount to less than the chartered freight, it is not obvious why the latter, if it has been saved by the sacrifice, should not be the freight to contribute. Lowndes, however, supports the practice on the ground that in the case of a jettison the shipowner's loss of freight would not be compensated by contribution. See Lowndes, Gen. Av. 5th ed. 367.

Sect. 987. shipowner should, in Lowndes' opinion, be required to contribute to general average as for freight.

Ulterior chartered freight.

988. Lowndes does not treat expressly of the general question as to a shipowner's liability to contribute for freight expected to be earned by the vessel's engagements for the future. A vessel may, at the time of a general average act, be performing one contract of carriage, and may have one or more separate engagements booked for some time in advance. From the view, however, which he expresses as to his third class of charter-parties, it appears that the primary subject of contribution would be the freight actually being earned, and that the future freights would only contribute in respect of the extent to which the contracts relating to them enhanced the value of the ship. The Association of Average Adjusters agree that the present freight should contribute, but exempt all other, by providing "that when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading (*y*), and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average."

Only the net freight, after deducting all expenses of earning it, is to contribute.

989. From the second principle (*z*) it follows that, in order to ascertain the amount at which freight ought to contribute, the wages of the master and crew earned between the date of the sacrifice and the termination of the voyage, as well as the port charges at the port of discharge, including the cost of discharging the cargo (*a*), ought to be deducted from the gross amount of the freight, for they are part of the necessary expenses of earning freight, and must, in any case, be paid out of it (*b*).

(*y*) The rule does not expressly provide for the case where the ship is subject to the first charter-party, but no cargo has actually been shipped thereunder. But it is conceived that the same principle would be applied.

(*z*) *Ante*, § 985.

(*a*) Lowndes, § 75.

(*b*) Stevens, Average, 63; 2 Phillips, s. 1389.

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On the same principle, where the first ship is disabled, and the cargo is sent on in a second, the excess of freight for the entire voyage, over that paid to the substituted ship, alone forms the contributory value of freight. Hence, where the shipowner, in such case, is obliged to pay the same or a higher freight for the hire of the second ship than he was to receive for the use of the first, then, in case the loss occurred before the transhipment, no contribution is due for freight, because no freight in such case is finally received by the shipowner, or saved by the sacrifice (*c*). The practical rule, therefore, is, that freight contributes to general average upon its net value, after deducting the wages of the master and crew (*d*).

Goods contribute on their net value at the time and place of adjustment.

990. Like ship and freight, goods contribute upon the value finally saved out of what was at risk at the time of the sacrifice; in other words, upon the value of the goods as they come into the hands of their owners, at the place and time of adjustment (*e*).

The port of adjustment is generally the port of destination.

That place, if possible, is the port of discharge, and the time of making it is as speedily as possible after the ship's arrival there. Hence, the general practical rule is, That goods contribute on their actual net value, *i.e.*, on their market price at the port of adjustment, less freight, duty and expenses of landing (*f*).

But it may be the port of departure.

In case of a general average loss at the outset of the voyage, and of the ship in consequence putting back into

(*c*) So decided in America. Searle *v.* Scovell (1819), 4 Johns. Ch. C. 218; 2 Phillips, Ins. s. 1388.

(*d*) The rule of practice adopted by the Association of Average Adjusters is: "That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of, and no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date."

(*e*) Benecke, Pr. of Indem. 298; Stevens, Average, 49.

(*f*) Stevens, Average, 48; Benecke, Pr. of Indem. 301; 2 Phillips, Ins. s. 1394; Lowndes, § 70. Salvage or particular charges payable in respect of the goods must be deducted: The Eliza Lines (1900), 102 Fed. R. 184, affd. (1902), 114 Fed. R. 307; Carver, s. 419.

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the port of loading, the adjustment, said Arnould, should be settled there; and in such case, he added, the contributory value of the goods will be "their cost on board without insurance," *i.e.*, the amount of tradesmen's bills and shipping charges, "such being the value at risk" (*g*). It has, however, been submitted that an adjustment there will only be justifiable if the voyage be broken up (*h*). In that event the value of the goods has not been increased by the payment of the shipping charges, and it has been held that they are not to be added (*i*).

When the adjustment is settled abroad, the contributory value of the goods should be their market price at the foreign port if this be ascertainable; if not, their value there, to be estimated in the best way possible, as in case of ship (*k*).

The value of the goods jettisoned or sold must be added to the value of the goods saved.

If the sacrifice to be contributed for consists of a jettison or sale of goods for the general benefit, then, on the principle already illustrated in the case of ship and freight, the estimated net value of the goods jettisoned or sold must be added to the net value of the goods saved, and the whole will be the contributory value of the goods (*l*).

Thus, let the net value of the goods saved, deducting freight, be	£1,000
Add net value of the goods jettisoned, &c., deducting freight, &c.	100
Value of goods to contribute	£1,100

Damaged goods must be taken at their damaged value, unless

If the goods saved are deteriorated or damaged, by the perils of the sea, after the sacrifice, they must, of course, be taken at such deteriorated value, for such is their value as finally saved (*m*); if, however, they have been damaged by the very sacrifice for which contribution is claimed, then they must be taken at their value as sound, for this damage is made good to them in contribution (*n*).

(*g*) 2nd ed. p. 957.

(*h*) *Ante*, § 981.

(*i*) Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375. If, in a case where the adventure is not broken up, the average could be adjusted at the port of loading, it seems to follow from the judgments in this case that the insurance ought to be taken into account as well as the shipping charges. As to taking the invoice price of the goods as the basis of the valuation, see Lowndes, Gen. Av. § 70.

(*k*) Cf. *ante*, § 984.

(*l*) Stevens, Average, 48.

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the damage be caused by the sacrifice.

991. By way of illustrating what has preceded, the following example, in figures, of a general average adjustment, settled after the ship's arrival at her port of destination, is taken, with a few alterations, from Abbott on Shipping:—

Example of a general average adjustment.

Valuation of Losses.		Value of Articles to contribute.	
Goods of A. jettisoned	£500	Goods of A. jettisoned	£500
Damage done to goods of B. by the jettison	200	Net value of the goods of B., deducting freight and charges, and including amount made good in general average	1,000
Freight of A.'s goods jettisoned	100	Ditto of the goods of C.	500
Price of a new cable, anchor and mast £300		Ditto ditto D.	2,000
Deduct one-third new for old (*o*)	100	Ditto ditto E.	5,000
	200	Value of the ship £2,000	
Expense of bringing the ship off the sands	50	Net freight, deducting wages and charges.. 800	
Pilotage and expenses of going into and out of the port where the ship put in to refit	100		2,800
Expenses there (*p*)	25		
Adjusting this average	4		
Postage	1		
Total amount of losses to be contributed for	£1,180	Total of contributory values	£11,800

Then, as 11,800*l.* : 1,180*l.* :: 100*l.* : 10*l.*, therefore each person will lose 10 per cent. on the value of his interest in ship, freight, and cargo.

(*m*) Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375; Benecke, Pr. of Indem. 298.

(*n*) Stevens, Average, 48.

(*o*) Only one-sixth is now allowed in respect of cables, and nothing off the price of a new anchor.

(*p*) The loss, to repair which the ship put in to refit, being general average, and assuming Atwood *v.* Sellar ((1880), 4 Q. B. D. 342; 5 Q. B. D. 286) to be good law.

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Thus A. loses 50*l.*, B. 100*l.*, C. 50*l.*, D. 200*l.*, E. 500*l.*, the shipowners 280*l.*

The shipowners, therefore, are to pay towards the contribution 280*l.*; but they are to be paid 480*l.* (*i.e.*, freight, 100*l.*; mast, cable, and anchors sacrificed, 200*l.*; disbursements, 180*l.*): on the whole, therefore,

		£
The shipowners are actually to receive		200
A. contributes 50*l.*, but is to be paid 500*l.*—actually receives		450
B. contributes 100*l.*, but is to be paid 200*l.*—actually receives		100
Total to be actually received		£750
On the other hand, C., D., and E. have lost nothing, and are to pay as before, viz.:—	C.	50
	D.	200
	E.	500
Total to be actually paid		£750

This amount is exactly equal to the total to be actually received, and must be paid to each person entitled to contribution in rateable proportion.

Place of adjustment and foreign adjustment. Where should a loss be adjusted where the vessel is carrying cargo for different destinations?

992. The proper place for the adjustment of general average is, as we have already seen, the ship's port of destination or discharge. It often happens, however, that a ship may have more than one destination, and be carrying cargo to be discharged at more than one place, and even at places in different countries with different laws. In such a case the questions as to where an adjustment is to take place, on what values, and according to what law, are some of many difficult points that may arise, and there is no judicial authority on the subject. It is, however, discussed very clearly and carefully by Carver (*q*), and Lowndes (*r*), to whose pages the reader is referred. Carver's view on the whole is that the

(*q*) Carriage by Sea, ss. 425, 426. (*r*) Gen. Av. § 62.

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ultimate port of the voyage should as a rule be regarded, and that the adjustment should be there made on the basis of the arrived values. Lowndes gives a useful illustration of what was actually done in a case of some importance, where, however, the adjustment was agreed to without litigation. Apart from complications of this nature, the rule is, that where the port of destination happens to be a foreign port, the general average loss is adjusted there, according to the law and usage of the country to which such foreign port belongs; and the adjustment so made is called a foreign adjustment (*s*). If the adventure be broken up at an intermediate port, either of necessity or by consent of the parties, that port becomes in effect the port of discharge, and the place therefore for adjusting the general average. But in the absence of proof of the termination of the voyage, by necessity or consent, at an intermediate port, an adjustment made at such port, without the express consent of all parties concerned, will not be binding on them (*t*).

It has also been already observed that there is great diversity in the practice of different countries with regard to what shall or shall not be included in general average; sometimes losses are included and charged for which are general average in the country where the adjustment is settled, but not so in the country where the charter-party was entered into and the policy of insurance effected; and sometimes a different proportion of contribution is assessed in the foreign port from what would, under similar circumstances, have been assessed in the home port.

993. In either case two questions arise:—First, are the co-

(*s*) Simonds *v.* White (1824), 2 B. & Cr. 805. See Wavertree Sailing Ship Co. *v.* Love, [1897] A. C. 373, where it was held that the shipowner is under no obligation to employ an adjuster at the foreign port to draw up the statement.

(*t*) As to what justifies the termination of the voyage at an intermediate port, cf. Fletcher *v.* Alexander (1868), L. R. 3 C. P. 375; Mavro *v.* Ocean Marine Ins. Co. (1874), L. R. 9 C. P. 595; 10 C. P. 414; and, for an extreme case upon the facts, see Hill *v.* Wilson (1879), 4 C. P. D. 329.

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adventurers themselves bound by the foreign adjustment? Secondly, are the underwriters bound by it?

The parties to the adventure are bound by a foreign adjustment.

With regard to the first question there is now no controversy amongst jurists, for, as it is expressed by Story, J., "When a case of general average occurs, if it is settled in the foreign port of destination, or in any other foreign port where it rightfully ought to be settled, the adjustment there made will be conclusive as to the items, as well as the apportionment thereof upon the various interests, although it may be different from what our own law would have made in case the adjustment had been settled in our own ports" (*u*).

Thus where, on an adjustment settled at St. Petersburg, the owners of the cargo (British subjects) had been compelled (in order to get possession of their goods) to pay a contribution assessed upon them for the expenses of repairs, which were general average in Russia but not in this country, it was held that they could not recover it back from the shipowner, who was himself a British subject (*x*).

The same decision was given in a case, also arising upon a Russian adjustment, where the contribution was for wages and provisions during a refitment, which, as we have seen, are not general average in this country; here also the action was brought by the owner of the goods to recover back the sum so paid against the shipowner, and with the like result (*y*).

Reason of the rule.

The reason of the rule is thus given by Lord Tenterden (in the course of his judgment in the case of Simonds *v.* White): "The shipper of goods tacitly, if not expressly, assents to general average, as a known maritime usage, and by assenting to it he must be also taken to assent to its adjustment at the usual and proper place, according to the usage and law of the place" (*z*).

The law in this respect is the same in the United States (*a*).

(*u*) Peters *v.* Warren Ins. Co.; see 2 Phillips, Ins. s. 1413.
(*x*) Simonds *v.* White (1824), 2 B. & Cr. 805.
(*y*) Dagleish *v.* Davidson (1824), 5 Dowl. & Ryl. 6.
(*z*) 2 B. & Cr. 810. (*a*) 3 Kent, Com. 243.

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The underwriter is bound by a foreign adjustment, when proved to have been settled according to the laws and usages of the foreign port.

994. With regard to the second question, namely, whether the underwriter in this country is bound by a foreign adjustment, many difficulties have been raised, and it has been strenuously contended by some writers of considerable practical knowledge, both in this country and the United States, that the underwriters should in no case be bound by a foreign adjustment, when either the items of the loss or the modes of apportionment are different from what they would have been had the adjustment been settled in a home port (*b*).

There have not been very many decisions on this point in English Courts—no doubt owing to the fact that it has for some time been the regular practice to insert in policies a special clause, known as the Foreign General Average Clause, by which the parties expressly provide for the contingency of an adjustment being made abroad. The effect of this clause will be discussed later. At present the point for consideration is as to the binding nature of a foreign adjustment, where there is no such clause in the policy.

The true rule, to be gathered from general reasonings and from the tenor of the few decisions there are on this subject, appears to be this:—

1. That the underwriter is in all cases bound by a foreign adjustment of general average, when it is rightly settled according to the laws and usages of the foreign port (*c*).

2. But that, unless it is clearly proved to have been settled in strict conformity with such laws and usages, he is in no

(*b*) See, especially, Stevens, Average, 71, 72. Phillips appears to admit that the underwriters would be bound, even though the contribution should be differently apportioned, provided the losses adjusted as general average would be either general or particular average at the home port, but not otherwise. 2 Phillips, Ins. s. 1414.

(*c*) Provided always that the loss which is declared by the foreign adjustment to be general average arose from a peril insured against. See Harris *v.* Scaramanga (1872), L. R. 7 C. P. per Brett, J., at p. 496, citing 2 Phillips, Ins. ss. 1353, 1409, 1414; also the Mar. Ins. Act, 1906, s. 66, sub-s. 6, *infra*, § 997, note (*q*). For what is an adjustment according to the law of the foreign port, see the judgments of Kennedy, J., and Stirling, L. J., in De Hart *v.* Compania, &c. "Aurora," [1903] 1 K. B. 109; 2 K. B. 503, *post*, § 1000.

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case bound thereby, if it would not be general average in this country.

Cases in which a foreign adjustment has been held binding. Newman v. Cazalet.

995. Thus, where the assured (owner of goods) had been compelled to pay, under a foreign adjustment settled at Pisa, in respect of losses, some of which would not have been general average in this country, and upon contributory values, differently computed from what they would have been in this country (the goods being assessed at their full value, the ship at one-half, the freight at one-third), yet, as it clearly appeared in evidence that all the losses in respect of which the claim was allowed were general average at Pisa, and that the apportionment of loss was correct according to the mercantile usage of that place, the assured was allowed to recover against his underwriter the full proportionable amount of his claim (*d*).

Walpole v. Ewer.

So, where the holder of a respondentia bond (on a Danish ship), who would not have been liable to general average at all in this country, was compelled to pay a contribution under a foreign adjustment, settled in Denmark, satisfactory evidence having been given that it was the law and practice in Denmark that holders of respondentia bonds should contribute in general average, he recovered against his underwriters (*e*).

Where, however, it is not a proper case of general average according to the laws and usages of the foreign port, the underwriter is not bound by a foreign adjustment.

In both these cases there was clear evidence that the adjustment was correct according to the law and practice of the port where it was settled, and it was also clear that the port where it was in fact settled was the proper port for settlement. If, however, either of these facts be not satisfactorily established, the underwriter will not be bound by the foreign adjustment, whenever, either in the items or the apportionment of the loss, it differs from what it would have been if settled in his own country (*f*).

Power v. Whitmore.

996. Thus, where the owner of goods insured from London

(*d*) Newman *v.* Cazalet, 2 Park, 900.
(*e*) Walpole *v.* Ewer (1789), 2 Park, 898.
(*f*) Hill *v.* Wilson (1879), 4 C. P. D. 329; 2 Phillips, s. 1414.

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to Lisbon was compelled, under a foreign adjustment, settled in Lisbon, to pay a contribution for losses which, according to the laws of this country, do not belong to general average—and no sufficient proof was given that, by the laws and usages of Lisbon, such losses were treated as general average there—it was held that the owner of the goods could not recover from his underwriter his proportionate amount of the sum so paid (*g*).

It by no means follows from this case, as has been sometimes supposed, that underwriters in this country can in no case be bound by a foreign adjustment; for Lord Ellenborough puts his judgment entirely on the ground that the case contained no allegation of fact, as to its being the law or usage at Lisbon to treat losses and expenses of the kind charged for as the subjects of general average (*h*).

Harris v. Scaramanga.

Finally, the view of the law as above stated was confirmed in Harris *v.* Scaramanga: "Now, I think, it is clearly established that upon such a policy" (*i.e.*, a policy containing no special foreign adjustment clause) "English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound, although the contributions are apportioned between the different interests in a manner different from the English mode, or though matters are brought into or omitted from general average which would not be so treated in England" (*i*).

The law in the United States upon this subject appears to be to the same effect (*k*).

(*g*) Power *v.* Whitmore (1815), 4 M. & S. 141. In Harris *v.* Scaramanga (1872), L. R. 7 C. P. at p. 495, Brett, L. J., hints at disapproval of this decision.

(*h*) See per Lush, J., in Dent *v.* Smith (1869), L. R. 4 Q. B. at pp. 450, 451.

(*i*) Harris *v.* Scaramanga (1872), L. R. 7 C. P. at p. 495, per Brett, J. In Hendricks *v.* Australasian Ins. Co. (1874), L. R. 9 C. P. at p. 468, the same learned judge seems to use expressions to a somewhat different effect. See also Mavro *v.* Ocean Mar. Ins. Co. (1874), L. R. 9 C. P. 595; 10 C. P. 414; Stewart *v.* West India Co. (1873), L. R. 8 Q. B. 88, 362; The Mary Thomas, [1894] P. 108.

(*k*) 3 Kent, Com. 243; see also the cases collected in 2 Phillips, Ins.

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The Foreign Adjustment Clause.

997. Such, then, being the position apart from any special clause in the policy, it now remains to consider the effect of the foreign general average clause above referred to. This clause for many years ran substantially as follows: "General average and salvage charges payable as per official foreign adjustment if so made up, or per York-Antwerp Rules if in accordance with the contract of affreightment." As regards the object with which this clause was introduced into policies there have been two views: (1) That, there being doubts as to whether the cases above cited from Park (*l*) sufficiently established the law as above laid down, the clause was only inserted in order to remove all such doubts, or, in other words, in order to avoid running the risk of the Pisa (*m*) case being considered bad law. (2) That the clause was intended to do something more, and to give the foreign adjustment some further effect than had been given to it by the decisions on policies which did not contain such a clause.

Its object.

In support of the former of these two views, arguments of considerable strength were formerly urged, and such was apparently the view of Lord Blackburn (*n*). But the latter view was clearly the basis of the decision of the Court in Harris *v.* Scaramanga (*o*), and this decision has been approved by the Court of Appeal (*p*). The latter view, therefore, is the authoritative view of our Courts.

It has already been observed that even in cases where there is no foreign adjustment clause, a foreign adjustment,

s. 1414. Phillips classifies the cases under three heads: 1. Where the foreign adjustment merely varies the proportions of the contribution. 2. Where it brings into general average what by the *lex loci contractûs* is particular average, and *vice versâ*. 3. Where it brings into general average what, by the *lex loci*, is neither general nor particular average. Admitting the liability of the underwriter in the two former classes of cases, he disputes it in the third. See also Baily, General Average, 199.

(*l*) Newman *v.* Cazalet and Walpole *v.* Ewer, *ante*, § 995.

(*m*) Newman *v.* Cazalet.

(*n*) See Mavro *v.* Ocean Co. (1875), L. R. 10 C. P. at p. 418. See also McArthur, Mar. Ins. 208.

(*o*) L. R. 7 C. P. 481. See especially the judgment of Brett, J., at p. 498.

(*p*) In De Hart *v.* Compania Anonima "Aurora," [1903] 2 K. B. 503.

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if properly made, binds an English underwriter, even though the contribution is thereby assessed in different proportions from those in which it would have been assessed by English law, and even though matters are thereby included or excluded as general average which English law would have treated differently. But there is under such circumstances one defence open to the underwriters, notwithstanding the foreign adjustment, viz., to show that the loss, which is declared by such adjustment to be general average, did not arise from any of the perils covered by the policy (*q*). It has been decided that the insertion of the foreign adjustment clause has the effect of depriving the underwriter even of this defence.

The Foreign Adjustment Clause makes the underwriter liable even where the general average was not due to perils insured against. Harris *v.* Scaramanga.

998. In Harris *v.* Scaramanga (*r*) it appeared that the foreign adjustment not only assessed contribution on different principles from English law, but also included, under the head of general average, losses and expenses which, whether or not properly the subject of contribution as between the ship, cargo, and freight, would not apart from the clause be recoverable from underwriters, inasmuch as they arose from perils which were not insured against at all. The facts of the case were as follow:—A cargo of rye was insured from Taganrog to Bremen. The policy contained the usual memorandum, "Corn, &c. warranted free from average unless general, or the ship be stranded," &c.; and in the margin were the following conditions:—"To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship be stranded, &c. Warranted free from capture and seizure." After leaving Taganrog, the vessel having encountered severe weather was compelled to put into two several ports for repair, at each of which the captain, in order to obtain funds to put her in a

(*q*) By the Mar. Ins. Act, 1906, s. 66, sub-s. 6, "In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against."

(*r*) (1872), L. R. 7 C. P. 481.

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condition to continue her voyage, gave a bottomry bond on ship, freight and cargo. On arrival at Bremen the consignees of the cargo paid the whole amount in order to obtain delivery, the captain having no funds. The ship was eventually sold at the instance of the consignees, but sold for 663*l.* less than was certified by the average stater at Bremen to be the ship's proportion of liability on the bonds. A supplemental average statement was subsequently made at Bremen, in which this sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds, and it was admitted that "such a loss is treated at Bremen as a general average loss, and not as a particular average loss." The action was brought upon the policy to recover the 663*l.* as for a general average loss, stated so to be by the foreign adjustment. The main defence was that even assuming the loss to be a general average loss by the law of Bremen, it was not due to any peril insured against, but merely owing to the want of funds of the captain. Bovill, C. J., however, delivering the judgment of himself and Keating, J., held that the question, whether the claim in this case was to be considered as general average for which the underwriters were liable, was to be determined not by the Court, but by the foreign stater. "Under the terms of this policy," he said, "the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port, if and when made, as conclusive between them, both in principle and details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy" (*s*), and later (*t*), "If the defendants' contention be correct, it would equally have entitled them to dispute each item in the original average statement on the ground that it was not properly the subject of general average, or that it did not arise from any of the perils covered by the policy. But it appears to me that the intention and effect of

(*s*) L. R. 7 C. P. at p. 489. (*t*) At p. 491.

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the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad; and that the underwriters by this policy, as between themselves and the assured, agreed to be bound by the opinion and decision of the foreign average stater, both as to facts and law, on the subject of the general average in the statement which he might make up in the foreign port."

Opinion of Brett, J., as to effect of Foreign Adjustment Clause.

999. Brett, J., also gave judgment in favour of the assured, though on a somewhat narrower ground. He agreed that the loss was not a general average loss by English law, and that it was not due to a peril insured against. He then expresses the opinion, after discussing such authority as there is on the point, that even where a policy contains no foreign adjustment clause an English underwriter is bound by the terms of a foreign adjustment to pay what such adjustment declares to be general average, though not general average by English law; but that this liability only attaches where the general average loss is due to a peril insured against. Such being the effect of an ordinary policy, some additional effect, he continues, must be given to the clause, in order that its insertion may not be meaningless, and the only way to give such effect to the clause is to say that it was intended to meet such a case as the one before the Court. Where, therefore, by foreign law a loss is a general average loss, and where by such law a general average loss is, by the mere fact of its being a general average loss, properly chargeable to underwriters, whether or not the peril which caused such loss is covered by the policy in question, a foreign adjustment which, in accordance with such law, charges the loss against an English underwriter is binding on the underwriter, if he has agreed to accept a foreign adjustment, even though he in his policy has never granted protection against the peril to which the loss was due (*u*).

(*u*) Harris *v.* Scaramanga (1872), L. R. 7 C. P. 481. It seems that

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Criticism of the rule.

It is not proposed to criticize this decision except by pointing out that the members of the Court were all of opinion that if the general average loss had been caused by a peril expressly excepted in the policy, such as capture or seizure, the underwriters would not have been liable in respect thereof, whatever might be the tenor of the foreign adjustment. It is, however, difficult to see how this reservation can logically be maintained. There seems no difference in principle between perils which are excepted from the policy by express words, and perils which are excepted therefrom by omission to include them. It is possible that the Courts may some day hold, notwithstanding the *dicta* to the contrary in Harris *v.* Scaramanga, that the foreign adjustment clause renders underwriters liable to reimburse a general average contribution, even if occasioned by a peril expressly excepted.

De Hart *v.* Compania "Aurora."

1000. The question of the construction of this clause was re-opened in a later case (*x*), and the Court of Appeal adopted the rule laid down in the judgment of Bovill, C. J., and Keating, J., in Harris *v.* Scaramanga (*y*), and held that by reason of the clause a foreign adjustment made in good faith is conclusive between the underwriters and the assured (*z*). The following were the facts of this case: The plaintiffs' ship was chartered to carry from Pensacola to Antwerp a cargo of timber, including (as is usual in this trade) a deck load; and the charter-party contained the following clause: "In case of average the same to be settled according to York-Antwerp Rules, 1890, excepting that jettison of deck cargo (and the freight thereon) for the

the claim in Greer *v.* Poole (1880), 5 Q. B. D. 272, could have been recovered, had the amount only been included as general average in the foreign statement. See also Robinows *v.* Ewing's Trustees (1876), 3 Ct. of Sess. Cas. (4th series) 1134.

(*x*) De Hart *v.* Compania Anonima "Aurora," [1903] 1 K. B. 109; 2 K. B. 503 (C. A.).

(*y*) (1872), L. R. 7 C. P. 481.

(*z*) For an American decision to the same effect on a similar clause, see International Nav. Co. *v.* Sea Ins. Co. (1903), 124 Fed. R. 93; (1904), 129 Fed. R. 13.

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common safety shall be allowable as general average." During the voyage it became necessary for the safety of the ship and her cargo, in consequence of perils insured against, to jettison part of the deck-load. Under Rule I. of the York-Antwerp Rules: "No jettison of deck cargo shall be made good as general average," and by the Belgian law, apart from contract, it is also not the subject of general average; but the Belgian law recognizes any special provisions in a charter-party as to what shall be the subject of general average. Therefore, in an average statement made up at Antwerp the average stater, in accordance with the terms of the charter-party, included the jettisoned cargo and its freight as general average. The underwriters on the vessel contended that the statement of the foreign average adjuster is not conclusive unless it is made in conformity with the foreign law, and that the statement was not in accordance with the general rule of the Belgian law. The Court of Appeal, however, held that by the foreign adjustment clause the parties had agreed to be bound by the statement as it was in fact made up (*a*).

Reservation made by Romer, L. J.

Romer, L. J., qualified his judgment in this case by the following remarks (*b*): "I should like to make a reservation for further consideration if the case I am about to mention should hereafter arise; that is to say, if the statement were made up according to the law of the port which recognized the special terms of the contract of affreightment. I doubt if the parties to the policy of insurance in a case like the present would be bound by the statement if the contract of affreightment imported terms as to general average of a special and unusual character, which could not reasonably

(*a*) Kennedy, J., decided in favour of the plaintiff on the ground that the Belgian law recognized the express provisions of the charter-party, and therefore that the average statement was in accordance with the Belgian law; and in the Court of Appeal, Stirling, L. J., while agreeing with the other members of the Court as to the meaning of the clause, also concurred in Kennedy, J.'s, decision.

(*b*) [1903] 2 K. B. at p. 509.

Sect. 1000. have been contemplated by the parties to the policy of insurance. If such a case arises I should like further to consider it."

New Average Adjustment Clause.

Since this decision the foreign adjustment clause in the Institute Clauses for policies on ship or freight has been altered, and in its present form it seems intended to guard against any further extension of the underwriter's liability by reason of special clauses in the contract of affreightment. The new clause is worded in the following terms: "General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp Rules, or in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ('No'); but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends, and as if the contract of affreightment contained no special terms upon the subject."

Foreign Adjustment Clause may make underwriter liable to pay particular average not covered by the policy, if it be general average by foreign law.

Mavro v. Ocean Mar. Ins. Co.

1001. Where the foreign statement is made binding, it renders the underwriter liable not only to reimburse the assured in respect of contributions levied upon his interest in favour of the other interests, but also to make good to him his own contribution to a loss sustained by his own particular interest, which is particular average by English law, but general average under the adjustment. Thus, in Mavro *v.* Ocean Marine Insurance Co. (*c*), there was a partial loss both of ship and cargo under circumstances which constituted a case for general average contribution by foreign, but not by English, law. In an action on the policy brought by the cargo-owners, the defendants paid all the items stated by the foreign adjustment to be general average, except in respect of the damage to the cargo, relying, as regards the latter, on a

(*c*) (1874), L. R. 9 C. P. 595; 10 C. P. 414 (Exch. Ch.).

"free from average, unless general" clause. Admitting the correctness of the decision in Harris *v.* Scaramanga, they nevertheless contended that the foreign adjustment which had been made in pursuance of a similar clause only applied so as to make them liable for the amount which the plaintiffs had paid by way of contribution to the damage sustained by the ship. The Court, however, held that the plaintiffs were also entitled to recover the loss suffered by the cargo itself. **Sect. 1001.**

Foreign Adjustment Clause binds assured as well as underwriter.

Although the adoption of the foreign adjustment clause has in most cases the effect of increasing the liability of the underwriter, yet there may be cases where the effect is the opposite. The adjustment when properly made is as binding on the assured as it is upon the insurer, and the former cannot turn round, in a case where it suits him to do so, and recover from his own underwriters, as particular average or otherwise, what the foreign statement has declared to be only recoverable as general average by a contribution from the other interests. Thus in "The Mary Thomas" a contribution to certain expenditures incurred by the shipowner, which were general average expenditures by foreign law, was assessed against the cargo. The shipowner was, however, unable to obtain payment from the cargo-owners, owing to the rule of law in the foreign country which precluded him from doing so where the loss was occasioned by the default of his own servants. He then endeavoured to reprobate the foreign statement and to recover the amount from his own underwriters, but this he was not allowed to do (*d*).

But a foreign adjustment must have been necessary.

Moreover, the clause does not apply at all where there is *ab initio* no case for general average, and therefore no necessity for any statement, foreign or otherwise. Nor does it apply where there is no reason, either on principle or of

(*d*) The Mary Thomas, [1894] P. 108 (C. A.), distinguishing Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639. It is doubtful whether Hick *v.* London Ass. Co. (1895), 1 Com. Cas. 244 (Mathew, J.), is quite consistent with this decision.

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necessity, why a foreign port should have been chosen for making the adjustment (*e*).

Where adjustment made abroad on an estimate of damage sustained.

1002. It is sometimes necessary to have a general average adjustment prepared abroad, though it may be possible and expedient to take the vessel, which has suffered the general average damage, in respect of which the adjustment is made, to a home port for repairs. The cost of the repairs must in this case, for the purposes of the adjustment, be a matter of estimate, which may easily be far greater or far less than the actual cost as subsequently determined. Suppose the estimate to exceed the actual cost, the result is that the shipowner obtains from the cargo a larger contribution than he is entitled to. As between the shipowner and the owners of the cargo, such a circumstance can give rise to no question, each party being deemed to have agreed to be bound by the amount of the estimate. But an interesting and difficult question then arises between the shipowner and his underwriters. Are the latter also bound by the estimate made for the purposes of the foreign adjustment, and therefore liable to pay the shipowner such proportion thereof as the value of the ship may bear to that of all the contributing interests? Or, secondly, are the underwriters only bound to pay the shipowner the ship's proportion of the actual repair bill? Or, thirdly, are the underwriters entitled to treat the contract as one of indemnity, and merely to pay the difference between the actual cost of the repairs and the amount already received from the cargo under the foreign adjustment?

Illustration.

1003. By way of illustration, let us suppose that in a case where ship and cargo are the two contributing interests, the contributory value of ship being double that of cargo, a general average sacrifice of ship takes place, and that in the foreign port where the general average is adjusted the amount

(*e*) The Brigella, [1893] P. at pp. 197, 201, not overruled on either of these points by Montgomery *v.* Indemity Mutual, &c. Co., [1902] 1 K. B. 734.

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of the ship's damage is estimated at 6,000*l.* The shipowner recovers 2,000*l.*, being one-third of this sum, from the cargo, and her repairs are subsequently completed at home for 4,500*l.* On the first alternative, the shipowner would recover 4,000*l.* more from his underwriters, receiving thus 6,000*l.* in all for damage which has only cost him 4,500*l.* On the second alternative, he would receive from his underwriters two-thirds of 4,500*l.*, making 5,000*l.* in all. On the third alternative, having already received 2,000*l.* from the cargo, he would only recover the balance of his loss, namely, 2,500*l.* There is obviously much to be said in favour of the third alternative, inasmuch as it is the only one under which the shipowner does not make a profit out of his loss. And if it be urged that there is no reason why the underwriter, rather than the shipowner, should enjoy all the benefit of the overpayment made by the cargo-owner, it must be remembered that in the converse case—*i.e.*, where the amount of the damage happens to have been under-estimated at the foreign port—it is the underwriters on ship who suffer all the loss in consequence of such under-estimate; for the shipowner can proceed against his own underwriters for the whole of his general average damage, surrendering to them merely the inadequate proportion which he has received from the cargo. If, then, under these circumstances it is they who suffer, it may be contended that when circumstances are different it is they who should have the advantage.

The attention of average adjusters seems not to have been so much turned to this possible view of the matter as to have been divided between the merits of the other two alternatives. An attempt was made some time ago to agree upon a rule by which the second alternative would have become a rule of practice, but the discussion revealed so substantial a difference of opinion that the attempt proved a failure. Those who support the first alternative conceive that it is forced upon them by the decisions upon the foreign adjustment clause which have been already noticed (*f*), and that the adoption

(*f*) *E.g.*, Harris *v.* Scaramanga; Hick *v.* London Ass. Co.; The

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of any other rule would be in defiance of the law. The editors do not quite appreciate this difficulty. These cases do not appear to determine anything more than that what a foreign adjustment declares to be general average shall be general average, and that the amount shown by the adjustment to be general average shall be recoverable as such from English underwriters. They do not determine that a shipowner shall, under any circumstances, recover from his underwriters more than the loss he has sustained.

Liability of the owners of ship, goods and freight, for their respective amounts of contribution.

1004. The average having been thus adjusted, it remains to inquire who are the parties legally liable to pay the proportionate shares of the contribution, and in what mode can such payment be enforced.

Rights of parties liable against their underwriters.

Primarily the sole parties liable by the law of general average are the parties upon whose respective interests the contribution has been assessed, *i.e.*, the owners of ship, freight and goods. But by virtue of the contract in the policy, the owner of property sacrificed may have recourse in the first instance to his own insurer for the whole of his loss (*g*), and the insurer upon payment succeeds, by subrogation, to the rights of the assured as against third persons (*h*). This rule, however, does not apply to general average expenditures, as these do not involve the loss or destruction of any part of any particular interest, so as to make the underwriter on that interest directly liable in respect of the whole thereof. Hence an underwriter cannot be sued for the whole of a general average expenditure, but only for the proportion assessed against the interest which he has insured, and there must therefore be some kind of adjustment before he can be so sued (*i*). So by the Marine Insurance Act, 1906 (*k*), it is now provided that "Subject to any express provision in the

Mary Thomas, *ubi supra*, and Price *v.* The A1 Ships' Small Damage Assn. (1889), 22 Q. B. D. 580.

(*g*) See, however, an exception to this rule stated in § 1005.

(*h*) Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639.

(*i*) The Mary Thomas, [1894] P. 108.

(*k*) Sect. 66, sub-sect. 4.

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policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute."

Modern practice—master's lien on the goods.

The general practice now is for the underwriters to pay in the first instance the amount of their contribution; but this is a mere matter of convenient practical arrangement, leaving the legal liabilities, and therefore the legal remedies, of the respective parties entirely unaltered. Accordingly the master has still a lien on the goods till payment of the contribution (*l*), or he may enforce his claim by action (*m*).

Practice in case of a general ship.

In the case of a general ship, where there are many consignees, it is usual, in practice, for the master, before he delivers the goods, to require a deposit in cash sufficient to cover the probable amount of the merchant's liability, or to take a bond from the merchant for payment of his portion of the average, when the same shall be adjusted (*n*), or to require both a deposit and a bond. But the bond which is exacted in these circumstances must be reasonable. Nor is the shipowner bound to accept security in lieu of immediate payment; consequently each consignee must pay the amount demanded by the shipowner, or at his own risk tender what he thinks is his proper proportion. He is, however, entitled to the necessary account or particulars from the owner or master, to enable him to ascertain what his proper proportion

(*l*) Per Lord Tenterden in Scaife *v.* Tobin (1832), 3 B. & Ad. 523. Cf. Anderson *v.* Ocean SS. Co. (1884), 10 App. Cas. at p. 115; and Huth *v.* Lamport (1885), 16 Q. B. D. 442, 735. See also Wellman *v.* Morse (1896), 76 Fed. R. 573, cited in Lowndes, Gen. Av. 5th ed. 774.

(*m*) Birkley *v.* Presgrave (1801), 1 East, 220.

(*n*) It is his duty not to release his lien without obtaining security, and his owners will be liable to an action for damages at the suit of a cargo-owner who is entitled to contribution if he neglects this duty. Crooks *v.* Allan (1879), 5 Q. B. D. 38; Strang *v.* Scott (1889), 14 App. Cas. 601; Nobel's Co. *v.* Rea (1897), 2 Com. Cas. 293; The Santa Ana (1907), 154 Fed. R. 800.

Sect. 1004. is: and if such particulars be refused, the consignee would not be allowed by the Court to be prejudiced by not having made a sufficient tender (*o*). A consignee who is not the owner of the goods is not rendered liable for contribution by the mere receipt of them under a bill of lading, unless there be an express condition to that effect in the bill (*p*).

In recent years another kind of security has come extensively into use, in the place of a deposit on bond, viz., a guaranty by the merchant's underwriters of the cargo's contribution to the general average (*q*).

The parties interested are severally, and not jointly, liable.

The parties severally interested in ship, cargo, and freight, are, as a general principle, severally, and not jointly, liable for their respective proportions of the contribution: if, however, they be jointly interested, they would, on principle, be jointly liable, and have accordingly been held to be so in the United States (*r*).

Hence it also follows, that if one of such joint owners have insured his interest separately, and in consequence of his joint liability is obliged to pay his partner's share of the contribution as well as his own, his underwriters will not be liable to reimburse to him their proportion of what he has so paid (*s*).

Direct liability of underwriters to reimburse general average sacrifice or contribution.

1005. Where there has been a general average sacrifice owing to a peril insured against, the underwriter is directly liable to the owner of the interest sacrificed in respect of the full amount of such sacrifice. Having paid in respect of the loss he is then entitled to stand in the place of his assured for the purpose of obtaining contribution from the other interests (*t*). The underwriters on the contributing interest

(*o*) Huth *v.* Lamport (1885), 16 Q. B. D. 442, 735; The Norway (1864), Br. & Lush. 377, 397.

(*p*) Scaife *v.* Tobin (1832), 3 B. & Ad. 523; see Walford *v.* Galindez (1897), 2 Com. Cas. 137.

(*q*) See Lowndes, 5th ed. § 80a. For the form of guaranty in use at Lloyd's, see *ibid.* App. BB.

(*r*) Sims *v.* Willing (1822), 8 Serg. & Rawle, 103.

(*s*) See 2 Phillips, s. 1411.

(*t*) Dickenson *v.* Jardine (1868), L. R. 3 C. P. 639. In America

Sect. 1005. is also liable, if the loss has been caused by a peril insured against, to reimburse his assured in respect of the contribution which the latter has paid, or is liable to pay (*u*). The result is that questions of general average contribution are in practice frequently fought out not between the owners of the several interests, but by their respective underwriters. But, nevertheless, any question as to the right to contribution is always determined by the Courts without regard to any question of insurance, and as if the contest were in reality, as it is in form, one between the owners themselves. As a deduction from this principle, Barnes, J., held in The Brigella (*x*) that as there could be no case for general average contribution where all the interests at risk were owned by the same person, such person could have no claim upon his insurer on one of the interests for a general average contribution, although, had the interests been separately owned, there would have been a general average loss. But this decision was shortly afterwards overruled by the Court of Appeal (*y*), and it is now provided by the Marine Insurance Act, 1906 (*z*), that where ship, freight and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons (*a*).

the same rule is considered by Parsons as now established, although there is some authority the other way. See 2 Parsons, 289—293; Internat. Nav. Co. *v.* Atlantic Mut. Ins. Co. (1900), 100 Fed. R. 304. The rule does not apply to general average expenditures. The Mary Thomas, [1894] P. 108; *ante*, § 1004.

(*u*) Mar. Ins. Act, 1906, s. 66, sub-s. 5, *ante*, § 908.

(*x*) The Brigella, [1893] P. 189.

(*y*) Montgomery *v.* Indemnity Mutual Mar. Ins. Co., [1902] 1 K. B. 734.

(*z*) Sect. 66, sub-sect. 7.

(*a*) It has been held in the United States that sacrifices in the nature of general average should be treated as general average even though there be only one interest at stake: Potter *v.* Ocean Ins. Co. (1837), 3 Sumner, 27; Dollar *v.* La Fonciere Co. (1908), 162 Fed. R. 563; affirmed (1910), 181 Fed. R. 945. Potter *v.* Ocean Ins. Co. was cited with approval in Montgomery *v.* Indemnity Mutual Mar. Ins. Co., *supra*. The question has not been definitely before the English Courts,

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Exception where ship, freight and cargo owned by the same assured.

The rule that in case of a general average sacrifice the owner of the interest sacrificed can recover the full amount of the loss from the insurer of that interest does not apply when two or more of the contributing interests are owned by the same assured. The reason for this exception, as stated by the Court of Appeal, is that the assured is deemed to have the contributions of the other interests which belong to him in his pocket, and therefore the amount of these contributions must be deducted from the amount of the loss (*b*). Thus, if ship, freight and cargo belong to the same person, and the thing sacrificed be part of the ship, the assured can only sue the underwriter on ship for the ship's proportion of the loss.

Liability of underwriters proportionate to amount insured.

The underwriters are not necessarily bound to reimburse the full amount of the sacrifice or of the contribution, but only that proportion of it which the value of the interest as insured bears to its value as estimated for the purposes of contribution (*c*); and this is obviously just, for the value of the ship or goods, as between the assured and his underwriter, is either their value in the policy or else, in an open policy, their value at the time and place of the ship's sailing; but their contributory value is, as we have seen, something very different to this, viz., their net value as they reach their owner's hands at the port of adjustment. It is evident, therefore, that the underwriter cannot be at all affected by the latter value, but only by the former (*d*).

Thus, suppose goods to be insured in the policy for 500*l.*; let their net value at the port of discharge, *i.e.*, their contributory value, be 1,500*l.*—the amount of contribution paid

but the editors have been informed that it is the practice of most English adjusters and underwriters to treat such sacrifices as general average, though ship be in ballast and not chartered.

(*b*) Montgomery *v.* Indemnity Mutual Mar. Ins. Co., *supra;* overruling on this point The Brigella, *supra.*

(*c*) Phillips, Ins. s. 1410; Anderson *v.* Ocean SS. Co. (1884), 10 App. Cas. 107; 54 L. J. Q. B. 192.

(*d*) A convenient phrase obtains in practice for expressing these two values—viz., the contributory values and the arrived values; the latter alone concerning the underwriters.

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by them to be 150*l.*—then the underwriter will be liable to reimburse to the assured on goods, not 150*l.*, or the whole of the sum to be contributed, but 50*l.*, or a third of that sum, that being the proportion which the amount insured (500*l.*) bears to the contributory value (1,500*l.*); or, to put the same thing in another way, the owner of the goods (as one of the parties to the contribution) has to pay in contribution 10 per cent. on their contributory value; but the underwriter has only to pay to the owner of the goods (as his assured) 10 per cent. on the amount for which they are insured.

Supposing the contributory value not to exceed the amount insured, the rule of reimbursement is still the same. Thus, goods insured for and valued in the policy at 500*l.* are valued in contribution at 500*l.* The assured has paid in contribution 50*l.*, *i.e.*, a tenth of the contributory value: the underwriter repays him 50*l.*, or a tenth of the value in the policy.

Hence the rule, "whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured" (*e*).

Provision of the Marine Insurance Act.

This principle is recognized in sect. 73, sub-sect. 1 of the Marine Insurance Act, 1906, which declares that—

> Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in

(*e*) 1 Magens, 245, case xix.; Phillips, Ins. s. 1410. On the other hand, it is provided by a rule of the Association of Average Adjusters that an underwriter who has paid for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect of such loss, although the amount so recovered may exceed the amount paid by him. See Appendix D.

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proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute (*f*).

"That amount" in the final provision of this section is presumably the amount of the particular average loss for which the underwriter is liable; and when there is no particular average loss which both constitutes a deduction from the contributory value and falls on the insurer, it is submitted that this provision has no application, and that any question as to the liability of the insurer must be determined by the preceding provisions of the sub-section or the application of recognized principles.

Sub-sect. 1 of sect. 73 differs in several respects from the custom of Lloyd's embodied in the corresponding rule of practice of the Association of Average Adjusters (*g*). The

(*f*) When a vessel is undervalued in the policies on ships, supplementary insurances are now frequently effected which enable the assured to recover in whole or in part the excess of his contribution to general average, &c. over the amount recoverable from the insurers on ship. The following is one of the various forms of "excess clauses" which are used for this purpose:—"In the event of claims for general average, salvage charges, and/or claims under the Institute Collision Clause, not being recovered in full under the policies on hull and machinery by reason of the difference between the insured values as expressed in those policies, and the sound value of the vessel, this policy will pay such proportion of the excess as the sum hereby insured bears to the difference between the vessel's sound and insured values, or to the total sum insured against excess liabilities if it exceed such difference."

Where an "increased value" policy for 1,855*l*. was by an ancillary clause made to include "any liability which may attach to the shipowner in consequence of the hull and machinery being valued for contribution to general average or salvage charges at more than the insured valuation," it was held that this clause was not a contract of indemnity against liability, and that the insurers were only bound to contribute to the excess amount of salvage and general average respectively in the proportions that 1,855*l*. bore to the total excess valuation and total excess contributory value of the vessel: Holman & Sons *v.* Merchants' Mar. Ins. Co., [1919] 1 K. B. 383.

(*g*) The rule is as follows:—

"If the ship or cargo be insured for more than its contributory value,

rule only professes to deal with insurances on ship or cargo. Where the term "full contributory value" is used in the sub-section, the words in the rule are "contributory value." Further, that part of the rule which corresponds to the final part of the sub-section only deals with the deduction made in the case of insurances on ship (*h*), and it makes no distinction between particular average for which the insurer is liable and particular average for which he is not liable. Moreover, it is expressly stated that the rule does not apply to foreign adjustments, when the basis of contribution is not the net value of the thing insured.

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The meaning of the term "full contributory value" in the earlier part of the sub-section is not free from doubt. In their ordinary sense the words "is insured for its full contributory value" are equivalent to "is insured for not less than its contributory value," and it is submitted accordingly that "full contributory value" means the amount on which the subject-matter has in fact been made to contribute. Yet it is possible to contend that "full contributory value" means

the underwriter pays what is assessed on the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and where there has been a particular average for damage which forms a deduction from the contributory value of the ship, that must be deducted from the insured value to find upon what the underwriter contributes.

"This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured."

(*h*) The application of the deduction in the terms of the sub-section to insurances on goods raises a question of some difficulty, when the goods are valued in the policy at more than their sound contributory value. Is the amount of "the particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable," the amount deducted from the sound value for the damage in assessing the goods for general average contribution, or is it the larger amount which the insurer is liable to pay under the policy? The language of the sub-section on this point is not free from ambiguity; but it is submitted that the amount to be deducted from the insured value is the amount for which the insurer is liable in respect of the particular average loss. So also where the goods are valued in the policy at less than their sound contributory value, it is submitted that only the amount for which the insurer is liable is to be deducted from the insured value.

Sect. 1005. something more, that it denotes the maximum amount on which the subject-matter could in any circumstances have been made to contribute; *i.e.*, its value for contribution, independent of any deductions for damage in the case of ship or cargo, and in the case of freight its gross amount, without the deduction of the expenses of earning it, incurred subsequently to the general average act (*i*). In support of this contention it may be argued that in the final provision of the sub-section "contributory value" clearly means the value before any such deductions are made, and that the term "full contributory value" cannot denote something less than the term "contributory value" (*k*).

As against underwriters contributory

1006. In one case the facts were that a vessel was insured for and valued in the policy at 33,000*l*. During the currency

(*i*) The editors have been informed that before the Marine Insurance Act it was the universal practice thus to compare the insured value with the gross amount of the freight upon which the contributory value was based.

(*k*) The following simple example will illustrate the difference in result between these two constructions:—

Sound value of ship	£10,000
Cost of repairs (not payable by underwriters)	3,000
Contributory value	£7,000
Ship's contribution to gen. av., 10 per cent.	£700
Ship insured for and valued at	£8,000

If the "full contributory value" means the amount on which the vessel contributes, she is insured for more than her full contributory value, and the underwriters pay 700*l*.

If the "full contributory value" means the sound value, *i.e.*, 10,000*l*., she is insured for 8/10ths of her full contributory value, and the underwriters pay 8/10ths of 700*l*., *i.e.*, 560*l*.

The editors are informed that in practice the cost of repairs (though the underwriter is not liable for them) is sometimes deducted both from the sound value and from the insured value. Thus, using the same figures:—

Insured value	£8,000
Less cost of repairs	3,000
	£5,000

Then, if 7,000*l*. pays 700*l*., 5,000*l*. will pay 500*l*. It seems, however, to the editors that this method of adjustment, on whatever grounds it might have been supported before the Marine Insurance Act, cannot now be justified in view of the language of sect. 73, sub-sect. 1.

Sect. 1006. value cannot exceed the valuation in the policy.

of the policy she incurred general average expenses, and had also to pay a salvage award. In the salvage action her real value was proved to be 40,000*l*., and this amount was also accepted as her contributory value for general average purposes. Her owners claimed to recover from their underwriters the whole amount of the ship's contribution towards the general average expenses and the salvage award. But it was held by the House of Lords, affirming the decisions of Bigham, J., and of the Court of Appeal, that they could not be allowed to allege that the value of the vessel exceeded 33,000*l*., and that therefore only thirty-three fortieths of the whole amount was recoverable (*l*). A third alternative, which the editors suggested in a previous edition of this work, while the case was still *sub judice* in the Court of Appeal, commended itself to Stirling, L. J., in the Court of Appeal, and to Lord Macnaghten in the House of Lords as theoretically a more logical view, but one which, in view of certain practical objections, it would nevertheless not be proper to apply, namely, that the underwriters should be held liable for the amount which would have been assessed against the ship, if her contributory value had in fact been neither more nor less than her policy valuation.

The rule of the French law the same.

1007. So in France, it was decided in the Cour Royale of Aix (30 August, 1822), that, as between the assured and his underwriter a general average loss is to be adjusted, either upon the value in the policy, or, in an open policy,

(*l*) The SS. Balmoral Co. *v.* Marten, [1900] 2 Q. B. 748; [1901] 2 K. B. 896; [1902] A. C. 511. A different rule has been laid down in the United States. In International Navigation Co. *v.* Atlantic Mutual Ins. Co. (1900), 100 Fed. R. 304, Brown, D. J., in a very learned and exhaustive judgment, held the insurers liable for the full amount, irrespective of the valuations in the policies. His decision was affirmed on appeal (1901), 108 Fed. R. 988. See also International Nav. Co. *v.* Sea Ins. Co. (1904), 129 Fed. R. 13; Maldonado *v.* British & Foreign Mar. Ins. Co. (1910), 182 Fed. R. 744. The Massachusetts Courts seem, however, to follow a rule, known as the Boston rule, which agrees with the English decision.

Sect. 1007. upon the value of the goods at the time and place of loading on board (*m*).

The following observations by Boulay-Paty tend to put the whole subject in a clear light:—

"When the object is to ascertain the nature and extent of the legal liabilities to which the underwriter is exposed in consequence of the contribution which has been assessed on the subject insured, reference must be had to the policy of insurance alone, which is the law really regulating the relations of the parties. The claim of the assured against his underwriter in respect of the contribution is a very different claim from that which he has against his co-adventurers, and flows solely from the stipulations in the policy. Hence, the adjustment as between the assured and the underwriter ought invariably to be fixed upon the value of the subject insured at the time and place of the ship's sailing, without any distinction in this respect between general and particular average loss" (*n*).

(*m*) Boulay-Paty, Emerigon, vol. ii. p. 8.
(*n*) *Ibid.*

CHAPTER V.

OF PARTICULAR AVERAGE.

SECT.
What is Particular Average? 1008, 1009
Adjustment of Particular Average—
On Goods ..... 1009a—1022
On Ship ..... 1023—1040
On Freight, Profits, &c. 1041
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1008. PARTICULAR average losses are defined, and the distinction between such losses and particular charges is drawn, in sect. 64 of the Marine Insurance Act, 1906, in the following terms:— **Definition of a particular average loss and of particular charges.**

> Sub-sect. 1. A particular average loss is a partial loss (*a*) of the subject-matter insured, caused by a peril insured against, and which is not a general average loss (*b*).
>
> Sub-sect. 2. Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

Particular charges are recoverable from the insurer under the sue and labour clause; and this is so, even where the policy contains a warranty against particular average, if they

(*a*) Sect. 56, sub-sect. 1, of the Act declares that "any loss other than a total loss as hereinbefore defined is a partial loss."
(*b*) Arnould's definition was "a loss arising from damage accidentally and proximately caused, by the perils insured against, to some particular interest, as the ship alone, or the cargo alone." For a learned note by Maclachlan on the origin, meaning, and history of the term "average" as used in Maritime Law, see Arn. 6th ed. pp. 919—926; Maclachlan, Merchant Shipping, App. to c. xiv. See also McArthur, App. 4.

Sect. 1008.

were incurred with the object of preventing not merely a partial but a total loss (*c*).

Adjustment of particular average.

Particular average, instead of being contributed for by the general body of those who are interested in the adventure, falls entirely upon the particular owner of the property deteriorated by the damage (*d*); and such owner, if insured, has a claim against his underwriter in proportion, 1st, to the degree by which the damage sustained may have diminished the value to him of the property insured; 2nd, to the sum which the underwriter by the policy has agreed to insure on such property (*e*).

Whatever percentage this deterioration may amount to on the value which the property would otherwise have sold for, that same percentage the underwriter is bound to pay to the assured, upon the sum for which, by the policy, he has agreed to stand insurer.

For instance, if goods which have been insured for 500*l*., would have realized in the market to which they were being sent 1,500*l*., but for the occurrence of a particular average loss, which prevents them from selling there for more than 1,200*l*., it is plain that these goods have been deteriorated to the extent of 300*l*., or one-fifth of the value they would otherwise have realized: the underwriter, in such case, is not bound to repay the assured 300*l*., or the whole amount of the actual loss sustained, but only 100*l*., or a fifth part of the sum for which the goods were insured, that is, he is bound to pay the assured the same proportion of the sum insured, as the damage

(*c*) See the Mar. Ins. Act, 1906, s. 64 (2). Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; (1867), 2 C. P. 357.

(*d*) Hence the term "particular average loss." 1 Emerigon, c. xii. s. 39, p. 585.

(*e*) Sect. 67 of the Mar. Ins. Act, 1906 (see *ante*, § 338), does not make this subject any easier to understand by the introduction of the new expression "measure of indemnity." The "measure of indemnity" is the amount recoverable in a given case, assuming the assured to be fully covered. In the case of a total loss he recovers the full "measure of indemnity"; in the case of a partial loss only a proportionate part thereof.

may have deducted from the value they would otherwise have realized. Sect. 1008.

What losses are particular average generally.

1009. As far as relates to the cause of loss, we have already investigated the principles and collected the examples of particular average losses, in treating of those risks and losses which are covered by the policy; on this part of the subject it will be only necessary to say, that all damage sustained at sea by ship and cargo which does not involve their total (*f*) destruction or privation, whether actual or constructive, gives the assured a claim against his underwriters, subject to the conditions and limitations by which the responsibility of the underwriter is modified and controlled. Of these conditions the principal are:—That the damage which is the subject of the claim must have been proximately caused by the perils insured against, and that it must not have arisen either from the ordinary wear and tear of the voyage, or from the inherent vice and defect of the subject insured, or the wilful misconduct of the assured himself. When the foundation of the claim against the underwriter consists in expenditures incurred in the course of the voyage (*g*), it must appear that these expenditures were—1, necessary; 2, extraordinary (that is, necessitated by some casualty, not by the mere common occurrences of an average voyage); 3, incurred for the benefit of the ship alone, or the cargo alone.

It would be merely to repeat what has been elsewhere stated, if we attempted in this place to enumerate all the cases that give a claim for particular average loss on the different subjects of insurance. We propose now to consider the principles and rules which govern the adjustment of any loss, when it has been ascertained to be a particular average loss.

Summary of rules in Mar. Ins. Act,

1009a. First as to the adjustment of a particular average loss on goods.

(*f*) The distinction between a total loss of part, which is not within the warranty against particular average, and a partial loss of the whole, which is, is dealt with elsewhere, §§ 1018, 1082.

(*g*) Called "particular charges." Kidston *v.* Empire Mar. Ins. Co. (1866), L. R. 1 C. P. 535; Mar. Ins. Act, 1906, s. 64 (2), *ante*, § 1008.

Sect. 1009a. s. 71, as to recovery for particular loss of goods.

The rules on which depends the "measure of indemnity" for a particular average loss, *i.e.*, the total amount which the assured, if fully insured, can recover (*h*), are thus summarized in sect. 71 of the Marine Insurance Act, 1906:

> Sect. 71. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—
>
> (1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value (*i*) of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:
>
> (2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss:
>
> (3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value:
>
> (4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

The effect of these rules will now be explained.

(*h*) See Mar. Ins. Act, 1906, s. 67, *ante*, § 338.

(*i*) For the insurable value of goods, see Mar. Ins. Act, 1906, s. 16, sub-s. 4, *ante*, § 365.

Sect. 1010. Adjustment of particular average on goods.

1010. The true method of ascertaining the amount which the underwriter ought to pay, in order to indemnify the assured for a particular average loss on goods arriving sea-damaged, depends mainly upon the following elementary principle of insurance law; viz., that the amount upon which the premium is paid is, as between the assured and the underwriter, the sole amount to be regarded in estimating the amount of the underwriter's liability; he pays no loss upon that for which he receives no premium (*k*).

Now, in a fully underwritten policy on goods, unless otherwise stipulated, the amount is either, in an open policy, their insurable value, which consists of their prime cost (*i.e.*, their invoice price at the port of loading), together with all expenses till put on board, including premium and costs of insurance (*l*), or else, in a valued policy, the value expressed in the policy; hence the sole basis upon which a particular average loss on goods fully insured can be adjusted is, as regards the underwriter, either their prime cost on board, or their value in the policy (*m*).

When the goods are only partially insured, it has already been pointed out that there is no difference in the amount recovered, in case of a particular average loss, whether the policy be valued or open. The amount recoverable depends in general, in both cases, on the amount subscribed (*n*).

Amount of loss payable

1011. From this principle it follows that the amount which

(*k*) In order to avoid all misconception, let it be remembered that each separate underwriter pays only upon the actual sum by him subscribed. See Mar. Ins. Act, 1906, s. 67 (2), *ante*, § 338. Thus, if five underwriters have each subscribed 200*l.* on a policy on goods valued at 1,000*l.* and the goods arrive damaged one-fourth, each underwriter will have to pay 50*l.* as his quota to make good this loss—*i.e.*, one-fourth of 200*l.* The five underwriters will pay collectively 250*l.*, or one-fourth of 1,000*l.*, the whole amount of the valuation.

(*l*) Mar. Ins. Act, 1906, s. 16, sub-s. 3, *ante*, § 365; Tuite *v.* Royal Exch. Ass. Co. (1747), 1 Park, 224, 225; Usher *v.* Noble (1810), 12 East, 639; Waldron *v.* Coombe (1810), 3 Taunt. 162.

(*m*) Usher *v.* Noble (1810), 12 East, 639; Tuite *v.* Royal Exch. Ass. Co. (1747), 1 Park, 224, 225; 1 Marshall, 232; Stevens, Av. 178; Benecke, Pr. of Indem. 12—14.

(*n*) See *ante*, chapter on "Valuation," § 340.

Sect. 1011. by underwriter ought not to vary with the rise and fall of the markets at the port of arrival.

the underwriter has to pay, in respect of a particular average loss on sea-damaged goods, cannot at all depend upon the higher or lower market price which such goods may fetch in their port of destination or arrival.

For this market price at the port of destination is a very different thing from their prime cost on board at the port of loading, or (it may be) from their value in the policy, being the price at which the merchant can afford to sell them there to a consumer, after paying freight and all charges, and either realizing a profit or submitting to a loss; this price, therefore, is composed of three constituent parts—1. Prime cost on board; 2. Freight, duty, and landing charges; 3. Profit in a gaining, or loss in a losing, market (*o*).

Now it is the first of these alone—*i.e.*, prime cost, or value in the policy—with which the underwriter on goods is concerned: he has not insured against loss by freight, &c.; he has not insured against loss of expected profit. In the language of Lord Mansfield, he only "engages so far as the prime cost or value in the policy, that the thing shall come safe; he has no concern with any profit or loss which may arise to the merchant from the goods; he has no concern with any subsequent value" (*p*).

Principle of indemnity in case of sea-damaged goods.

1012. The principle, in fact, of indemnity, as practically adopted in this country, is, as we have already seen, that the underwriter on goods does not engage to put the merchant in the same condition he would have been in had his goods arrived safely at the port of destination, but solely to put him in regard to such goods in the situation in which he was at the beginning of the risk.

There is, therefore, an important distinction running through the whole of this branch of insurance law—viz., that the extent of loss the assured on goods sustains by the sea-damage is one thing, the amount which the underwriter has to pay in respect thereof is quite another; accordingly, when

(*o*) Benecke, Pr. of Indem. 3; Stevens, Av. 85.
(*p*) Lewis *v.* Rucker (1761), 2 Burr. 1170; Stevens, Av. 119.

goods arrive sea-damaged, two points are to be ascertained— Sect. 1012.
first, the extent of depreciation in value which the goods have suffered; secondly, the amount which the underwriter ought to pay in respect thereof.

Mode of ascertaining the extent of depreciation on goods arriving sea-damaged. Sound and damaged values.

1013. The first point is ascertained by simply comparing the price for which the goods would have sold in the market had they arrived there sound with the price for which they actually do sell arriving there damaged.

Where the damaged goods are actually sold by public auction, the amount they realize is called the damaged value; the value which they would have sold for, if sound, is estimated by supposing them to be sold at the current price for sound articles of the same kind in the same market, and the amount supposed to be realized by these *pro formâ* sales is called the sound values.

The difference, then, between the market price of the sound and the market price of the damaged goods, or, in technical language, between the sound and damaged values, gives the direct amount of the merchant's loss.

But this cannot be the amount the underwriter has to pay, for, first, it would make the market price of the goods at the port of destination the basis of the underwriter's liability, when, as we have just seen, the only true basis of such liability is their prime cost at the port of loading; secondly, it would involve the underwriter in the rise and fall of the markets, with which, as we have also seen, he has no concern; that is, for the same amount of sea-damage he would have to pay more when the goods come to a gaining, and less when they come to a losing, market (*q*); while the desideratum is to

(*q*) This will be obvious from the following example:—
Let the prime cost of the goods be 500*l.*; the amount of loss by sea-damage be half the sum for which they would have sold if sound; the profit or loss be half the prime cost.
Then take,

(1) A losing market.

Goods, if sound, would have sold for half prime cost	£250
Being damaged, did sell for half that sum	125
Difference between sound and damaged values (merchant's loss)..	£125

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obtain some uniform measure, or standard of value, by which the amount the underwriter has to pay, in respect of a particular loss on damaged goods, shall be always the same when the proportional extent of damage is the same (*r*).

Mode in which the ascertained percentage, or proportion of depreciation, is applied to the sum insured, in order to ascertain what the underwriter has to pay.

1014. The object, then, in comparing the proceeds of the sound and damaged sales for the purposes of indemnity under the policy is not to ascertain the direct amount of the merchant's loss, but its relative amount—the proportion, that is, which it bears to the price at which the goods would have sold if sound; the question being, not whether the depreciation amounts to any given fixed sum, but whether it amounts to one-half, one-fourth, or one-eighth of the sum for which the goods would have sold, if sound; whether, in a word, the commodity is one-half, one-fourth, or one-eighth the worse for the sea-damage; when this is ascertained, the liability of the underwriter is ascertained also, for he pays the same proportional part, whether it be one-half, one-fourth, or one-eighth of the prime cost, or value in the policy (*s*).

Thus the sum which the underwriter will have to pay will depend solely on the relative extent of the loss and will be the same whether the goods arrive at a gaining or a losing market (*t*).

The underwriter on a losing market would, on this principle, pay 125*l*. Take next,

(2) A gaining market.

Goods, if sound, would have sold 50 per cent. above prime cost ...	£750
Being damaged, did sell for half that sum	375
Difference between sound and damaged values (merchant's loss)..	£375

The underwriter on a gaining market would pay 375*l*., though the amount of deterioration is the same in both cases.

(*r*) Stevens, Av. 119.

(*s*) Per Lord Ellenborough in Usher *v.* Noble (1810), 12 East, at p. 647.

(*t*) Take the same data as in the preceding note—*i.e.*, let the prime cost be 500*l*.; the depreciation, half the sound values; the profit or loss, half the prime cost.

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In short, that which the assured loses by the depreciation of his goods is an aliquot part of the market value for which they would have sold had they arrived sound at their port of destination; that which the underwriter pays in respect of such loss is the same aliquot part of their prime cost or value in the policy: thus, if the damage amounts to half the sound value of the goods, the underwriter pays half the sum he has agreed to insure; if to a third, then he pays a third of that sum, and so on in exact proportion to the extent of the depreciation (*u*).

The comparison must be of gross, not net, values.

1015. Even after this rule of adjustment was established, it was for some time doubted whether the amount of depreciation on the sea-damaged goods was to be ascertained by comparing together the net or the gross produce of the sound and damaged sales: the question came on for consideration in the Court of King's Bench, when it was established by Lawrence, J., in one of the ablest judgments ever delivered in Westminster Hall, that the true rule of adjustment is, that

Then,

(1) On a losing market.

Sound values (there being 50 per cent. loss on prime cost)	£250
Produce of damaged goods (being half the sound value)	125
Difference between sound values and damaged goods (*i.e.*, merchant's loss)	£125

But 125*l*. is one-half, or 50 per cent. on 250*l*. (the sound values); the underwriter pays one-half, or 50 per cent. on 500*l*. (the prime cost)—*i.e.*, he pays 250*l*.

(2) On a gaining market.

Sound values (being 50 per cent. over prime cost)	£750
Produce of damaged goods (being half the sound values)	375
Difference between sound values and damaged goods (merchant's loss)	£375

But 375*l*. is one-half, or 50 per cent. on 750*l*. (the sound values); the underwriter pays one-half, or 50 per cent. on 500*l*. (the prime cost)—*i.e.*, he pays 250*l*., as before.

(*u*) Lewis *v.* Rucker (1761), 2 Burr. 1167; Hurry *v.* Royal Exch. Ass. Co. (1801), 3 B. & P. 308; Johnson *v.* Sheddon (1802), 2 East, 581; Usher *v.* Noble (1810), 12 East, 639.

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the percentage, or aliquot part, which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound with the gross produce of the damaged sales (*x*); and this is now invariably acted on in practice as the true rule of adjustment (*y*).

It is in this way alone, as the learned Judge most ably shows, that an uniform measure or standard of adjustment can be obtained, the result of which will be the same whether the markets rise or fall, or whether the charges are increased or diminished (*z*).

By the gross produce of the sales is meant the market price at which the merchant, after paying freight, duty, and landing charges, can sell the goods to the consumer or purchaser at the port of arrival. It is plain that a comparison of the full market price, which the consumer would thus give for the damaged goods, with that which he would have given for the same goods if sound, all charges being in both cases previously paid by the seller, affords the exact measure of their depreciation; for it is the deteriorated quality of the goods which, in such case, alone determines the difference of price; "the quality of the goods," as Lawrence, J., puts it, "can alone influence him in determining what he shall pay" (*a*).

Otherwise the underwriter would be

1016. This mode, then, gives the exact measure of depreciation; it is clear, also, that the comparison of the net proceeds would not only fail in this respect, but would also involve the underwriter in the rise and fall of the markets; by the term "net proceeds" is meant the gross proceeds, deducting freight, duty, and landing charges. Now, with regard to freight, the most important of these deductions, it is a fixed principle of our law maritime that however much goods may be deteriorated in value by sea-damage, yet, if they arrive in bulk, the same freight is payable on them as though they had arrived sound. The deduction then to be made from the gross proceeds of the sound and damaged sales in respect of freight would be an invariable quantity, however great the amount of damage might be, and whether the goods came to a losing or a gaining market; but, as Lawrence, J., says, in the celebrated judgment already referred to, "If you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between their remainders." Now, as the percentage on the prime cost or value in the policy payable by the underwriter varies directly with the amount of this difference, it is obvious that any method of adjustment which makes such amount greater or less, according to the rise or fall of the markets, must involve the underwriter in the consequences of such rise and fall. The method of adjustment by comparison of the net proceeds of the sound and damaged sales inevitably leads to this result, and therefore, upon the principles already stated, is rejected (*b*).

(*x*) Johnson *v.* Sheddon (1802), 2 East, 581, generally known at Lloyd's as the "Brimstone Case," from the nature of the subject insured, which was a cargo of brimstone and shumack. Stevens, Av. 92.

(*y*) Except where the policy contains a special clause as to adjustment on the basis of bonded prices or net proceeds. Such a clause is the "net values clause" which provides that "all claims, whether general or particular average, shall be based on a comparison of the net sound and damaged values, after deduction of freight, duty, and other charges payable at port of destination."

(*z*) For detailed proof, see Stevens, Av. 119.

(*a*) 2 East, 583. Where damaged goods have prior to sale been necessarily conditioned, it is the value of the conditioned goods, and not that of the goods less the cost of conditioning, that is to be compared with the sound value, in order to ascertain the proportion of loss. Francis *v.* Boulton (1895), 65 L. J. Q. B. 153 (Mathew, J.).

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involved in the rise and fall of the markets.

The same freight is payable on goods arriving in bulk, however damaged.

(*b*) Take the same data as in the two preceding notes, and let the amount of freight payable on the goods be in all cases 100*l.*

Then,

(1) On a losing market.

Gross sound sales	£350	
Deduct freight and charges	100	
Net sound sales		£250
Gross damaged sales (half less)	£175	
Deduct freight and charges	100	
Net damaged sales		75
Difference (giving the amount of damage)		£175

But 175*l.* is 70 per cent. on 250*l.* (the net sound sales). ∴ the underwriter pays 70 per cent. on 500*l.*, the prime cost—*i.e.*, 350*l.*

Sect. 1016. 'Another consequence of taking the net produce would be, that the underwriter would be made responsible for a loss not arising from the deterioration of the commodity by sea-damage, but from having to pay equal freight duties and charges on commodities of unequal value, viz., on the sound and damaged goods.

But, by an adjustment founded on a comparison of the gross proceeds of the sound and damaged sales, the extent of the underwriter's liability will be always the same, when the relative amount of depreciation is the same. Thus, let it be assumed that the gross proceeds of goods valued at 500*l.* in the policy would, if they had come to a losing market in a sound state, have been 350*l.*, and if to a gaining market, 850*l.*; let it be further assumed that the depreciation in both cases is one-half their sound value:—

	In a losing market.	In a gaining market.
Then, gross proceeds of sound sales .	£350	£850
gross proceeds of damaged sales	175	425
Difference, giving amount of damage .	£175	£425

In both these cases, the amount of damage being half the gross proceeds of the sound sales, the underwriter pays half the value in the policy, or 250*l.* in each case, irrespective entirely of all fluctuation in the markets.

(2) On a gaining market.

Gross sound sales	£850	
Deduct freight and charges	100	
Net sound sales		£750
Gross damaged sales (half less)	£425	
Deduct freight	100	
Net damaged sales		325
Difference (giving the amount of damage)		£425

But 425*l.* is $56\frac{2}{3}$ per cent. on 750*l.* (the net sound sales). ∴ the underwriter pays $56\frac{2}{3}$ per cent. on 500*l.* (the prime cost)—*i.e.*, 283*l.*: 6*s.* 8*d.* That is, for the same amount of damage the underwriter pays 350*l.* in a losing, and 283*l.*: 6*s.* 8*d.* in a gaining, market.

Sect. 1017. Exception where custom to sell in bond.

1017. An exception to the rule of adjustment by which the amount of depreciation of damaged cargo is made to depend on a comparison between the gross sound and gross damaged values is allowed in the case of goods which are at the port of destination ordinarily sold in bond (*c*). Apart from such exception, the rule above laid down would require the duty to be added to the sound and arrived, or damaged, values, before the comparison was made. But there was for years a custom at Lloyd's "to adjust particular average on a comparison of bonded, instead of duty-paid, prices, in claims for damage to tea, tobacco, coffee, wines and spirits imported into this country." The principle on which this exception was based received in more recent times a wider recognition by the adoption of the following rule by the Association of Average Adjusters:—"That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term 'gross proceeds' shall, for the purposes of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive of customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond" (*d*).

Adjustment on a total loss of part.

1018. When an integral part of the goods insured is totally lost, as, *e.g.*, where one case or package out of several cases or packages of the same description of goods is burnt, or has all its contents washed clean out of it, or goes in bulk to the bottom of the sea, the underwriters will have to pay the same proportion of the insurable or agreed value, which the goods lost bear to the whole goods of the same description covered by the insurance; in other words, the exact amount lost must be paid for at its value, whether insurable or agreed (*e*).

(*c*) See Mar. Ins. Act, 1906, s. 71 (4), *ante*, § 1009a.

(*d*) See McArthur, 252. Where the amount of the duty is not an invariable charge, but varies with the amount of the damage, it is immaterial whether the adjustment of a particular average loss on damaged goods sold in bond be made on a comparison of the amount of the sales either including or excluding the duty. See Stevens, 137—147; Benecke, 430.

(*e*) Stevens, Av. 150; Benecke, Pr. of Indem. 150. See Mar. Ins.

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Where there is also a particular average loss of part.

When such total loss of part and also a particular average loss both occur on the same interest, as, for instance, if of twenty hogsheads of sugar ten be totally washed out, and ten damaged by sea water, the practice is to adjust them separately; but this is not absolutely necessary, as, whether they are involved together or separated, the result is precisely the same (*f*).

Adjustment where, of several different articles insured together, each arrives sea-damaged.

But where several articles are insured together in the same policy, and each suffers a particular average loss by sea-damage, the loss must be adjusted separately on each, even though the clause "to pay average on each species as if separately insured" be not inserted in the policy: for otherwise the underwriter would be involved in the rise and fall of the markets, except in the very improbable case when the state of the markets at the port of arrival is alike as to all the articles, *i.e.*, when all the articles, had they arrived sound, would have realized in the port of arrival exactly the same percentage of profit and loss upon their first cost, or valuation in the policy (*g*).

Sale of sound and damaged goods together when forming part of same bale or package. Underwriter not liable for loss owing to the assortment being broken.

When out of whole packages or bales of manufactured goods only a few articles or pieces in each arrive sea-damaged, it is a frequent practice to sell the sound and damaged goods together at the same auction; the practice does not appear objectionable; but it must be carefully borne in mind, that in adjusting the average on such a sale the diminished value at which the sound part of the package may sell, owing to the assortment being broken, is not a loss for which the underwriter is liable: for, as Stevens observes, "he is accountable only for the actual damage done to the thing insured, and engages to guarantee the assured against

Act, 1906, s. 71, sub-ss. 1 and 2, *ante*, § 1009a. The passage in the text assumes the goods to be fully covered by insurance.

(*f*) Benecke, Pr. of Indem. 439; Stevens, Av. 151, 152, who give the proof.

(*g*) This is most ingeniously and incontestably proved both by Benecke and by Stevens; by the former algebraically, and by the latter arithmetically; the proof, however, in its detail, is too long for insertion here, and the reader is, therefore, referred to Benecke, 441, n. ‡, and Stevens, 153—155.

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the direct operation of sea-damage, but not against the consequential results" (*h*).

In practice, where a bale or case containing a number of smaller pieces or packages appears to be substantially damaged, the bale or case as a whole is sold as damaged goods, and the underwriter is charged with his proper proportion of the difference between the sound and damaged values of the whole, without any investigation as to the exact amount of physical damage which the goods may have actually sustained.

Extra charges of damaged sales to be added to the loss payable by the underwriter.

1019. As, however, sales by auction of the damaged goods are resorted to mainly with the view of comparing the sound and damaged values, so as to ascertain the amount of indemnity which the underwriter has to pay; and, as the charges of these sales need not have been incurred if the goods had not been insured, they are to be borne by the underwriter, though not a part, nor a direct consequence, of the sea-damage: accordingly, these extra charges (consisting mainly of brokerage, lot money, commission to the agent of the underwriters, &c.) are added separately to the amount of the loss, after its quantum has been ascertained, and then the whole is apportioned on the underwriters in the usual way (*i*). Where, in an action on a policy, the jury had found a verdict for an average loss, the Court would not grant a new trial, on the ground that it should have been left to the jury to

(*h*) Stevens, 155—158, 5th ed.; Benecke, 437, 438. See accordingly Cator *v.* Gt. Western Ins. Co. of New York (1873), L. R. 8 C. P. 552; Lysaght *v.* Coleman, [1895] 1 Q. B. 49 (C. A.). Where the insurance was on "228 cases whisky," and the straw and labels were damaged, Bigham, J., held that the assured could recover for the loss arising from the sale of the cases of whisky in their damaged state. Brown *v.* Fleming (1902), 7 Com. Cas. 245. The ground of the decision was that the straw and labels were part of the thing insured.

(*i*) Stevens, Av. 148—150; Benecke, 436, 437. The rule of practice adopted by the Association of Average Adjusters is that "the expenses of protest, survey and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them."

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determine whether these extra charges of the damaged sales should be borne by the underwriter or not; as that point was in the discretion of the arbitrator by whom the amount of the loss was directed to be ascertained (*j*).

It should here be noticed that though the charges for ascertaining the damage to goods fall upon the party who is liable to bear the damage thereon, *i.e.*, upon the underwriter when he is liable under the policy (*k*), yet the underwriter cannot be made liable for the cost of examining such goods as prove to be undamaged (*l*).

Sea-damage on goods sold in ship's port of distress adjusted as a salvage loss.

1020. Generally speaking, a particular average loss on goods is adjusted at the port of destination, and, in such case, the adjustment ought always to be conducted in the manner above described: if, however, a ship, in the course of her voyage, is obliged to run for a port of distress to repair, and the cargo being necessarily unloaded for that purpose, it is discovered that the whole, or part of it, is so damaged that it would probably be wholly spoiled if reloaded and sent on, and therefore, to prevent further deterioration, it is sold on the spot for the benefit of all concerned, in such case the claim must be adjusted as a salvage loss—that is, the underwriter pays the difference between the prime cost, or insured value of the goods, and the net proceeds of the damaged sales, *i.e.*, their market price after deducting all expenses, including freight, where any is due (*m*).

Adjustment on goods at an intermediate port.

If the assured, in order to take the benefit of a favourable market, or for other reasons, chooses to put an end to the risk by voluntarily receiving his goods at any port short of their destination, Phillips thinks that the loss the goods may have incurred by sea-damage should be adjusted upon the same principles as at the port of destination (*n*).

(*j*) Hudson *v.* Marjoribanks (1823), 7 Moore, 463; *S. C.* but not *S. P.*, 1 Bing. 393.

(*k*) 2 Phillips, Ins. s. 1741.

(*l*) Lysaght *v.* Coleman, [1895] 1 Q. B. 49 (C. A.).

(*m*) Stevens, 81; Appendix ii. 263—265; Benecke, 444; 2 Phillips, s. 1480.

(*n*) 2 Phillips, Ins. s. 1467.

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Adjustment on goods arriving sea-damaged above 5 per cent. under the memorandum.

1021. In treating of the common memorandum, we have already had occasion to consider the mode of computing the degree of loss by sea-damage on memorandum articles, so as to ascertain whether it amounts to 5 per cent.; it is perhaps hardly necessary to add that, in order to make the underwriter liable under this clause, it is not necessary that the direct loss sustained by the merchant should amount to 5 per cent. on the prime cost or the sum insured, but only on the gross proceeds of the sound sales (*o*).

Adjustment where whole of intended cargo not on board at time of loss.

Generally speaking, as we have seen in case of sea-damage to goods under a valued policy, the valuation is the sole basis of adjustment, *i.e.*, the underwriters are to pay the same percentage on the valuation in the policy as the rate of depreciation amounts to on the sound sales; and this is so whenever, at the time of loss, the full cargo was on board to which the valuation was intended to apply. Where, however, only a part of the full intended cargo is on board at the time of loss, and such part is totally lost with the ship, the rule of adjustment on valued policies is that the underwriters pay the same proportion of the valuation in the policy as the goods lost bear to the whole intended cargo (*p*); in open policies they pay the proved value of the goods (*q*). The rule would be the same, *mutatis mutandis*, if such part, after being shipped, arrived sea-damaged.

Adjustment on a policy covering a fluctuating interest.

The following case shows the rule of adjustment on a policy intended to cover a fluctuating interest:—An insurance

(*o*) Phillips puts this case: Several articles are included in one invoice, all insured "free of average under 5 per cent." without discrimination of the different articles. How is the 5 per cent. to be computed? Suppose one of the articles to be sea-damaged—are the underwriters liable if the damage to this article is 5 per cent. of the sound value of all the articles, or are they only liable where it is 5 per cent. on the whole invoice value of all the articles? He decides, and, as it seems, with reason, that the latter is the true mode of computation: 2 Phillips, s. 1782. *Secus*, if the policy is to be construed distributively, as in Duff *v.* Mackenzie (1857), 3 C. B. (N. S.) 16, and Wilkinson *v.* Hyde (1857), 3 *id.* 30.

(*p*) Tobin *v.* Harford (1863), 13 C. B. (N. S.) 791; 32 L. J. C. P. 134; in error, 34 L. J. C. P. 37.

(*q*) Rickman *v.* Carstairs (1833), 5 B. & Ad. 651.

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was effected for twelve months "on goods" on board thirty barges plying backwards and forwards between London and Birmingham for 12,000*l.*, "as interest might appear thereafter." A particular average loss having been sustained by the sinking of one of these barges full of goods within the year, it was held that the underwriters were bound to pay that proportion of such loss, which 12,000*l.* bore to the whole value of goods at risk on board all the barges at the time of loss, and not that proportion which 12,000*l.* might bear to the whole amount carried during the year (*r*).

Merchant does not get a real indemnity under an open policy.

1022. While the underwriter on goods (as is now the invariable practice) insures only their prime cost at the port of loading, the sole mode of adjustment that can be adopted is that which is founded on a comparison of the gross proceeds of the sound and damaged sales. But although, as between the assured and the underwriter, this is an equitable mode of adjustment, it is obvious that it by no means affords a perfect indemnity to the assured as a mercantile man. Indeed, as we have already seen, it does not profess to do so—its object being not to put the assured in the same condition as though his goods had come undamaged to a saving market, but solely to place him in the same condition he was in at the beginning of the risk (*s*).

That which the assured loses by the depreciation of his goods at the port of destination is an aliquot part of their market price there, which market price is made up—1, of their prime cost; 2, of freight, duty, and landing charges; 3, profit or loss. That which the underwriter pays is the same aliquot part of the prime cost alone; hence it is manifest that all loss incurred by items 2 and 3 must fall on the assured alone.

(*r*) Crowley *v.* Cohen (1832), 3 B. & Ad. 478. The decision, however, seems to turn rather on the construction of the particular policy than on any rule of adjustment, the policy being held to be not so much a floating policy on goods up to 12,000*l.* as a time policy covering all goods at risk at any one moment.

(*s*) Stevens, Av. 96; Benecke, Pr. of Indem. 1—23.

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In an earlier part of this work, while dealing with the subject of valuation, we have noticed certain methods which have been suggested for the purpose of securing a more complete indemnity to the assured. To those pages the reader is here referred (*t*).

Adjustment of particular average on ship.

1023. Having seen elsewhere for what partial losses and disbursements the underwriter on ship is liable under the policy, it remains now only to consider in what mode such losses are adjusted.

In ordinary cases a vessel which has been damaged is repaired by her owners. A vessel is generally intended to be navigated, and a damaged vessel is unfit for navigation. The usual measure of the damage sustained by the shipowner is the cost of repairing minus the improvement resulting therefrom (*u*). No such comparison between repaired and unrepaired value is resorted to in the case of ship, as we have just seen is usually made in the case of particular average on goods. The reason why a different method of adjustment is usually applied in the two cases is that goods are usually intended for sale, and though damaged will nevertheless command a price. If they require to be reconditioned, this is generally done, not by the merchant assured, but by the purchaser. A ship, however, is not usually intended for sale, and it is presumed that necessary repairs will be done by her owner (*x*).

(*t*) Vol. I. §§ 337, 344.

(*u*) Lowndes on Mar. Ins. 2nd ed. p. 190. As to adding the cost of employing a surveyor, and banker's charges for an overdraft to pay for repairs done abroad, see Agenoria SS. Co., Ltd. *v.* Merchants' Mar. Ins. Co., Ltd. (1903), 8 Com. Cas. 212.

(*x*) The distinction is well pointed out by Lush, J., in Lohre *v.* Aitchison (1877), 2 Q. B. D. at p. 507; see also per Lord Blackburn, 4 App. Cas. at p. 762; per Brown, D. J., in Internat. Nav. Co. *v.* Atlantic Ins. Co. (1900), 100 Fed. R. at p. 323. Where goods are in fact reconditioned by the assured, the same rule applies as if the case were one of particular average on ship; see Francis *v.* Boulton (1895), 65 L. J. Q. B. 153. And, conversely, as to the method adopted where the damaged ship was sold, see Pitman *v.* Univ. Mar. Ins. Co. (1882), 9 Q. B. D. 192; *post*, § 1034.

Sect. 1023. The rules relating to the adjustment of particular average losses on ships are thus stated in the Marine Insurance Act, 1906, s. 69:—

Rules in Mar. Ins. Act, s. 69.

Partial loss of ship.

Sect. 69. Where a ship is damaged, but is not totally lost, the measure of indemnity (*y*), subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions (*z*), but not exceeding the sum insured in respect of any one casualty (*a*):

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk (*b*), the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

Rule of adjustment.

The rule for adjusting a particular average loss on the ship is very simple, viz., that in open policies the underwriter pays the same aliquot part of the sum he has agreed to insure, as the damage or the expense of repairing it (*c*) is of the ship's value at the commencement of the risk; in valued policies he pays the same proportion of the repair bill

(*y*) See Mar. Ins. Act, 1906, s. 67, *ante*, § 338.

(*z*) See §§ 1024—1030, *infra*.

(*a*) See § 1032, *infra*.

(*b*) The case negatived here is discussed in § 1034, *infra*.

(*c*) The shipowner is entitled to have the ship repaired with materials and workmanship corresponding to its original character: Agenoria SS. Co. *v.* Merchants' Mar. Ins. Co. (1903), 8 Com. Cas. 212; North Atlantic SS. Co. *v.* Burr (1904), 9 Com. Cas. 164.

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as his subscription bears to the valuation in the policy (*d*). Thus, suppose in an open policy an underwriter has insured 1,000*l*. on a ship, the insurable worth of which is proved to have been 2,000*l*. at the outset of the risk, but whose value is reduced by the wear and tear of the voyage, &c. to only 1,500*l*. at the time of loss; then if a particular average loss takes place amounting to 500*l*., as that sum is one-fourth of 2,000*l*., the ship's insurable value at the outset, the underwriter pays the same proportionable amount, or one-fourth of 1,000*l*. the sum he has insured, viz., 250*l*. (*e*).

The principal difficulty, therefore, in adjusting a particular average loss on ship consists not in the rule of apportionment, but in ascertaining and fixing the amount of damage.

Rule of deducting one-third new for old.

1024. If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct one-third from the whole expense both of labour and materials (*f*) which the repairs have cost, and to assess the damage at the remaining two-thirds. This is termed deducting one-third new for old, and it is done on the principle that, except where the ship is quite new, the substitution of new for old materials is a benefit to the shipowner, who gets the ship the better for the repairs by the substitution of new work for old, and would consequently be a gainer if the whole expense of labour and repairs were regarded as so much pure loss to him; to avoid discussion in each particular case the amount of deduction is fixed at one-third (*g*).

(*d*) Mar. Ins. Act, 1906, s. 67 (2), *ante*, § 338; Benecke, Pr. of Indem. 460; 2 Phillips, Ins. s. 1435. As to the effect of different valuations in two or more policies, cf. Bruce *v.* Jones (1863), 1 H. & C. 769; Bousfield *v.* Barnes (1815), 4 Camp. 228; *ante*, §§ 349—353.

(*e*) This shows the policy of insuring ships, as nearly as may be, to their full value, for the purposes of indemnity.

(*f*) See note (*c*), *supra*.

(*g*) Da Costa *v.* Newnham (1788), 2 T. R. 407; Poingdestre *v.* Royal Exch. Ass. Co. (1826), Ryan & Moody, 378. Per Lord Tenterden in Fenwick *v.* Robinson (1828), 3 C. & P. 324; Lohre *v.* Aitchison

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Limitations of the rule as to deducting one-third new for old.

This rule, as regards wooden ships, is confirmed by the decisions above referred to. There is no decision of the Courts as to its applicability to iron ships (*h*), and it is doubtful how far it would be held binding. The usage, however, is to apply the rule in general to both; but, as regards iron ships and ironwork in wooden ships, with certain exceptions which are now formally recognized by the Association of Average Adjusters (*i*). Moreover, in practice the rule is often superseded by special clauses in the policy, such as—"In event of claim, no one-third new for old to be deducted from the cost of ironwork repairs of hull, masts or spars"; or, where it is intended that there shall be no such deduction at all, "Average payable without deduction of thirds, new for old, whether the average be particular or general."

Henderson *v.* Shankland criticised.

1025. In Henderson *v.* Shankland (*k*), the "Woodburn" sustained particular average damage, which was followed by general average sacrifices, making her a constructive total loss, and for the purpose of contribution it was determined that the value of the ship was her value after suffering the particular average damage, and before the general average sacrifices. It was further held that this value could be properly arrived at by estimating what would have been the cost of doing the particular average repairs, and deducting this amount from her sound value before the accident. The owners of the vessel then contended that from the estimated cost of such repairs there should be a deduction of one-third new for old. And it is submitted that this contention was well founded. For a damaged vessel is not depreciated in value to the extent of the whole cost of the repairs which are necessary to reinstate her, but only to the extent of the

(1877), 2 Q. B. D. 501; 3 Q. B. D. 558; Stevens, Av. 172; Benecke, Pr. of Indem. 457.

(*h*) As to this, cf. Lidgett *v.* Secretan (1870), L. R. 6 C. P. at p. 627 (per Willes, J.).

(*i*) See rules in Appendix D.

(*k*) [1896] 1 Q. B. 525.

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difference between such total cost and any enhancement in value which she may acquire by reason of having new materials put into her; and this extent custom has fixed at two-thirds of the cost of the repairs. For instance, suppose the sound value of the vessel to have been 1,200*l.*, and the cost of repairing the particular average damage 300*l.*, it does not follow that before the repairs were effected she was only worth 900*l.*; for it is presumed that her value after the repairs is enhanced to the extent of one-third of the repairer's bill. The Court of Appeal, however, affirming Mathew, J., refused to apply the one-third rule to this case, relying mainly on the opinion expressed in this work, and also of Phillips, that the deduction is not applicable to cases of constructive total loss, where the inquiry is whether the cost of the necessary repairs will exceed a vessel's repaired value. But this opinion appears to the present editors to be quite consistent with the application of the thirds principle in the case under consideration. The reason why the deduction is not allowed in cases of constructive total loss is simply because the sole question for consideration there is whether the vessel is worth repairing or not, and her value before the damage is immaterial. In order to determine whether the vessel is worth repairing, the actual cost of the repairs must clearly be considered without deductions. If a vessel can only be repaired at a cost of 3,000*l.*, and she will then not be worth the 3,000*l.* spent on her, there is clearly a constructive total loss. It would be absurd to require the owner to spend the 3,000*l.* in all cases where the vessel after such expenditure will be worth over 2,000*l.* These considerations, however, do not apply to the case of the deductions which were claimed in Henderson *v.* Shankland (*l*).

The deduction is not made where the ship is on her first voyage.

1026. It is obvious, that if the ship be quite new, the reason for the rule would fail, and the rule itself consequently would not apply; accordingly, if it can be shown that this is the

(*l*) The decision in this case is also questioned by Carver, Carriage by Sea, s. 422.

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case, the deduction of one-third new for old will not be made (*m*). In this country the general rule is that a ship is to be so regarded only while she is on her first voyage (*n*); but when she shall be considered to be on her first voyage is in itself a question that has given rise to much controversy, and can hardly yet, perhaps, be considered as settled, as the following cases will show. A ship, which had never been at sea before, was insured on a voyage "from Bristol to New York, during her stay there, and back to the port of discharge"; the charter-party stipulated that the ship, after sailing outwards, was "to return to London, Liverpool or Bristol, &c., and so end her intended voyage." The ship arrived at New York in safety, but, on her passage homeward from New York to Liverpool, got upon a shoal, and was obliged to be repaired; upon a claim for these repairs the sole question was whether the ship was on her first voyage or on her second when the loss took place, so as to be within the rule for deducting one-third new for old—in other words, the question was whether the passage back from New York to England was under the circumstances to be considered as a second voyage or only as part of the first.

What is the ship's first voyage. Fenwick v. Robinson.

After much conflicting evidence of brokers and underwriters, Lord Tenterden suggested to the jury that the charter-party and policy might fairly be taken into consideration for the sake of ascertaining whether the voyage out and home was all one adventure, as, upon the face of those instruments, his lordship said, it appeared to be. The jury found for the plaintiff, saying that they considered it as all one voyage (*o*).

Pirie v. Steele.

1027. In the next case a new ship was chartered for a voyage from London to Port Jackson and Van Diemen's

(*m*) Stevens, Av. 172.

(*n*) The York-Antwerp Rules, 1890, allow no such deductions in the case of wooden or composite ships when the vessel is under one year old at the time of the accident.

(*o*) Fenwick *v.* Robinson (1828), Danson & Lloyd, 8; *S. C.*, 3 C. & P. 323.

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Land with convicts, freight to be paid on her arrival there; and by the ship's articles it appeared that she was bound on a voyage from England to Van Diemen's Land, Australia, or any other (*sic*) port in India, till her arrival in England. The ship completed her outward voyage, but being unable to procure homeward freight from Van Diemen's Land, went in ballast to Madras, and there took in freight for England, as was proved to be customary for ships so chartered. In the homeward passage from Madras to England she sustained injury whereby the same question was raised.

The evidence, as in the former action, was very contradictory; but the jury expressed themselves satisfied that the rule allowing a deduction of one-third did not apply under the circumstances, and found for the plaintiff (*p*).

Lord Abinger considered that the most sensible rule was, not to deduct thirds until the ship was of a certain age.

Lord Abinger, before whom the case was tried, said that he could not subscribe to the doctrine of the policy determining the point (*q*), and at the same time approved of the practice of some insurance companies to deduct no thirds unless the ship be eighteen months old as a very sensible rule (*r*). Special clauses to this effect are commonly inserted in modern policies.

Remarks on these decisions.

These decisions are not satisfactory, nor is it, perhaps, possible to derive from them any general rule—though, upon the whole, the weight of authority seems in favour of the position that, except under very special circumstances, a new ship is to be considered on her first voyage, so as to exclude the underwriter from deducting thirds, if the loss takes place at any part of an integral voyage out and home, whether on the outward or homeward voyage, the entirety of the voyage to be determined from all the facts of the case, and not from the charter-party or policy alone. In fact, as it was put by Sir Frederick Pollock, in the course of his argument in Pirie

Suggested rule.

(*p*) Pirie *v.* Steele (1837), 8 C. & P. 200.

(*q*) 8 C. & P. 204.

(*r*) 8 C. & P. 202. Cf. also Thompson *v.* Hunter, cited 2 Mood. & Rob. 51, where it is stated that "the plaintiff recovered the full amount of his loss," which must clearly be erroneous, and must mean "the amount minus deduction of one-third new for old."

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v. Steele, the first voyage lasts from the first time that a ship leaves her port till she comes back to it again, if she leaves it *cum animo revertendi* (*s*).

Where loss is chiefly on new material of an old ship.

1028. If an old ship have been newly repaired just before sailing on the voyage on which the loss takes place, and the loss falls exclusively on the new materials, the same rule of exclusion of thirds would seem to apply (*t*); and it has been decided that if the damage fall chiefly on the repaired part, there is nothing to exclude the underwriter from his right of deducting thirds (*u*).

Where ship never comes to the hands of the owner again.

If the ship, after being repaired, never comes into the hands of the owner again, the reason for the rule obviously fails, as in such case it is clear that he can never derive any benefit from the superior value of the new over the old materials.

Thus, where the assured was prevented from regaining possession of his ship by the fault of the underwriters in refusing to pay a bottomry bond for repairs incurred by their direction and at their expense, by reason of which the ship was sold to satisfy the bond, &c., it was held that they were not entitled to deduct their thirds (*x*); but where the failure to regain possession of the ship arises from the default of the assured himself, it has been held, in the United States, that the exception does not apply, and that the underwriters are entitled to the deduction (*y*).

No thirds deducted for anchors.

1029. It is not, however, every part of the ship's furniture and apparel, in respect of which thirds are to be deducted; thus, we have already seen that certain exceptions are formally recognized by the Association of Average Adjusters, not only

(*s*) 8 C. & P. 201. In the United States this exception of the "first voyage" appears in general not to be recognized; but thirds are deducted, though the ship be new or on her first voyage: 2 Phillips, s. 1431; 2 Parsons, 384; Lowndes, Gen. Av. 5th ed. 765.

(*t*) See Stevens, Av. 172.

(*u*) Poingdestre *v.* Royal Exch. Ass. Co. (1826), Ryan & Mood. 378.

(*x*) Da Costa *v.* Newnham (1788), 2 T. R. 407.

(*y*) Humphreys *v.* Union Ins. Co. (1824), 3 Mason, R. 429.

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as regards iron ships generally, but also as to ironwork in wooden ships. Similarly, the cost of replacing anchors is not subject to this deduction, as anchors are considered not to lose in value by being used (*z*). The deduction from chain cables is fixed at one-sixth (*a*). As to metal sheathing, the practice is stated by McArthur (*b*) as follows:—"When the re-metalling of a ship is recoverable under the policy, allowance in full is made in particular average for the cost of a weight of new metal equal to the gross weight of sheathing stripped off, credit being given for the proceeds of the old metal sheets. The remainder of the weight of new metal sheathing put on is placed to the debit of the shipowners, as it is the result of natural wastage corresponding with the fixed deduction on account of wear and tear made from other repairs. In addition to the above, should any sheets have been rubbed off or otherwise altogether lost by sea perils, the cost of the gross weight of sheathing used to replace them is allowed, subject to the deduction of one-third. The expense of stripping off the old and putting on the new metal, with the cost of the felt and metal nails used in connection with the re-metalling, is also allowed, less thirds, credit being given for the proceeds of the old nails."

Chain cables.

Metal sheathing.

In this country thirds are regularly deducted from the cost of painting, unless the ship was on her first voyage.

Painting.

From what the one-third is deducted.

1. From the cost of repairs before deducting the value of the old materials.

1030. As the old materials thrown aside in making the repairs are always of some, and occasionally of considerable value, it is important to ascertain whether the proceeds of such old materials are to be deducted from the gross expense of the repairs before or after deducting the one-third new for old. It has been decided in the United States that the true rule is to apply the old materials towards payment of the new, as far as they will go, and then to deduct the third from the

(*z*) McArthur, 213; Benecke, 458.

(*a*) McArthur, 214; it was the same when Stevens wrote, Av. 173.

(*b*) Pp. 213, 214. See also the Rules of Practice of the Association of Average Adjusters, *post*, Appendix D.

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2. From the expense of both labour and materials.

balance (*c*). Arnould (*d*), agreeing with Phillips (*e*), considered this to be the correct rule. In this country, however, the practice is the other way, *i.e.*, first to deduct the third, and then to deduct the value of the old materials (*f*). To the present editors the English practice appears to be best supported by principle, the value of the old materials being accepted in part payment of the cost of the repairs (*g*). The third is deducted not from the expense of the materials alone, but from that of the labour and materials conjointly (*h*).

Incidental expenses, such as marine interest.

In England no thirds are deducted from graving dock expenses, use of appliances, &c. Phillips, however, cites (*i*) with approval a case where similar deductions were allowed in Boston, United States. And in England the deduction is in practice allowed from any increased expenditure which may be incurred in raising funds for the repairs, such as the marine interest on a bottomry bond, although it cannot be said that the ship is in any way benefited by such increase of expenditure. This practice is supported by a decision of the Supreme Court of Massachusetts (*k*), but appears difficult to support in principle, and is well criticized by McArthur (*l*).

(*c*) Byrnes *v.* National Ins. Co. (1823), 1 Cowen, R. 265; American Ins. Co. *v.* Center (1829), 4 Wendell, R. 45.

(*d*) 2nd ed. p. 1001. (*e*) Ins. vol. ii. s. 1434.

(*f*) McArthur, 219; Gow, Mar. Ins. 219; Lowndes, Ins. s. 183 (2nd ed.).

(*g*) The different results of the two rules may be illustrated as follows: A damaged mast is replaced at a cost of 300*l.*, and after it is taken out is worth 30*l.* In England the underwriter pays 200*l.* less 30*l.*, *i.e.*, 170*l.* By the American rule he pays two-thirds of 270*l.*, *i.e.*, 180*l.* The theory is that the mast before it was damaged was worth 200*l.* Therefore, according to the English practice, the assured receives an exact indemnity; according to that of America he is the gainer by 10*l.*

(*h*) Benecke, Pr. of Indem. 458.

(*i*) 2 Phillips, s. 1432.

(*k*) Orrok *v.* Commonwealth Ins. Co., 38 Mass. 456. "In case of a partial loss, where money is taken up on bottomry, the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode as a part of the loss." Per Story, J., in Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 405, 406.

(*l*) Mar. Ins. p. 214.

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Extra cost of repairs at port of distress is a charge on the underwriter.

1031. Where repairs are necessarily done to a ship in a port of distress, and, as will frequently be the case, cost more there than if done in the home port, it has been made a question at what rate they should be paid for by the underwriters on ship—at that of the port of distress or the home port (*m*). The former appears unquestionably to be the true rule of adjustment, as the necessity of repairing the ship in the port of distress which occasioned the increased expense was an immediate consequence of one of the perils insured against; accordingly, this is the rule adopted in practice in all cases of necessary repairs at a foreign port, the underwriter being of course entitled to deduct his thirds (*n*).

Temporary repairs made at a foreign port.

In one case in the United States where full repairs might have been made abroad, but at an expense much greater than they would have cost at home, and the master chose to pursue his voyage with temporary repairs merely, the cost of such temporary repairs, and also the subsequent permanent repairs rendered necessary after the ship's arrival in her home port, were both included in the particular average (*o*). Even though the underwriters refuse their assent to the repairs being done in a particular way, yet the assured may, it seems, proceed to such repairs, and, if they are necessary and done properly, the underwriters will be liable (*p*).

Expenses of removing vessel for repairs.

The expenses of removing a vessel from a port of distress to the port of repair are allowed as part of the cost of repair, and if she returns to the port from which she was removed, the expenses incurred in returning are also allowed (*q*).

Cost of replacing

Goods necessarily sold in a port of distress to defray the

(*m*) Magens, vol. i. p. 54, and case xx. p. 255.

(*n*) Benecke, Pr. of Indem. 459—461. The thirds are in practice deducted from the actual cost of the repairs, wherever effected. This system may undoubtedly operate hardly on the shipowner, *e.g.*, in cases of repairs at a port of refuge which frequently cannot be effected except at excessive prices. See remarks by Mr. McArthur (Mar. Ins. p. 214, n.), who, however, defends the practice.

(*o*) Brooks *v.* Oriental Ins. Co. (1829), 24 Mass. 259.

(*p*) Waller *v.* Louisiana Ins. Co. (1821), 9 Martin, 276.

(*q*) See Rules of Practice of the Association of Average Adjusters, *post*, Appendix D.

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goods sold for repair of ship is average.

cost of repairing the ship are, if the ship reach her port of destination, to be paid for at their clear value at the port of destination. But if they sold for more in the port of distress than they would have realized in the port of destination, the merchant is entitled to receive from the shipowner the higher price (*r*).

Successive losses.

1032. As to successive losses, happening during the currency of the same policy, it is provided as follows by the Marine Insurance Act, 1906, s. 77:—

> (1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.
>
> (2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:
>
> Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

Expense of repairs actually made before total loss may be recovered cumulatively as average,

but not the estimated cost of repairs not in fact made.

Thus, if a ship have been actually repaired in a port of distress, and be afterwards totally lost before arriving at her port of destination, the cost of such repairs may be recovered cumulatively in addition to the total loss, either *quâ* average, or as money laid out and expended in labouring for the safeguard and recovery of the ship under the general printed clause in the policy (*s*). This rule, however, only applies to repairs actually made; hence where a ship put back twice in distress, and on the first occasion was actually re-coppered, but on the second occasion was only surveyed, but not repaired, and in the course of the survey some of

(*r*) Alers *v.* Tobin (1802), Abbott, Shipping, 245, 5th ed., and the law there laid down; Atkinson *v.* Stephens (1852), 7 Exch. 567; Richardson *v.* Nourse (1819), 3 B. & Ald. 237.

(*s*) Le Cheminant *v.* Pearson (1812), 4 Taunt. 367; Livie *v.* Janson (1810), 12 East, at p. 655. So, in America, Matheson *v.* Equitable Marine Ins. Co. (1875), 118 Mass. 209, where the rule is said to be part of the general law of marine insurance.

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her wales, &c. were necessarily removed, in order to examine her timbers, and never replaced, but sold with the rest of the ship as wreck, it was held, that the cost of the re-coppering might be recovered in addition to a total loss, but not the estimated expense of replacing the wales (*t*). Moreover, it appears that the rule only applies to repairs for which the owners were themselves liable to pay. Where, therefore, the cost of the repairs is discharged by means of moneys raised on bottomry, repayable only in the event of the ship's safe arrival, the owners, being released from payment by the loss of the ship, cannot recover from their underwriters for a loss which they have in fact never suffered (*u*). Where no such repairs have been made, no previous partial loss by sea-damage can be recovered from the underwriter, as a particular average, in addition to a subsequent total loss (*x*); the less is there swallowed up by the greater, and both form but one loss (*y*). So, too, if the subsequent total loss occur during the currency of the policy, but be not due to a peril therein insured against, the underwriter pays nothing (*z*). But if the average loss unrepaired have occurred during the currency of one policy, and the subsequent total loss occur during the currency of another policy, and after the expiration of the first policy, the assured is entitled to

(*t*) Stewart *v.* Steele (1842), 11 L. J. (N. S.) C. P. 155; 5 Scott, N. R. 927. See, however, criticism of this case (at least, as reported in Scott) by Brett, L. J., 9 Q. B. D. at p. 213.

(*u*) The Dora Forster, [1900] P. 241, Barnes, J., citing 2 Phillips, Ins. s. 1267.

(*x*) Livie *v.* Janson (1810), 12 East, 648.

(*y*) Knight *v.* Faith (1850), 15 Q. B. 649.

(*z*) Livie *v.* Janson, *supra;* Wilson SS. Co., Ltd. *v.* British & Foreign Mar. Ins. Co., Ltd., *infra*, § 1032a. This rule is not covered by sub-sect. 2 of sect. 77 of the Act of 1906, as a subsequent total loss, not covered by the policy, is not "under the same policy" as an earlier partial loss, which was covered. But as it does not conflict with any provision of the Act, it remains good law under sect. 91, sub-sect. 2, of the Act, which preserves the rules of the common law, save in so far as they are inconsistent with the express provisions of the Act: see Wilson SS. Co., Ltd. *v.* British & Foreign Mar. Ins. Co., *infra*, § 1032a.

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recover under both policies, *i.e.*, for the average loss as well as for the total loss, if they be due to perils insured against(*a*).

Prior average loss by sea-damage unrepaired, merges in a subsequent total loss. Livie *v.* Janson.

1032a. The following cases illustrate the principles laid down in the preceding section:—

A ship, "warranted free from American condemnation," in attempting to escape an American embargo, ran out of New York in the night, and sustained an average loss by stranding on the rocks of Governor's Island, where she was deserted by her crew, and next day was seized there by the Americans, and condemned by them for breach of the embargo: the assured claimed a total loss; but the Court held that he could recover nothing; not a total loss, for that was caused by American condemnation, a risk expressly excepted by the policy; not an average loss, because the total loss, by subsequent seizure and condemnation, rendered the deterioration of the property wholly immaterial to the assured, and therefore took away the right to recover in respect of the previous partial loss by sea-damage (*b*).

Doctrine as stated by Lord Ellenborough.

Upon the general question, Lord Ellenborough said, "There may be cases in which, though a prior damage be

(*a*) Lidgett *v.* Secretan (1871), L. R. 6 C. P. 616; Livie *v.* Janson, *ubi supra;* Knight *v.* Faith (1850), 15 Q. B. 649.

(*b*) Livie *v.* Janson (1810), 12 East, 648, distinguished by Willes, J., in Ionides *v.* Universal Marine Assn. (1863), 32 L. J. C. P. at p. 178, and approved by the House of Lords in Wilson Shipping Co. *v.* British & Foreign Mar. Ins. Co., *infra*. Phillips, ss. 1136, 1137, &c., dissented from the decision in Livie *v.* Janson as being irreconcilable with a rule which he laid down as follows: "In case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, or one insured against by A. and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion." The rule which Phillips lays down was approved by the Supreme Court of the United States in Ins. Co. *v.* Transportation Co. (1870), 12 Wall. 194, which, however, was not a case of a partial, followed by a total loss. The facts were that a steamer insured against fire only got into collision, and the collision caused a fire. But for the fire the vessel could have been salved and repaired for 15,000 dollars, but in consequence of the fire the expenses of salving and repairing her amounted to 22,300 dollars. It was held that in respect of the extra 7,300 dollars the underwriters were liable to the amount insured, viz., 5,000 dollars.

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followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss. Actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description, unless, indeed, they are more properly to be considered as covered by that authority, with which the assured is generally invested by the policy, of 'suing, labouring, and travailing for, in, and about the defence, safeguard, and recovery of the property insured'; in which case, the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantive average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea risks" (*c*).

Actual disbursements for repairs made prior to the total loss, may be recovered in addition thereto. Le Cheminant *v.* Pearson.

In another case the previous partial loss was of the description alluded to by Lord Ellenborough, and consisted of actual disbursements for repairs in fact made prior to the total loss: in this case the ship while lying in port at Jersey, before sailing, sustained an average loss by sea-damage, which the plaintiff repaired; the ship having been afterwards totally lost by capture in the course of the voyage, the plaintiff brought his action for a total loss, and claimed also to recover in respect of the expenses incurred in the repairs of the previous partial loss, by virtue of the suing and labouring clause. The Court of Common Pleas held that the plaintiff might recover, in addition to a total loss, for the sums so expended; and Sir J. Mansfield remarked that he might so recover, whether (*cc*) as for an average loss from damage repaired, or as expenses incurred under the permission in the policy, "to sue, labour, travail," &c. (*d*).

(*c*) 12 East, 655.

(*cc*) Arnould, 2nd ed. p. 1194, had "either."

(*d*) Le Cheminant *v.* Pearson (1812), 4 Taunt. 367. Cf. also Stewart *v.* Steele (1842), 11 L. J. (N. S.) C. P. 155; 5 Scott, N. R. 927; Blackett *v.* Royal Exch. Ass. Co. (1832), 2 Cr. & J. 244. And, in America, Matheson *v.* Equitable Mar. Ins. Co. (1875), 118 Mass. 209.

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Unrepaired damage. Wilson Shipping Co. v. British and Foreign Mar. Ins. Co.

The question whether the assured can recover for unrepaired damage followed by a total loss during the currency of the policy arose again in the recent case of Wilson Shipping Co., Ltd. *v.* British & Foreign Marine Insurance Co., Ltd. (*e*). In that case the plaintiffs had insured a vessel, of which they were the owners, with the defendants against marine risks by a time policy from the 20th February, 1917, to the 20th February, 1918. She was not insured against war risks, but was let to the Admiralty for the whole of the currency of the policy under the "T. 99" form of charter-party, by which the Admiralty assumed responsibility for war risks and agreed in the event of total loss by such risks to pay the ascertained value of the vessel at the time of the loss. On three occasions during the currency of the policy she sustained damage from marine perils; but only temporary repairs were effected and the permanent repairs were postponed. On the 25th January, 1918, she was torpedoed and became a total loss. The Admiralty paid to the plaintiffs a sum calculated by deducting from the agreed sound value (which largely exceeded the insured value) the estimated cost of the permanent repairs, and the plaintiffs sought to recover the amount of the deduction on the marine policy. Mr. Justice Bailhache held on the authority of Livie *v.* Janson (*f*) that the partial loss had merged in the total loss and that the assured could not recover. This decision was reversed by the Court of Appeal on the ground that notwithstanding the total loss, the partial loss continued to the prejudice of the shipowners. The judgment of the Court of Appeal was, however, reversed by the House of Lords.

"It is beyond doubt," said Lord Birkenhead, L. C., "that if the respondents had been their own insurers, they could not have recovered. . . . As to the amount which the Admiralty deducted from the 'sound' value the respondents were their own insurers, and their loss is due therefore not to a peril

(*e*) [1919] 2 K. B. 643; [1920] 2 K. B. 25 (C. A.); [1921] 1 A. C. 188.

(*f*) *Supra*.

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insured against but to their failure to obtain complete indemnity under the terms of their charter-party. Such a cause is no concern of the underwriters, and cannot, in my judgment, be treated as a material fact in determining their liability.

"The true rule is capable of statement in the following proposition. When a vessel, insured against perils of the sea, is damaged by one of the risks covered by the policy and before that damage is repaired she is lost, during the currency of the policy, by a risk which is not covered by the policy, then the insurer is not liable for such unrepaired damage."

All the Lords who heard the appeal agreed that the case was indistinguishable from Livie *v.* Janson and that Livie *v.* Janson was good law. Lord Finlay, however, reserved his opinion as to what the liability of the insurers would be, if there were evidence from which it could be inferred that their contract of insurance was entered into with reference to the special liability of the Admiralty for total loss under their charter-party.

1032b. If the assured, after sustaining an average loss, sell his vessel unrepaired, he is nevertheless entitled to recover for the partial loss, on the ground that the damage sustained is a continuing prejudice, for the ship's value must have been lessened by it. "Therefore the amount of the loss must be calculated as though the ship had actually been repaired and proceeded on her voyage, or had foundered without being repaired, soon after the policy expired" (*g*).

An unrepaired loss is a prejudice to a sale.

These last words, from the judgment of Lord Campbell, point out that it is at the moment of the expiration of the policy that the liability of the insurer is definitely determined, and that there can be no merger thereof in any subsequent loss. This prominently appeared in a case where, as it happened, the same insurer was liable for both losses.

(*g*) Per Lord Campbell in Knight *v.* Faith (1850), 15 Q. B. 649. As to the rule for calculating an unrepaired partial loss on a vessel sold under this condition, see Pitman *v.* Universal Mar. Ins. Co. (1882), 9 Q. B. D. 192, *post*, § 1034.

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Particular average unrepaired under one policy may be recovered, in addition to a total loss under another, covering a subsequent voyage or period.

In Lidgett *v.* Secretan (*h*), "The Charlemagne" was insured "at and from London to Calcutta, and for thirty days after arrival." The same vessel was insured in a valued policy "at and from Calcutta" to a port in England. On her outward passage, consequently during the currency of the first policy, she struck upon a reef and sustained such damage that she was kept afloat only by continual pumping till her arrival at Calcutta. There she discharged her cargo and was then placed in a dry dock for repairs. Part of the repairs had been done and the first policy had expired, when she caught fire and was totally destroyed, the second or homeward policy having attached as soon as she arrived at Calcutta. It was held under these circumstances, that the assured was entitled to recover under the first or outward policy the full amount of the partial loss, repaired or unrepaired, and under the second or homeward policy the full amount insured as for a total loss.

The second, being a valued policy, attached on the vessel with the agreed value, notwithstanding the unrepaired damage was then subsisting, as there was no fraud on either side; and consequently, when the total loss had occurred, the sum recoverable under this policy was the full agreed value (*i*). Had the fire taken place during the currency of the first policy only, the assured could not have recovered for the unrepaired damage.

Foreign law.

The principles thus established in our jurisprudence have been adopted and confirmed in that of the United States (*j*).

In France it has been decided, after considerable fluctuation of opinion among the authorities, that cost of repairs, rendered necessary by prior sea-damage, may be recovered cumulatively (*k*).

(*h*) Lidgett *v.* Secretan (1871), L. R. 6 C. P. 616.

(*i*) Lidgett *v.* Secretan, *supra; S. P.* Barker *v.* Janson (1868), L. R. 3 C. P. 303.

(*j*) See cases collected in 2 Phillips, Ins. s. 1742.

(*k*) 4 Boulay-Paty, Droit Com. Mar. 519—532, gives the earlier jurisprudence; see also Nolte's edition of Benecke, vol. ii. pp. 191—193.

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Owner may elect to repair, instead of claiming for total loss.

1033. In case the damage sustained by the ship be such that the expense of repairs would be greater than her value when repaired, although the assured might abandon upon due notice given and claim as for a constructive total loss, yet he is not bound to do so; he may repair her if he choose, and if he do, the same rule of adjustment applies.

A ship of the actual value of 3,000*l.*, valued in the policy at 2,600*l.*, upon which the defendants underwrote 1,200*l.*, sustained such damage on her voyage that when towed into Queenstown Harbour she was worth only 998*l.* without deducting salvage and general average. The owner chose to repair his vessel, and by means of a large outlay made her when repaired worth 7,000*l.* From the insurers he claimed 100*l.* per cent., and notwithstanding the argument at the bar that the assured would be making a large gain out of what was a mere contract of indemnity, by getting a vessel worth 7,000*l.* instead of one that had been worth 3,000*l.* only, it was held in all the three Courts that he was entitled to 100*l.* per cent.—*i.e.*, 1,200*l.*, the full amount insured (*l*).

Adjusting an average loss on ship sold unrepaired.

1034. If the ship after sustaining an average loss is sold by her owner unrepaired, the measure of what he is entitled to recover against the insurer is the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale. Such was the view taken by Lindley, J., and by the majority of the Court of Appeal, in a case of which the facts were as follow:—

Pitman *v.* Universal Mar. Ins. Co.

A ship valued in a time policy at 3,700*l.* was worth 4,000*l.* at the time of her leaving Singapore for Moulmein, which was the commencement of the risk. When near to Moulmein she took the ground, and remained aground for four days in considerable danger; she was got off, however, but with so much damage to the hull that notice of abandonment was given to the insurer. This notice was not accepted, but a

(*l*) Lohre *v.* Aitchison (1877—79), 2 Q. B. D. 501; 3 Q. B. D. 558; Aitchison *v.* Lohre (1879), 4 App. Cas. 755. See also Woodside *v.* Globe Marine Ins. Co., [1896] 1 Q. B. 105.

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request was made to the owner to repair; and he, after doing some trifling repairs, sold her in effect unrepaired for 3,897*l*. He then claimed two-thirds of the amount of her estimated repairs—viz., 781*l*.—from the insurer, who paid into Court 245*l*., including in that sum certain general average expenses; and the question was whether under the circumstances the assured was entitled to the estimated expense of the repairs, although they had not been executed.

Lindley, J., before whom the case was tried, found that the sound value of the ship at Moulmein was 4,000*l*., and held that the assured was entitled to the difference between the proceeds of the sale, less the actual repairs done, and the sound value of the ship, the same being applied to the value in the policy in determining the amount payable by the insurer. His decision was affirmed by Jessel, M. R., and by Cotton, L. J., diss. Brett, L. J., and the rule, in the terms stated above, was formulated in the course of his judgment by Cotton, L. J. (*m*).

On the other hand, the view of Brett, L. J., was that the estimated cost of the repairs was in all cases the criterion of loss, and that to allow damages so ascertained to be limited by the fact that the shipowner had in the particular case determined to sell, and had been able to secure a peculiarly good bargain, was to import considerations of fortuitous circumstances alien to the contract of insurance. And in answer to the argument that the shipowner would in such event be making a profit out of a contract of indemnity, his Lordship pointed out that this, owing to the circumstances of particular cases, was not infrequently the result, as in Lohre *v.* Aitchison. It is impossible not to feel the force of this powerful dissenting judgment, in view of which the law can hardly yet be regarded as finally settled.

(*m*) Pitman *v.* Universal Mar. Ins. Co. (1882), 9 Q. B. D. 192. Cf. also Bristol Steam Navigation Co., Ltd. *v.* Indemnity Mutual Ins. Co. (1887), 57 L. T. 101; 6 Asp. M. C. 173, a case which, however, might perhaps have been decided, as it was, in favour of the underwriters, even apart from the authority of Pitman's case.

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Incidence of an expenditure by which more than one interest has been benefited.

1035. An interesting and difficult question has been discussed in our Courts as to the amount properly chargeable to particular average in cases where, by reason of certain expenditures, more than one interest has been benefited. For instance, a vessel may be taken into dry dock for one specific purpose, but this may well afford an opportunity for other work to be done on her, and, by effecting the two operations at one time, dock dues will be saved. Under such circumstances, should a proportion of the expenses be charged to different accounts, so that each may share in the advantage so obtained, or must the whole be charged to the account for which the expenditure was primarily intended to be incurred?

The Vancouver.

The facts in the case of The Vancouver (*n*) were as follow:—The vessel, having completed a voyage from Hong Kong to San Francisco, was found to have a very foul bottom, which so much affected her speed as to make it necessary for her owners to put her into dry dock for the purpose of being cleaned, scraped, and painted, before putting to sea again. She was therefore put into dry dock for this purpose only. It was thereupon discovered for the first time that she had sustained certain particular average damage at sea, consisting in the fracture of her stern-post. The damage was repaired in eight days, during the first three of which the cleaning, &c. was also going on. The result was that the two operations, by being effected concurrently, took three days less to effect than if they had each been effected separately, and three days' dock dues were saved. The question in the case was whether the damage to the stern-post was average exceeding 3*l*. per cent. within the meaning of the memorandum. The figures showed that if no part of the dock dues in respect of the first three days (in addition to the whole amount of dues for the last five days) was to be deemed as having been incurred on account of the particular average repairs, then the cost of such

(*n*) The Marine Ins. Co. *v.* The China Trans-Pacific SS. Co., Ltd. (1886), 11 App. Cas. 573.

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Ratio decidendi of The Vancouver. Lord Esher's judgment.

1036. It is not easy to gather what were the precise reasons on which the members of the House of Lords based their decision. The opinion of Lord Esher, however, in the Court of Appeal is clear and intelligible, and it appears to have been substantially adopted by their Lordships. He observes (*p*):—"Now, the question seems to me to be reduced to this. How much of the payment for the dock would be attributed as a matter of business to the use of the dock for the one purpose, and to the use of the dock for the other? Inasmuch as the burthen on the dock is not increased by either, inasmuch as the advantage to each of them is the same, it seems to me that any man taking a business view of the matter would say: As there is a particular sum for the use of the dock to be paid for the two purposes, and the burthen on the dock is not increased by the two transactions going on together, but the advantage to the two persons is equal, supposing they had to be carried on by different persons, those different persons ought to pay half the expenses whilst the dock was being used equally by both of them. Whenever it is used, it is used equally by both of them, although the repairs of the one kind might cost far less than the repairs of the other. Supposing the repairs to the stern-post

(*o*) Baggallay, L. J., agreed, however, that there should be an apportionment, and only differed as to the principle on which the amount of the apportionment should be calculated.

(*p*) 11 App. Cas. at p. 579.

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Before proceeding to deal with the next case, it will be well to call attention to certain circumstances in relation to the case of The Vancouver. First, the only point as to which discussion arose was as to charges for the use of the dock: there was no question as to expenses of getting in or out

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of the dock. Secondly, although the vessel was necessarily taken in for the purpose of cleaning, and for this purpose alone, yet it was even more necessary that the particular average repairs should be effected then and there. Thirdly, the question in The Vancouver case was simply whether, for the purposes of the memorandum, the shipowner's method of estimating the percentage which his particular average bore to the whole value of the vessel, was or was not the correct method, so as to entitle him to recover the whole.

The Ruabon.

1037. We now proceed to consider the case of The Ruabon (*q*), which also went to the House of Lords. The vessel, having in the course of a voyage run aground, was taken to Cardiff, where, in January, 1896, she was put into dry dock for the purpose of having her average repairs effected, in respect of which her underwriters were admittedly liable. In November, 1896, it would have been necessary for her to be docked and surveyed in order to retain her classification at Lloyd's, and her owners accordingly took advantage of the opportunity and had her surveyed whilst in dock for the repairs. The claim of the plaintiffs, her owners, against the underwriters included sums for towage, pilotage, dock dues, &c. The underwriters claimed that, under the circumstances, part of the docking expenses (*r*) should be borne by the owners. Mathew, J., considered that the case was covered by the decision of the House of Lords in The Vancouver case, and held, accordingly, that the underwriters were entitled to make the deduction which they claimed, and this decision was affirmed in the Court of Appeal. The Lords Justices (A. L. Smith, Chitty and

(*q*) Ruabon SS. Co., Ltd. *v.* The London Assurance, [1897] 2 Q. B. 456; [1898] 1 Q. B. 722; [1900] A. C. 6.

(*r*) It is not quite clear from the reports whether the dock dues, as well as the cost of putting in and out of dock, were in dispute. In the report of the trial in 2 Com. Cas. 295, it is expressly stated that the defendants had paid all the dues for the use of the dock, and were only claiming that the expenses of bringing her in and taking her out again should be divided. But it is quite clear that the Court of Appeal and the House of Lords dealt with both.

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Collins, L. JJ.) were unanimously of opinion that, in so far as the dock dues were concerned, The Vancouver case was in point and undistinguishable. But as regards the expenses of getting in and out of dock there was a difference of opinion. A. L. Smith, L. J., considered that these expenses were covered neither by the decision in The Vancouver case itself nor by the principles there affirmed. He regarded this expenditure as having been incurred solely on account of the particular average repairs, and held that it was therefore chargeable to the underwriters in its entirety. The other members of the Court, however, thought that these expenses were incidental to the operation of docking, and, agreeing with Mathew, J., that they were covered by The Vancouver case, affirmed his decision.

Distinction drawn in the House of Lords between The Ruabon and The Vancouver.

1038. But the House of Lords took an entirely different view, and held that the whole of the expenses were chargeable to the underwriters. On two separate and distinct grounds it was there declared that the opinions not only of Chitty and Collins, L. JJ., but also that of A. L. Smith, L. J., in so far as he concurred with them as to the dock dues, were untenable. As to The Vancouver, the view of Lord Halsbury, L. C., in which Lords Macnaghten and Morris concurred, was that it was merely a decision as to the way in which, for the purposes of the memorandum, the extent of damage ought to be calculated. "What the Court had to determine was the liability under the policy in question, and with reference to that question, which, be it observed, is to be measured by what the damage would cost to repair, the Court held that the dock dues were part of the cost, and that, under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now the owner paid the dock dues, and, if he had not done so, the underwriter would undoubtedly have had to pay for dock dues, and if he had, the amount paid would have been over three per cent. It came,

Lord Halsbury's view.

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in fact, to a calculation of the extent of the damage done, and, that being measured by its cost of repair, it was held that the three per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case of Pitman *v.* Universal Marine Insurance Co. (*s*) as to the mode in which the particular average loss was to be arrived at in that case. He says: 'All the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, he is entitled, as a general rule, to recover the sum properly expended in executing the necessary repairs, less the usual allowances'" (*t*).

Lord Brampton's view.

The Vancouver was distinguished on a second ground by Lord Brampton, whose judgment was approved by Lord Davey. The view of these noble Lords was that The Vancouver only applied to cases where two operations are essentially necessary to be performed upon the hull of the ship, in order to render her fit to be sent to sea. "If the respondent's claim for contribution was allowed," said Lord Brampton (*u*), "I see no reason why such a claim might not be made against an owner who while his ship was in dry dock sold her, subject to immediate inspection and survey by his purchaser." His Lordship further points out (*v*) that "the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to re-classification at Lloyd's and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run."

1039. The difficulty presented by The Vancouver case being disposed of, it will suffice to quote Lord Halsbury's view as

(*s*) (1882), 9 Q. B. D. 192.
(*t*) Per Lord Halsbury, [1900] App. Cas. at p. 14.
(*u*) [1900] App. Cas. at p. 18.
(*v*) At p. 17.

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to the argument by which, independently of such authority, the underwriters were seeking to maintain their position. "This is the first time in which it has been sought to advance" the principle of contribution "where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or, if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because his neighbour has got an advantage from what he did" (*x*).

Result of decisions.

1040. The effect of The Ruabon case is clearly to impair very materially not indeed the authority, but the applicability, of the decision in The Vancouver. It is conceived that, in future practice, no apportionment of expenses should be allowed, except in cases very closely corresponding in their facts to those of The Vancouver. It is doubtful whether, consistently with The Ruabon case, any apportionment can take place, except in cases arising under the memorandum. It is probably correct to say that there can be no apportionment, except in cases where there has been in fact an absolute necessity for the immediate performance of the operation not originally contemplated. Both these conditions were present in The Vancouver case. Upon the first condition particular stress was laid by Lords Halsbury, Macnaghten and Morris in the case of The Ruabon. Upon the second condition equal stress was laid by Lords Brampton and Davey.

(*x*) Per Lord Halsbury, [1900] App. Cas. at p. 12. The two decisions were discussed in The Acanthus, [1902] P. 17.

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Recovery for partial loss of freight.

1041. The rule as to the amount recoverable for a partial loss of freight is thus stated in sect. 70 of the Marine Insurance Act, 1906:—

> Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity (*y*) is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

Adjustment of partial loss on freight.

Rule of adjustment as to freight.

The rule for adjusting a partial loss on freight is very simple—viz., that where the sum insured is less than the value of the interest at risk, the underwriter pays the same proportional part of the loss, that the sum insured is of the value of the freight (*z*); if the sum insured equals the value of the interest, then he pays the whole of the loss (*a*).

Rule where only part of full intended cargo is shipped, or contracted for at time of loss.

Freight is generally insured in valued policies, and when this is so the valuation in the policy is the sole basis on which to calculate the amount of indemnity the underwriter has to pay. Where, however, only part of the full cargo to which the valuation was intended to apply is on board, or contracted for at the time of loss, the underwriter can only be called on to pay upon such proportion of the amount insured as the part of the cargo on board, or contracted for at the time of loss, bears to the full intended cargo (*b*). Similarly, where part of the freight has been paid in advance, the underwriter only pays such proportion of the amount insured as the freight at risk bears to the whole freight (*c*).

Rule of adjustment in open policies.

In open policies on freight the loss by the general usage of Lloyd's was adjusted upon the gross, and not upon the net

(*y*) See Mar. Ins. Act, 1906, s. 67, *ante*, § 338.
(*z*) Mar. Ins. Act, 1906, s. 67 (2), *ante*, § 338.
(*a*) 2 Phillips, Ins. s. 1454.
(*b*) Forbes *v.* Aspinall (1811), 13 East, 323; Tobin *v.* Harford (1863), 13 C. B. (N. S.) 791; 32 L. J. C. P. 134; 34 L. J. C. P. 37; Denoon *v.* Home & Colonial Ass. Co. (1872), L. R. 7 C. P. 341. See Mar. Ins. Act, 1906, s. 26, sub-s. 3, *ante*, §§ 251, 252b; s. 75, sub-s. 2, *ante*, §§ 345, 346.
(*c*) The Main, [1894] P. 320.

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freight; and this usage, though considered inconsistent with sound principle, was sanctioned and acted upon by the Courts (*d*), and thus became a definite rule of law which has been recognised in the Marine Insurance Act, 1906 (*e*). If, in an open policy on freight, only part of the cargo be on board or contracted for at the time of loss, and this part be totally lost, the underwriters can only be called upon to pay the actual amount of freight on the goods actually lost, together with premiums and costs of insurance (*f*); in fact, in such cases the underwriters, whether in a valued or open policy, shall adjust as for a total loss of part of the freight: paying the same proportion of the sums for which they have subscribed the policy as the freight of the goods lost bears to the full freight, which would have been earned, had the whole intended cargo been loaded and all arrived.

Where only part of full intended cargo on board.

Freight where goods are sent on.

Where the original ship is disabled, and goods are sent on at a lower rate of freight, it has been held in the United States that the loss so occasioned should be adjusted as a salvage loss, *i.e.*, the underwriter pays the whole amount of the insurance, and puts into his pocket the excess of the freight due under the charter-party over the expense of forwarding the goods (*g*).

Under similar circumstances in this country, the shipowner having paid the expense of forwarding the goods, recovered the amount from the insurers on freight by an action on the sue and labour clause of the policy (*h*).

Adjustment on profits where part of goods lost.

Where, in the United States, it is agreed to adjust an average loss on profits at the same rate as on the goods out of which they are to arise, and the goods arrive sea-damaged, or

(*d*) Palmer *v.* Blackburn (1822), 1 Bing. 61; United States Shipping Co. *v.* Empress Ass. Corporation, [1907] 1 K. B. 259.
(*e*) Sect. 16 (2), *ante*, § 365.
(*f*) Forbes *v.* Cowie (1808), 1 Camp. 520. Per Lord Ellenborough in 13 East, 326.
(*g*) 2 Phillips, Ins. s. 1441, citing Coffin *v.* Storer (1809), 5 Mass. R. 252; Searle *v.* Scovell (1819), 4 Johns. Ch. C. 218.
(*h*) Kidston *v.* Empire Marine Ins. Co. (1866), L. R. 1 C. P. 535; 2 C. P. 357.

Sect. 1041. part of them is totally lost, this is adjusted as an average loss on profits *pro tanto* (*i*); and the rule there is the same, where part of the goods, owing to the decay produced by sea-damage, are necessarily sold, or thrown overboard in the course of the voyage (*k*).

Petty averages.

1042. In discussing the subject of general average, it has appeared that all extraordinary charges, occasioned by unforeseen and unusual accidents, and incurred for the general safety, were the subjects of general contribution: there are, however, many charges similar in kind, though different in occasion and object, which occur regularly in the usual course of the voyage, and which the master, in the ordinary course of his duty, necessarily furnishes for the purposes of the ship and cargo. These charges are called petty averages, and are never the subject of any claim on the underwriter.

They are all the ordinary charges at the places of loading and unloading, and during the voyage; such as common pilotage, tonnage, light money, beaconage, anchorage, ordinary quarantine, river charges, signals, instructions, passage-money by fortified places, expenses for digging a ship out of the ice when frozen up in the regular course of the voyage, &c. (*l*).

Of course, if any of these charges be incurred for any extraordinary purpose, or to relieve the ship and cargo from impending danger, they will, as we have seen, be general average.

(*i*) 2 Phillips, Ins. s. 1474, where it appears that the rule is the same, even apart from express agreement.
(*k*) *Ibid.*
(*l*) Abbott (5th ed.), 272; Carver, s. 587.

CHAPTER VI.

ACTUAL OR ABSOLUTE TOTAL LOSS.

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Distinction between absolute and constructive total loss.

1043. A TOTAL loss in insurance law is one on account of which the assured is entitled to recover from the underwriter the whole amount of his subscription.

It is stated in sect. 56, sub-sect. 2, of the Marine Insurance Act, 1906, that—

> A total loss may be either an actual total loss, or a constructive total loss.

An actual total loss is also commonly called an absolute total loss, the latter being the term which has hitherto been used to describe it in this work. As is stated in sect. 57, sub-sect. 2, of the Act—

> In the case of an actual total loss no notice of abandonment need be given.

An actual, or absolute total loss entitles the assured to claim from the underwriter the whole amount of his subscription without giving such notice.

A constructive total loss entitles him to recover for a total

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loss only on giving such notice. "If he fails to do so the loss can only be treated as a partial loss" (*a*).

According to sect. 57, sub-sect. 1, of the Act—

> Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss (*b*).

A constructive total loss takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, or where its recovery, though not utterly hopeless, is yet exceedingly doubtful (*c*).

Doctrine stated by Lord Abinger.

1044. The distinction between cases of absolute and constructive total loss has nowhere been better pointed out than

(*a*) Mar. Ins. Act, 1906, s. 62, sub-s. 1.

(*b*) La perte réelle est l'anéantissement ou la privation effective des choses assurées. Boulay-Paty on Emerigon, vol. ii. p. 217. Similarly, Arnould's statement was that "an absolute total loss takes place when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless."

(*c*) The following is the definition in sect. 60 of the Mar. Ins. Act, 1906:—

(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

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in the following passages, from the judgment of Lord Abinger, in the leading case of Roux *v.* Salvador:—

Cases of absolute total loss.

"The underwriter," says his Lordship, "engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured."

Cases of constructive total loss.

"But there are intermediate cases; there may be a capture which, though *primâ facie* a total loss, may be followed by a re-capture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination."

Abandonment.

"In all these, or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases, not only the thing assured, or part of it, is supposed to exist in specie, but there is a

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possibility, however remote, of its arriving at its destination, or, at least, of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it."

Consequences of not abandoning.

"If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before" (*d*).

What amounts to absolute total loss.

1045. It remains to inquire what kind of casualty amounts to a case of absolute total loss.

No better or more comprehensive answer can be given to this inquiry than in the words of Lord Abinger, already cited. If, in the progress of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound, by the very letter of his contract, to pay the sum insured (*e*).

Principles on which the doctrine of absolute total loss depends.

The great principle, therefore, on which all the cases of absolute total loss depend appears to be this—the impossibility, owing to the perils insured against, of ever procuring the arrival of the thing insured. If, by reason of those perils, the assured is permanently and irretrievably deprived not only of all present possession and control over it, but of all reasonable hope or possibility of ever ultimately recovering possession of, or further prosecuting the adventure upon it, that is a case of absolute total loss, independently of the

(*d*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 286.

(*e*) 3 Bing. N. C. 286. This agrees substantially with the definition in the Mar. Ins. Act, 1906, s. 57 (1), *ante*, § 1043.

election of the assured to treat it as such. Notice of abandonment would in such case be a mere idle formality, because nothing remains to be abandoned (*f*). In such cases, therefore, no notice of abandonment need be given (*g*); but if any remains of the wrecked ship or perished goods ultimately come to hand, or if any money have been realized abroad by their necessary and justifiable sale, such remains, or the net proceeds of such sale, as we shall elsewhere see, are considered as a salvage to which the underwriters are entitled after payment of a total loss (*h*). Hence it is that absolute total losses are familiarly known in insurance law as "salvage losses without abandonment" (*i*).

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No notice of abandonment requisite in cases of absolute total loss. But the remains of the property or its proceeds are a salvage for the benefit of the underwriters.

1046. Such, then, being the general principle, it will be found that all the cases of total loss in which no notice of abandonment is requisite may be ranged under the two classes, indicated by Lord Abinger—those, viz., in which,

Two classes of cases of absolute total loss.

(*f*) *Lex non cogit ad absurdum.* En cas de perte entière le délaissement est une formalité inutile. 2 Emerigon, c. xvii. s. 3, p. 213. "The general convenience of making an abandonment has led to the notion that it is more necessary than it really is: it is only necessary to make a constructive total loss; if the loss is actually total no abandonment is necessary." Per Lord Ellenborough, Mellish *v.* Andrews (1812), 15 East, 13; Rankin *v.* Potter (1873), L. R. 6 H. L. 156.

(*g*) Mar. Ins. Act, 1906, s. 57, sub-s. 2.

(*h*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 288.

(*i*) A more correct expression would be "salvage losses without notice of abandonment." The distinction between abandonment and notice of abandonment is pointed out by Brett, L. J., in Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. at pp. 470, 471, who proceeds as follows:—"There are two kinds of total loss—one which is called an actual total loss, another which in legal language is called a constructive total loss—but in both the assured claims as for a total loss. Abandonment, however, is applicable to the claim, whether it be for an actual total loss or for a constructive total loss. If there is anything to abandon, abandonment must take place, as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of Roux *v.* Salvador, but something has been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before."

Sect. 1046. 1st, the thing insured is wholly destroyed or annihilated by the perils insured against; or, 2nd, is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of the underwriter to procure its arrival.

With regard to the first head the question arises, What is meant by the words "wholly destroyed or annihilated by the perils insured against" as applied to the subjects of marine insurance?

Annihilation. It is quite clear that these words cannot mean a change of the thing from entity into nonentity, as that is even a physical impossibility, and must, therefore, of course, be thrown out of consideration, in treating of a contract of practical indemnity against substantial losses. It is equally clear that if the thing insured go in bulk to the bottom of the ocean, or be reduced by fire to a heap of ashes, though, in either case, its remains have an existence in *naturâ rerum*, yet the thing itself is practically and, as a subject of insurance, wholly destroyed, so as to entitle the assured, without notice of abandonment, to claim a total loss (*k*).

Wreck involving either complete dismemberment or destruction as a ship.

1047. On the same principle, if the thing insured, in the course of the voyage, be, by the perils insured against, reduced to a complete state of dismemberment, so as to have lost its characteristic form, and no longer to subsist under the same denomination as that which it was insured as being, this is an absolute total loss, though its constituent parts may all, or in great proportion, exist separately. Thus, if a ship in the course of the voyage be dismembered by the perils of the seas—if, in a word, she "be wrecked in pieces," so that "her planks and apparel be scattered about in the sea"—this is a

(*k*) See 2 Emerigon, c. xvii. s. 3, p. 213. "In matters of business a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it in deep water, though it might be possible, by some very expensive contrivance, to recover it": per Maule, J., in Moss *v.* Smith (1850), 9 C. B. 103. So, per Sewall, J., Murray *v.* Hatch (1810), 6 Mass. R. 465.

Sect. 1047. clear case of absolute total loss on ship; and it seems equally so where, though her hull may still hold together, yet the ship, as a ship, is destroyed, and subsists only as a wreck; nor is any notice of abandonment requisite in such cases to entitle the assured to claim a total loss (*l*).

In case of perishable goods. The great difficulty has arisen in determining when perishable goods shall be so far regarded as wholly destroyed and annihilated, within the true meaning of these words in insurance law, as to give the assured a right to recover the whole sum insured on them without notice of abandonment. In one sense commodities of a perishable nature may be said to be wholly destroyed for any practical purpose when, by the progress of decomposition or other chemical agency, they have undergone a physical change of structure so as no longer to remain the same kind of thing as before; in such case the thing insured, in the words of Emerigon, "*a cessé d'exister en essence, et dans la nature qui lui est propre*" (*m*).

Physical change of structure by decomposition. The question, then, is whether, if this physical change of structure have had its origin in the perils insured against, this is an absolute total loss within the policy on the commodities so destroyed. Thus, suppose hides, fish, fruit, or other perishable articles to have become changed in the course of the voyage, by the agency of fermentation or putrefaction originating in sea-damage, into a mass of rottenness, so as to have wholly lost all saleable value as hides, fish, or fruit, though they may produce a trifling sum if sold for glue or manure, is this an absolute total loss under the policy?

Deprivation. **1048.** Reserving the further discussion of this question for another place, we will proceed to give some illustrations of

(*l*) Les débris du navire naufragé existent, mais le navire n'existe plus. 2 Emerigon, 213; Cambridge *v.* Anderton (1824), Ry. & Mood. 60; *S. C.*, 1 C. & P. 213; and 2 B. & Cr. 691; see also Bell *v.* Nixon (1816), Holt, N. P. R. 425; and per Lord Watson in Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. at p. 603: "A mere congeries of wooden planks or of pieces of iron which could not without reconstruction be restored to the form of a ship."

(*m*) Chap. xvii. s. 3, vol. ii. p. 213.

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the principle that, where the thing insured is placed, by the perils insured against, in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, no notice of abandonment is requisite to give the assured a claim to a total loss.

Foundering at sea.

Thus, if the ship founders at sea, or goods go in bulk to the bottom of the ocean, so as to leave no assignable chance of their recovery, this is a clear case of absolute total loss: if,

Submersion.

on the other hand, they be merely submerged in shallow water, or in water not too deep to destroy all chance of getting them up again, though only at a very considerable outlay, this is only a constructive total loss, and the assured, in order to recover the whole amount of the insurance, must give due notice of abandonment (*n*).

On the same principles the assured, on the expiration of the time after which the legal presumption arises that a missing ship has foundered at sea, may claim a total loss without

(*n*) Anderson *v.* Royal Exch. Co. (1805), 7 East, 38; Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48; 2 Phillips, Ins. s. 1527. See also 2 Parsons, Ins. 69—71, where it is pointed out that mere submersion does not necessarily involve a total loss, either actual or constructive. And the authorities cited by these learned writers show that an actual total loss, at any rate, is not necessarily thereby constituted. See, too, Kemp *v.* Halliday (1865), 34 L. J. Q. B. 233; and L. R. 1 Q. B. 520, in the Exch. Ch. Nevertheless, in Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] A. C. 593, Lord Halsbury's language seems to suggest, at least, that a ship going to the bottom of the sea does necessarily become not merely a constructive, but an actual total loss. If this was what Lord Halsbury really meant to say, it is submitted that such a view is inconsistent with all prior authority, and considering what can be achieved by modern mechanical science and skill, is also inconsistent with principle. No such point appears to have been taken or relied upon by the appellant's counsel in arguing the case, and such was clearly not the *ratio decidendi* of the other Lords of Appeal, who appear to have treated the case as one of constructive and not actual total loss. In Montreal Light, &c. Co. *v.* Sedgwick, [1910] A. C. 598, the Privy Council seem to have considered that the submerged barge was not necessarily a total loss, and that the loss, if total, was only constructively so; but their Lordships decided the case on another ground, viz., that there was a "total loss of the vessel" within the meaning of the particular policy (which was on the cargo) when she sank to the bottom and was practically submerged, even though the barge-owner could not have claimed for a total loss of his vessel.

notice of abandonment; for it would, indeed, be absurd to require from the assured a formal abandonment of his chance of recovering that which the law presumes to be irrevocably lost. In the words of the statute (*o*)—"Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed." If, however, such ship should ultimately chance to turn up, this would be for the benefit of the underwriters, who might claim her as salvage (*p*). Sect. 1048.

1049. Every effective privation of the *spes recuperandi* amounts to an absolute total loss: if the thing insured be in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, it can never, or within no assignable period, be brought to its original destination—in such cases the fact of its remaining in specie at any forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his property, whether his inability arise from its annihilation or from any other insuperable obstacle (*q*). Privation of the *spes recuperandi*.

So, "if a ship," says Willes, J., "is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is a notice of abandonment, there is not even a constructive total loss" (*r*).

Goods were insured "from London to the Isle of France, Goods plundered by wreckers.

(*o*) Mar. Ins. Act, 1906, s. 58. Furthermore, it will be presumed that the cause of loss was foundering at sea: Houstman *v.* Thornton (1816), Holt, N. P. 242; Koster *v.* Reed (1826), 6 B. & Cr. 19.

(*p*) Houstman *v.* Thornton, *supra*.

(*q*) See the remarks of Lord Abinger, 3 Bing. N. C. 279, and Cossman *v.* West (1887), 13 App. Cas. 160.

(*r*) Barker *v.* Janson (1868), L. R. 3 C. P. 303.

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&c.: the ship was wrecked off the coast of that island, but some of the goods were saved from the wreck, and got on shore there, where, however, they fell into the hands of the natives, who destroyed part and plundered the rest. The assured claimed a total loss. It was objected to his claim that he had given no notice of abandonment. Sir Vicary Gibbs overruled the objection, and said: "An abandonment is not necessary to make this a total loss; the portion of the goods which were saved from the wreck, though got on shore, never came again into the hands of the owners: it is, therefore, a total loss to them" (*s*).

Goods seized by hostile force, and never restored.

Goods insured on a Baltic risk were, with the ship, while in a Swedish port, seized and detained by orders of the Swedish Government. The assured gave a notice of abandonment, which was too late, and wholly inoperative; afterwards, and about two months before action brought, the goods themselves were seized and unladen by a military force acting under the orders of the Swedish Government, and never restored. The Court held that as the loss on the goods continued absolutely total at time of action brought, the plaintiff might recover accordingly without notice of abandonment (*t*).

Where goods are taken out of ship, condemned and sold, and proceeds not restored before action brought, no notice of abandonment is necessary to make the loss total.

1050. A cargo of saltpetre, shipped in the East Indies by an American citizen, was seized at the Cape of Good Hope by a British man-of-war, and sold under decree of the Vice-Admiralty Court for the benefit of the captors; subsequently (before action brought) this decree was reversed on appeal, but the property, though directed to be, was not restored to the assured. The assured having claimed a total loss, it was objected that he had given no valid notice of abandonment. Lord Ellenborough, however, and the Court of King's Bench held that no such notice was necessary under the circumstances. "If," said his Lordship, "instead of the saltpetre having been taken out of the ship and sold, and the property

Aliter, where goods are finally restored.

(*s*) Bondrett *v.* Hentigg (1816), Holt, N. P. R. 149.
(*t*) Mellish *v.* Andrews (1812), 15 East, 13.

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divested, and the subject-matter lost to the owner, it had remained on board the ship and been restored at last to the owner, I should have thought there was much in the argument that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away" (*u*).

Effect of partial restitution after confiscation of goods.

1051. The cases of Tunno *v.* Edwards (*x*) and Goldsmid *v.* Gillies (*y*) afford some authority for the view that if goods are seized and confiscated by a hostile government, the restoration of a part of the goods, or their proceeds, before action brought prevents the assured from recovering for a total loss, even though prior to such restoration he might have claimed for an actual total loss. This view was adopted by Arnould (*z*). The editors submit, however, that if at the time of the confiscation the goods could properly be regarded as irretrievably lost to the assured, so that there was then an actual total loss, the subsequent restoration of a part of the goods by the voluntary act of the government of the captors could not deprive the assured of his right to claim for such actual total loss. In their view the only effect of the restoration of the property under such circumstances would be, that the underwriters would be entitled to the property as salvage. *A fortiori*, the editors submit that the restitution of a portion of the proceeds of the goods, after the goods themselves have been sold, will not alter the nature of the loss.

Apart from these two cases, there does not seem to be any authority for the proposition that an actual total loss, when once constituted, can ever be defeated by subsequent events.

Where thing insured

1052. In the case of Tunno *v.* Edwards, Lord Ellenborough

(*u*) Mullett *v.* Shedden (1811), 13 East, 304. Cf. Stringer *v.* English, &c. Mar. Ins. Co. (1869), L. R. 4 Q. B. 676; 5 Q. B. 599.
(*x*) (1810), 12 East, 488.
(*y*) (1813), 4 Taunt. 803.
(*z*) 2nd ed. pp. 1024, 1025, reproduced in 7th ed. § 1051.

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subsists in specie, and there is a chance of its recovery, notice of abandonment is necessary to make a total loss. Where there is no such chance, the fact of its subsisting in specie at the time of the casualty or sale is of no importance.

says: "Is it not an established and familiar rule of insurance law that, where the thing insured subsists in specie, and there is a chance of its recovery, in order to make it a total loss there must be an abandonment?" This is no doubt the rule, but then both its terms must be carefully attended to; the mere fact that the thing insured subsists in specie at the time of the loss does not render it necessary to give notice of abandonment, unless there is also at that time a chance of its recovery; where there is no such chance, the mere circumstance of its subsisting in specie at the time of the casualty is of no importance. "The loss," as Lord Abinger says, "is, in its nature, total to him who has no means of recovering his property, whether his inability arise from its annihilation or from any other insuperable obstacle" (*a*).

Assured, by taking to proceeds of sale, may waive his right to recover as for a total loss.

Even where such a loss has taken place, followed by sale, the assured may by his own conduct, in electing to take to the proceeds of the sale, instead of making his claim against the underwriters, if he thereby alters the position of facts so as to affect their interests, forfeit his claim to recover for a total loss (*b*).

So the underwriter may waive his right to notice of abandonment.

And so, *e converso*, even in a case where they would otherwise be entitled to notice of abandonment, the underwriters, by their own conduct, may forfeit the right to insist upon it; as where the assured, on hearing that his ship has put into port to repair in a disabled state, expresses his desire to the underwriters to abandon, but they dissuade him from it, and order the repairs to be made at their expense; this supersedes the necessity for any notice of abandonment, and the assured without it may recover the whole amount of the insurance (*c*).

1053. We proceed to consider the application of these principles to the case of the ship.

(*a*) In Roux *v.* Salvador (1836), 3 Bing. N. C. 279.

(*b*) Mitchell *v.* Edie (1787), 1 T. R. 608. And see, per Lord Abinger, Roux *v.* Salvador (1836), 3 Bing. N. C. 286. See, also, *S. P.* Allwood *v.* Henckell (1795), 1 Park, Ins. 399.

(*c*) Da Costa *v.* Newnham (1788), 2 T. R. 407. See Mar. Ins. Act, 1906, s. 62, sub-s. 8, *post*, § 1091.

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Absolute total loss of ship in cases of wreck, or irreparability.

Where the ship in the course of the voyage, owing to perils insured against, becomes an absolute wreck, broken in pieces and dismembered, so that "her planks and apparel are scattered on the sea" (*d*); this is a case of absolute total loss on ship, "although the whole or a greater part of the fragments may reach the shore as wreck" (*e*). In such case it is quite clear that the ship, as a ship, is totally destroyed—the ship has perished, only the wreck remains. ***Les débris du navire naufragé existent, mais le navire n'existe plus*** (*f*).

In such a case the assured may undoubtedly recover the whole amount of the insurance without notice of abandonment, the wreck being salvage for the benefit of the underwriter.

True view of Cambridge *v.* Anderton.

1054. The case of Cambridge *v.* Anderton appears to the present editors to be merely a somewhat strong instance of this principle. The facts of this case were as follows:—A timber-laden ship, insured from Quebec to Bristol, in sailing down the St. Lawrence struck upon the rocks, and got so fast set that the master could not get her off, but was obliged to leave her there exposed to a heavy sea. She was examined and found to be so damaged that, although still retaining the form of a ship, she was only saved from going to pieces by the timber which formed the greater part of the cargo; and, in the judgment of the surveyors, the expense of getting her off the rocks (if that could be accomplished), and repairing her, would exceed her value when repaired. They, therefore, advised the master to sell her, which he, in ignorance of the insurance, did, together with her register; and the purchaser, having succeeded in getting her off the rocks, repaired and sent her on another voyage (*g*), at the outset of which she

(*d*) Per Dallas, C. J., in Bell *v.* Nixon (1816), Holt, N. P. 423.

(*e*) Opinion of the Judges delivered to the House of Lords, in Irving *v.* Manning (1847), 1 H. L. Cas. 287.

(*f*) 2 Emerigon, c. xvii. s. 3, p. 213.

(*g*) It may occur here to the reader to ask how, if the vessel was actually repaired and subsequently sailed on another voyage, the Court in banc could properly have called her a mere congeries of planks at

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was lost in the Gulf of St. Lawrence. The plaintiff, who had never given notice of abandonment, brought his action for a total loss.

Lord Tenterden told the jury that the question was, whether this was a total or a partial loss, and that, in considering that question, they should look, not so much at the acts of the parties, whether buyers or sellers, as at the state of the ship itself. "If," said his Lordship, "the jury are of opinion that this vessel could not be repaired at all, or that she could not be repaired without incurring an expense equal to or greater than her value, then I shall hold, that, although she may exist in the form of a vessel, and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss, with benefit of salvage" (*h*). The jury found a verdict for a total loss.

The Court in banc refused to disturb that verdict. Lord Tenterden on that occasion said: "If the subject-matter of insurance remained a ship, it was not a total loss; but if it were reduced to a mere congeries of planks, the vessel was a mere wreck: the name you may think fit to apply to it cannot alter the nature of the thing." Bayley, J., on the same occasion, said: "I take the legal principle to be this: if, by means of any of the perils insured against, the ship ceases to retain that character and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss without notice of abandonment" (*i*).

From the above statement of the case, founded upon a collation of the two Nisi Prius reports with those in banc, the ship at the time of the sale appears to have been regarded as "a mere congeries of planks," or, as Lord Tenterden

the time of the sale. A reference to the report in 1 C. & P. 213 shows that the vessel was never made seaworthy to the satisfaction of her officers, who declared that they would not have trusted their lives in her even after the so-called repairs. The Court in banc must obviously have accepted the evidence to this effect.

(*h*) 1 Ry. & Mood. 60; and see, also, 1 C. & P. 214.

(*i*) Cambridge *v.* Anderton (1824), 2 B. & Cr. 691; 4 Dowl. & Ry. 203; *S. C.*, Ry. & Mood. 60; 1 C. & P. 213.

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expressed himself in a subsequent case, "no longer to be deemed a ship, but rather materials for another ship" (*k*).

On this view of the facts, irrespective of the sale by the master, it was quite impossible for the underwriter to contend that the plaintiff had not suffered an absolute total loss. The case, therefore, does not appear to establish any doubtful point of law (*l*).

And there is an absolute total loss where the ship, though not a complete wreck, is necessarily sold by the master where she lies.

1055. It is now also established in our jurisprudence that where the damage is short of a complete wreck or actual dismemberment—although, that is, her hull may hold together, and the form of a ship remain—yet, if the damage be so great as to make it wholly impossible for the master, by any means in his power, to repair her so as to keep the sea as a ship, or to do so except at a cost that would exceed the ship's value when repaired; and the master consequently, acting *bonâ fide* and as a prudent owner would, if uninsured, sells the ship where she lies—the assured may treat this as an absolute total loss of the ship, and recover the whole amount of the insurance without giving notice of abandonment (*m*).

(*k*) Allen *v.* Sugrue (1828), Dans. & Ll. 192.

(*l*) Such appears to be the view taken of this case by Phillips, vol. ii. s. 1495. Arnould, however (2nd ed. pp. 1028 and following), regarded it as an important legal decision on the effect of a sale of a vessel in a damaged condition. See also per Tindal, C. J., in Roux *v.* Salvador, 1 Bing. N. C. 539. The judgments, however, do not seem to lay any stress on the fact of sale, the point throughout insisted on being that the vessel was, prior to the sale, a total wreck. This being so, it is obvious that the sale, inasmuch as it could not make her any more of an absolute total loss than she was before, was, for the purpose of the decision, an immaterial fact.

In Levy *v.* Merchants' Mar. Ins. Co. (1885), 1 Times L. R. 228, the facts were very similar. There was an insurance against absolute total loss only; the vessel first became a constructive total loss, but afterwards sustained so much further injury by exposure to the winds and waves as to become a complete wreck, and she was sold without prejudice to the rights of any person. Mathew, J., in giving judgment in favour of the shipowner on the ground that there was an absolute total loss prior to the sale, appears to have taken the same view of Cambridge *v.* Anderton as that suggested above.

(*m*) Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 115; 8 Taunt. 755; *S. C.* (1821), 3 Brod. & B. 151; see § 203, *ante;* Robertson *v.*

Sect. 1055. In other words, the "right sale" of a vessel will convert a constructive into an absolute total loss. It is not, however, the mere fact of sale which entitles the assured to recover without notice of abandonment; in the language of Bayley, J., "there is no such head in insurance law as loss by sale" (*n*); that which entitles the assured to treat the loss in such cases as absolutely total, is the sale supervening upon the state to which the ship has been reduced by the perils insured against previous to the sale, and which alone justified the master in selling. The loss, in fact, before the sale must be constructively total, in order to enable the assured after the sale, to recover for it as an absolute total loss, without notice of abandonment. The mere fact of the sale will not have the effect of converting an average into a total loss (*o*).

No such thing as loss by sale.

Effect of sale when justifiable.

Farnworth v. Hyde.

1056. The doctrine in its application, effect and consequence is very tersely expounded by the Court of Common Pleas in the case of Farnworth *v.* Hyde. The jury in that case had found that the sale of both ship and cargo (the

Clarke (1824), 1 Bing. 445; Robertson *v.* Carruthers (1819), 2 Stark. 571; Cambridge *v.* Anderton (1824), Ry. & Mood. 60; 2 B. & Cr. 691; Doyle *v.* Dallas (1831), 1 M. & Rob. 48; Gardner *v.* Salvador (1831), *ibid.* 116; and see judgment of Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 288; and Cossman *v.* West (1887), 13 App. Cas. 160. Parsons (vol. ii. pp. 80—90) insists with some force that mere *bona fides* is insufficient, the sale must also be necessary: "Necessity and good faith must concur": Patapsco Ins. Co. *v.* Southgate (1831), 5 Peters, R. 604. And this position was confirmed in this country by the high authority of the Privy Council in Cobequid Mar. Ins. Co. *v.* Barteaux (1875), L. R. 6 P. C. 319, in which case their Lordships quoted with approval a passage from Arnould (2nd ed. p. 236; this ed. § 203) to the same effect. See also Australian Steam Navigation Co. *v.* Morse (1872), L. R. 4 P. C. 222; Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. 467. The cases, however, differ as to what circumstances constitute such a necessity. The facts of the other cases already cited in this note, with the possible exception of Robertson *v.* Carruthers, are consistent with this view, although the language reported to have been used does not always go so far.

(*n*) In Gardner *v.* Salvador (1831), 1 Mood. & Rob. 117. So, too, per Maule, J., in Navone *v.* Haddon (1850), 9 C. B. at p. 44, who also points out that a sale of goods prudently effected by the owner thereof in his own interest is not necessarily a right sale as against underwriters.

(*o*) See the very able argument of Maule, J. (then at the Bar), in Roux *v.* Salvador (1836), 3 Bing. N. C. 266, 270.

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cargo being of timber) was justified by the circumstances. "We are, therefore," says Montague Smith, J., in delivering judgment, "to say what is the legal effect of this sale so found (*p*) by the jury to have been right and necessary. We say that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale, where the ship or cargo might have been saved wholly or partially, if notice of abandonment had been given; but we are also aware that if a right sale, such as is here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give notice of abandonment and leave the ship or cargo to perish unsold; and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. . . . The opposing considerations for and against requiring notice of abandonment when the property insured exists in specie are stated in Roux *v.* Salvador and Knight *v.* Faith (*q*) respectively. . . . The judgment in Knight *v.* Faith accords with Roux *v.* Salvador in holding that there may be a total loss without abandonment where there has been a right sale caused by urgent necessity, with full proof that everything was done *optimâ fide*, and for the real benefit of all concerned (*r*). There is an apparent difference of opinion in

(*p*) This finding was set aside in the Exchequer Chamber. But the judgment here cited, upon the assumption on which it proceeded, viz., the assumption of a "right sale," a sale forced upon all parties concerned by the perils insured against, is still of the highest authority, and is quoted with approval in Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 102 (Brett, J.), and at p. 157 (Lord Chelmsford). Cf. also Cossman *v.* West (1887), 13 App. Cas. at p. 176.

(*q*) (1850), 15 Q. B. 649.

(*r*) The Mar. Ins. Act, 1906, s. 62, sub-s. 7, provides that "notice of abandonment is unnecessary where, at the time when the assured

Sect. 1056. these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury" (*s*).

Stringer *v.* English Mar. Ins. Co.

1057. These observations of the Court appear to receive illustration from the case of Stringer *v.* English, &c. Insurance Company (*t*). That was a case of seizure by a United States cruiser, and of suit in the Prize Court of New Orleans. After many months there was judgment against the captors, and appeal from this judgment, and a sale of ship and cargo upon interlocutory order of the Court of Appeal, as a precautionary measure against deterioration; and whether this sale ought to have been prevented by the assured giving bail to the full value was the question on which depended his right, in the absence of an available notice of abandonment, to recover as for a total loss. The Court upon this question were of opinion that, considering the fluctuating value of American currency at the time, no prudent man would have given security to the full amount, and that the sale, therefore, not being the gratuitous act of the assured, was one of the direct and immediate consequences of the original seizure. "We come, therefore, to the conclusion of fact, that the assured could not by any means which he could reasonably be called on to adopt have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon the insurers for a total loss" (*u*).

The same position seems to have been assumed by Lord

receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him."

(*s*) Farnworth *v.* Hyde (1866), L. R. 2 C. P. 204; 34 L. J. C. P. 207, 210. For an account of Lord Campbell's decision in Knight *v.* Faith, see per Blackburn, J., in Rankin *v.* Potter (1873), L. R. 6 H. L. 83, 130, cited *post*, § 1063.

(*t*) (1869), L. R. 4 Q. B. 676; in error, 5 Q. B. 599.

(*u*) *Per cur.* Stringer *v.* English, &c. Mar. Ins. Co. (1869), L. R. 4 Q. B. 676, 691, 692; on appeal, 5 Q. B. 599.

Tenterden in his summing-up to the jury in Doyle *v.* Dallas (*x*); and in the subsequent case of Gardner *v.* Salvador, Bayley, B., said to the jury, "The question in this case is, whether you are satisfied there has been a total loss by perils of the sea. I know of no such head of insurance law as loss by sale. If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship" (*i.e.*, a sea-going vessel), "he cannot, by selling, turn it into a total loss. *Bona fides* in the captain will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do" (*y*). Sect. 1057.

Result of the cases.

1058. It appears, then, that the authorities support, or, at all events, are not inconsistent with, the position that, when a ship is justifiably sold by the master (*z*) under such

(*x*) 1 Mood. & Rob. at p. 54.

(*y*) Gardner *v.* Salvador (1831), 1 Mood. & Rob. 116; in Tanner *v.* Bennett (1825), Ry. & Mood. 182; and also in Underwood *v.* Robertson (1814), 4 Camp. 138, where a total loss was claimed on sale of ship abroad, no notice of abandonment appears to have been given, and no objection made to the want of it.

(*z*) We have already advanced the view that no sale can be justifiable so as to affect the rights of underwriters, whether as to notice of abandonment or otherwise, unless it be made not only *bonâ fide* and prudently, but also under circumstances of necessity, and this passage in our text, which corresponds, though by no means literally, with a passage to be found on p. 1031 of the second edition, must be read subject to this qualification.

In the original passage, Arnould, after the words "sold by the master," added the words "or owner," maintaining that whether the sale was by the master or by the owner made no difference, and citing the cases of Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48; Allen *v.* Sugrue (1828), Dans. & Ll. 188; 8 B. & Cr. 561; and Idle *v.* Royal Exch. Ass. Co. (1819), 3 Moore, 148; 8 Taunt. 774. The proposition, however, laid down in this way may be open to misconception. It is only by reason of the emergency that underwriters will be bound. It is true that where a sale is effected by an owner present at the scene of emergency it will not have any the less a binding effect as against underwriters by reason merely of the emergency being grappled with

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circumstances that, though her timbers hold together, though she may not have lost the form of a ship, yet she has ceased to exist as a sea-going ship until she is repaired at a cost which would exceed her worth when so repaired, this is a case of absolute total loss on ship, for which the assured may recover without notice of abandonment.

Master should communicate with owners.

We have already pointed out that it is now an indispensable pre-requisite to the exercise by the master of any power of sale, that he shall communicate with his owners whenever communication is, under the circumstances, practicable, and would not be attended with such delay as must prove seriously detrimental to the interests involved (*a*).

1059. In the case of Roux *v.* Salvador (*b*), Tindal, C. J., relying on previous authorities, especially the *nisi prius* decisions of Allwood *v.* Henckel (*c*) and Hodgson *v.* Blakiston (*d*), considered that so long as the subject of insurance remains in specie, the assured cannot recover for a total loss without notice of abandonment, even although the assured had by a sale parted with the property insured. The

by the owner, instead of by the master. To this extent Arnould was probably correct, and so far he is borne out by the authorities which he cites. But where the master is able to communicate with his owners at home, it would in ninety-nine cases out of a hundred be equally possible for the owners in their turn to communicate with their underwriters, and in such cases it seems difficult to say that there could be any such emergency as to justify the owners in taking the matter into their own hands and selling without giving the underwriters an opportunity of deciding for themselves as to the best course to adopt. It is submitted that in all but the very rarest cases an owner at home, on receiving information from his captain as to the condition of his vessel, must, unless the vessel is then an actual wreck, give notice of abandonment if he wishes to recover a total loss. It is difficult, in these days of the telegraph and of modern facilities for communication, to conceive of circumstances so urgent as to relieve an owner from taking this course. The point was considered in the Court of Appeal in Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. 467, where there are indications that such was the view of their Lordships.

(*a*) See *ante*, §§ 195, 201; Carver, s. 316; Australian Steam Nav. Co. *v.* Morse (1872), L. R. 4 P. C. 222.

(*b*) (1836), 1 Bing. N. C. 539.

(*c*) 1 Park, Ins. 399.

(*d*) *Ibid.* 400, n.

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cases referred to, however, according to Arnould (*e*), only show that the mere fact of sale abroad, irrespective of the state of the ship or cargo which led to and justified it, does not constitute an absolute total loss. The doctrine that notice of abandonment is in all cases necessary where the property insured remains in specie was, however, overruled by the Exchequer Chamber in Roux *v.* Salvador itself, and since Rankin *v.* Potter (*f*) it has been impossible to contend that the mere want of notice of abandonment will preclude the assured from recovering, where there is nothing which a notice of abandonment can pass to the underwriter (*g*).

Where ship subsists as a ship mere fact of sale will not convert a constructive into an absolute total loss.

The following cases, which in previous editions of this work have been cited to show that a notice of abandonment must always be given where the thing remains in specie, can only be accepted now as authorities for the position that where the sale is not justified, as between owner and underwriter, such sale will not convert a constructive into an absolute total loss, so as to entitle the owner to recover for a total loss without giving notice of abandonment. That is to say, where the ship, though much damaged, is still subsisting as a ship when the assured receives intelligence of the loss, he cannot, by electing to sell, instead of repairing her, on the probable estimate of the expenses of repair being greater than her repaired value, entitle himself to recover a total loss without notice of abandonment.

Martin *v.* Crokatt.

1060. Thus, in Martin *v.* Crokatt (*h*), a ship and cargo being insured from Carlscrona (in Sweden) to London, the ship, in the course of her voyage, became so sea-damaged that she was forced to run into Warburg, a small fishing

(*e*) 2nd ed. p. 1032.

(*f*) L. R. 6 H. L. 83. In Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. 467, Brett, L. J., at p. 474, seems to express the opinion that where there has been a sale, notice of abandonment of the proceeds of sale must in all cases be given. This is an *obiter dictum*, and there appears to be no other authority for such a doctrine, which, it is submitted, cannot be supported.

(*g*) See Mar. Ins. Act, 1906, s. 62, sub-s. 7.

(*h*) (1811), 14 East, 465.

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place on the Swedish coast, where she was reported incapable of proceeding on her voyage without very expensive repair. The assured, on hearing this, without giving notice of abandonment, stated the facts to the underwriters, asking directions how to proceed; they declining to interfere, he ordered a sale of the ship and cargo (which latter was undamaged) for the benefit of all concerned: they were accordingly sold on the spot, and realized so little, that, after deducting expenses, a balance of 20*l.* was left against the assured. In an action for a total loss, Lord Ellenborough directed a nonsuit, on the ground that, as the ship continued to subsist in specie in the place whither she was carried, this was not a total loss without notice of abandonment. On motion for a new trial, the Court on the same ground refused the rule (*i*). Little stress seems to have been laid in this case upon the fact of the sale; and from the circumstances it is apparent that there can have been no necessity for the owner to have taken the matter out of the hands of the underwriters. And apart from such emergency, it was clearly a case for notice of abandonment, "in order," as Lord Ellenborough said, "to enable the underwriters to elect whether or not they will incur the expenses of repair."

Bell v. Nixon.

A ship, bound from Hull to Quebec, was obliged by tempest to run into Limerick, which then had no docks fit for taking in or repairing a ship of her size. On survey, she appeared much damaged, and as the agents of the assured there conceived it to be impossible to remove her to any other port for repairs, they had her resurveyed, condemned, and broken up where she lay, as the best course for all concerned. No notice of abandonment having been given, it was held that the assured could not recover as for a total loss (*k*). Dallas, C. J., said: "If the case be doubtful, the assured ought not to take upon himself to determine for the underwriter, to break up the ship, and call upon them for a total

(*i*) Martin *v.* Crokatt (1811), 14 East, 465.

(*k*) Bell *v.* Nixon (1816), Holt, N. P. 423. The Court in banc were unanimous, that notice of abandonment was necessary in this case.

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loss. The ship is proved to have been in that condition, that it was necessary to have a survey. She was not a wreck; her timbers were together; she existed as a ship specifically, both when she was surveyed and when she was sold" (*l*). In this case, too, it is apparent that there was no necessity for the owner to sell: he should have given notice of abandonment to his underwriters, and left them to take their own course.

Kaltenbach v. Mackenzie.

1061. The case of Kaltenbach *v.* Mackenzie (*m*) bears out the same principle. A vessel struck on a bank on the 22nd of January, 1871, while on the way to Hong Kong. She was taken back to Saigon, and on survey was reported to be a constructive total loss on the ground that the expense of her repairs would exceed her repaired value. On the 7th of February she was anchored in smooth water, and there was no evidence to show that she was in imminent danger of perishing, or that there was any immediate necessity for her sale. She was nevertheless sold by her owners by public auction shortly afterwards. No notice of abandonment was given, and there did not appear to be any reason why it should not have been given, except that the owner alleged that the underwriter, even if he had received such notice, could not have taken any other course than that adopted by the owners. On these facts the Court of Appeal held, reversing the decision of the Common Pleas Division, that the owners who claimed to recover for a total loss had been correctly non-suited by Lord Coleridge, C. J.

Fleming v. Smith.

The case of Fleming *v.* Smith in the House of Lords may likewise be referred to here for the sake of the emphatic assertion, by Lord Campbell, of the necessity of an abandonment in cases like that before him, a case in which, as his Lordship expressed it, "the ship was not submerged or destroyed, but remained in the form of a ship capable of being repaired, and it was for the captain to determine whether it should be repaired or not.

(*l*) Bell *v.* Nixon (1816), N. P. 423.

(*m*) (1878), 3 C. P. D. 467.

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"Under these circumstances the question arises whether, when the owners of a ship so insured receive intelligence that the ship is capable of being repaired, and that it is lying in port, they can claim as for a total loss without giving notice of abandonment? My opinion is, they cannot do so" (*n*).

Knight v. Faith.

1062. The case of Knight *v.* Faith has often been cited as showing that even a justifiable sale consequent on a constructive total loss will not relieve an owner from giving notice of abandonment. The facts of this case were that a ship insured on time for 1,000*l.*, having stranded off Santa Cruz, was beached there, unloaded, and surveyed. She was found to be so much damaged that the necessary repairs could not be done at Santa Cruz, there being no workmen, dockyard, or materials there; nor could she be taken to any port where she could prudently have been repaired. Shortly after the survey the master sold her for the benefit of whom it might concern: she fetched 72*l.* No notice of abandonment was given and a total loss claimed.

The Court, however, held that the sale by the master did not, under the circumstances, constitute an actual total loss, and therefore that, there having been no notice of abandonment, the assured could not recover as for a total loss (*o*). This decision, however, received severe criticism in the House of Lords in Rankin *v.* Potter (*p*), and can now only be supported on the ground that it does not appear to have been clearly shown that the sale was a justifiable sale as against the insurers. In Rankin *v.* Potter it was definitely decided by the House of Lords, affirming the doctrine of the Exchequer Chamber in Roux *v.* Salvador, that "notice of abandonment could not be in any case required, except where there was something which could be done by the underwriters in consequence." From this it follows that, inasmuch as when

(*n*) Fleming *v.* Smith (1848), 1 H. L. Cas. 513, opinion of Lord Campbell, p. 535.
(*o*) Knight *v.* Faith (1850), 15 Q. B. 649.
(*p*) (1872), L. R. 6 H. L. 83.

a ship is sold there is nothing to abandon to underwriters, notice of abandonment is unnecessary (*q*). This case will be more particularly dealt with subsequently, but it may be as well to cite in this context an extract from the opinion of Blackburn, J., relative to certain of the cases which have been noticed above. Sect. 1062.

1063. "The decision of the Court of Exchequer Chamber in Roux *v.* Salvador," says Blackburn, J., "was, as far as I can learn, received with general approbation at the time. There was, however, one exception; Lord Campbell never could be brought to think it right. In the case of Fleming *v.* Smith (*r*), the counsel for the applicants, the Attorney-General Jervis and Sir F. Thesiger, argued, as I think, logically from the decision in Roux *v.* Salvador, that notice of abandonment could not be in any case required, except where there was something which could be done by the underwriters in consequence, and then the failure to give notice of abandonment might be material as determining the election which the assured had whether to treat the loss as total or not. This, as I have already stated, is what I consider to be the law. Lord Campbell was of a different opinion, and in his opinion says: 'The law therefore requires that notice shall be given in order to convert a constructive into a total loss.' But though that was his opinion, it was not the judgment of the House of Lords. Lord Cottenham, Chancellor (and Lord Brougham concurred in his opinion), carefully puts the decision exclusively on the ground that the assured had in fact elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord Campbell; but he certainly did not express any concurrence with him."

(*q*) See Mar. Ins. Act, 1906, s. 62, sub-s. 7. In Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. at p. 474, Brett, L. J., suggests that even where there has been a sale there ought to be notice of abandonment, not indeed of the thing sold, but of the proceeds. But there is no other authority for this view.
(*r*) 1 H. L. Cas. 513.

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Knight *v.* Faith.

"After this, in the Queen's Bench, when Lord Campbell was Chief Justice, there arose the case of Knight *v.* Faith (*s*). The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in it the Court came to the conclusion, as stated in the judgment, 'that slight repairs might have been sufficient again to fit the ship for navigation,' and the Court said (*t*) that though the ship was sold, 'we are of opinion that as against the insurers the sale is not shown to be lawful.' On such facts the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from first to last. Yet the Court forced the counsel to amend the case by inserting a statement that no notice of abandonment was given; and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in Roux *v.* Salvador. It should in candour, however, be added that the other judges of the Court joined Lord Campbell in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the Court always diminishes its authority. And I think that, on perusing the judgment of Knight *v.* Faith, it will be found that no argument is produced which had not been used in Roux *v.* Salvador, and that no new authority is produced except Lord Campbell's own opinions in Fleming *v.* Smith and a passage (*u*) from the judgment of Lord Chancellor Cottenham, in Stewart *v.* Greenock Marine Insurance" (*x*).

A ship arriving a wreck at her port of

1064. It is clear that if the ship reach her home port, or that of her destination, in so shattered and dismembered a state as to be no longer a ship, but a wreck, the assured may

(*s*) 15 Q. B. 649.
(*t*) 15 Q. B. 657.
(*u*) 2 H. L. Cas. 159.
(*x*) L. R. 6 H. L. 83, 129, 130, per Blackburn, J.

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recover for a total loss without notice of abandonment. So too if she be wrecked in pieces off such port, so that nothing but her fragments come to hand, and the wreck will then be a salvage for the benefit of the underwriters. If, however, her planks still hold together, so that she retains the shape of a ship, though wholly irreparable for the sea again, except at a cost greater than her value when repaired, the safer practice would appear to be to give notice of abandonment; if that be done the fact of her being brought thus disabled into her port of destination will make no difference to the right of the assured to claim a total loss. It was so held in Shawe *v.* Felton (*y*) and in Allen *v.* Sugrue (*z*); and the law as to this point is the same in the United States (*a*).

destination is clearly an absolute total loss.

Shawe *v.* Felton.

Effect of sale on notice of abandonment.

If the assured have given notice of abandonment and then orders a sale, this will not, it seems, operate as a withdrawal of his notice if that notice were justified by the existing facts, *e.g.*, if the ship is, as a ship, wholly irreparable except at a cost greater than her repaired value (*b*). At the same time it must be added that such a course on the part of the assured personally should only be followed under very exceptional circumstances.

Absolute total loss on sea-damaged goods.

1065. Perishable goods are frequently insured in this country "free of average," that is, with a stipulation on the part of the underwriter that, in respect of such articles, he will be liable for nothing short of a total loss.

Hence, a point that has very often arisen is, what, upon articles so insured, amounts to a total loss? Not that a total loss on articles so insured differs at all from a total loss on

(*y*) (1801), 2 East, 129.
(*z*) (1828), Dans. & Ll. 188. See, too, Samuel *v.* Royal Exch. Ass. Co. (1828), 8 B. & Cr. 119; and Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159; a case which, as Lord Truro remarks, "seems somewhat in advance of prior determinations." Per Lord Truro, in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macqueen, H. L. Cas. at p. 339.
(*a*) Ralston *v.* Union Ins. Co. (1812), 4 Binney, 386. Cf. 2 Phillips, Ins. s. 1532.
(*b*) Allen *v.* Sugrue (1828), Dans. & Ll. 188.

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goods not so insured. As Lord Abinger says, "Whether a loss be total or partial in its nature must depend on general principles. The memorandum does not vary the rules upon which a loss shall be partial or total: it does no more than preclude the indemnity for an ascertained partial loss" (*c*).

Two classes of cases:
1. Where loss takes place in the course of the voyage.
2. Where the goods arrive at their port of destination sea-damaged.

The cases may be divided into two classes: 1. Where the loss has taken place in the course of the voyage, so that the goods never arrive at their destination. 2. Where the assured claims to recover on memorandum articles arriving in bulk sea-damaged.

First class.

1066. With regard to the former class of cases, the following is the rule established by our jurisprudence:—If perishable goods, by reason of sea-damage suffered in the course of the voyage, are necessarily unshipped at some intermediate port, and there found to be reduced, either to such a state of absolute putridity that they cannot with safety be reshipped into the same or any other vessel, and are consequently then and there thrown overboard; or to such a state of rapidly progressive decay that, instead of being reshipped and forwarded, they are necessarily sold at the intermediate port, from the certainty that, if sent on to their port of destination, their species itself would disappear, their form become changed, and their original character be entirely lost by decomposition before arriving there: in such cases there is an absolute total loss, within the meaning of the policy, on the goods so thrown away or sold. And even though at such forced termination of the risk (*i.e.*, at the time of the sale or throwing overboard) the goods may still have subsisted in specie, this will make no difference, the assured being entitled to recover the whole amount of the insurance without notice of abandonment, and the underwriters to the benefit of any salvage that may ultimately come to hand (*d*).

(*c*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 277, 278.

(*d*) Dyson *v.* Rowcroft (1803), 3 Bos. & Pull. 474; Cologan *v.*

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This rule opposed to that of Cocking *v.* Fraser.

1067. The rule thus established is opposed to that laid down by Lord Mansfield in the case of Cocking *v.* Fraser, which applied the more rigorous construction that nothing short of going to the bottom of the sea (or, in his Lordship's own words, "absolute destruction of the goods by the wreck of the ship") could amount to a total loss on articles insured "free of average," even at an intermediate port.

The facts of the case were as follows:—Fish was insured free of average from Newfoundland to the ship's port or ports of discharge in Portugal: the Portuguese port for which the cargo was destined was Figueira. The ship on her voyage encountered such bad weather that part of the fish was necessarily thrown overboard, and she was obliged to put into Lisbon, where the remainder of the fish was pronounced to be, as it in fact was, of no value through sea-damage. The ship did not proceed from Lisbon to Figueira in completion of her destined voyage, and the fish was not forwarded. Lord Mansfield held that the loss was not actually total, and that therefore the assured on fish could recover nothing (*e*). "What," said his Lordship, "is a total loss? A total loss of the thing insured is the absolute destruction of it by the wreck of the ship. The fish may all come to port, though, from the nature of the commodity, it may be putrid, it may be stinking, still, as the commodity specifically remains, the underwriter is discharged."

Cocking *v.* Fraser is

It seems better to consider this case as overruled in English

London Ass. Co. (1816), 5 M. & S. 447; Roux *v.* Salvador (1836), 3 Bing. N. C. 266; 4 Scott, 1. This head of absolute total loss is not expressly recognised in the Mar. Ins. Act, 1906, the wording of sect. 57, sub-sect. 1, *ante*, § 1043, not being wide enough to include the circumstances of the cases here cited. Possibly similar facts would be held to constitute a constructive total loss, under sect. 60, sub-sect. 1 (see note (*o*), *ante*, § 1043), in respect of which, by virtue of sect. 62, sub-sect. 7, no notice of abandonment need be given. Unless this be so, the result is that such cases are not covered by the definitions in the Act, either of actual or of constructive total losses. These definitions, however, need not necessarily be regarded as exhaustive.

(*e*) Cocking *v.* Fraser (1785), Park, 247; Marshall, 227; Benecke, Pr. of Indem. 270. See also the case reported, 4 Dougl. 295.

Sect. 1067. law than to endeavour to support it upon its facts (*f*), especially since the language of Lord Mansfield is so entirely unambiguous and so undoubtedly opposed to the rule now understood to prevail. It was, indeed, dissented from on three several occasions, by Lord Kenyon (*g*), Lord Alvanley (*h*), and Lord Ellenborough (*i*); the latter of whom expressly said that, "if obliged to choose between the two, he should incline to the opinion of Lord Alvanley in Dyson *v.* Rowcroft in preference to that of Lord Mansfield in Cocking *v.* Fraser."

overruled in English law.

Law in the United States.

1068. In the United States the case of Cocking *v.* Fraser was for some time considered as establishing the law (*k*). Phillips, it is true, writing in 1854, considered that there was so much discrepancy in the decisions as to justify him in adopting the contrary view. Parsons, however, in 1868, declared it to be "well settled that, if the goods insured arrive at the port of destination existing in specie, the underwriters are not liable, although they are of no value whatever." And, similarly, as regards damaged cargo which does not arrive at the port of destination, but is sold at an intermediate port, he considered the true doctrine to be that "if the article was in such a condition at the intermediate port that, by the exercise of reasonable diligence and care, it could be carried to the port of final destination so as to reach there in

(*f*) Lord Alvanley conjectures that the words "of no value," in the case of Cocking *v.* Fraser, are somewhat too large, and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but was only so much damaged as not to be worth carrying on to the port of destination. See Dyson *v.* Rowcroft (1803), 3 B. & P. 476.

(*g*) In Burnett *v.* Kensington (1797), 7 T. R. 222.

(*h*) Dyson *v.* Rowcroft (1803), 3 B. & P. 475, 476.

(*i*) In Cologan *v.* London Ass. Co. (1816), 5 M. & S. 455. See, too, Asfar *v.* Blundell (1895), 1 Com. Cas. 71, 185 (C. A.); [1896] 1 Q. B. 123.

(*k*) 3 Kent, Com. 295. See also Saltus *v.* Ocean Ins. Co. (1817), 14 Johns. N. Y. 138; Marean *v.* U. S. Ins. Co. (1814), 3 Wash. C. C. R. 256; Neilson *v.* Columbian Ins. Co. (1805), 3 Caines, 108; Phillips, s. 1767; Parsons, vol. ii. pp. 102—106.

specie, although it might be worthless, the loss would be but partial, but otherwise if it would not arrive in specie." The authorities were reviewed in 1870 by the New York Commission of Appeals in the case of Wallerstein *v.* Columbian Insurance Co. (*l*), in which case the Court pronounced in favour of the view supported by Phillips and the more modern English decisions, and against the narrow doctrine laid down by Lord Mansfield in Cocking *v.* Fraser. **Sect. 1068.**

1069. The following are some of the English cases which illustrate the tendency to relax the extreme rigour of Lord Mansfield's rule:—

Rotten fruit.

A cargo of fruit insured "free of average" from Cadiz to Lisbon was, in consequence of tempestuous weather, necessarily carried into Santa Cruz (an intermediate port), where it was found to be so much damaged by sea water that it had become rotten, and stunk to such a degree that it was necessarily thrown into the sea. The Court of Common Pleas held that the assured might recover for a total loss without giving notice of abandonment (*m*). Lord Alvanley said: "In this case it is found that the necessity" (for throwing the cargo overboard) "arose from sea water shipped during the course of the voyage, and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction; and is it not as much lost to the insured by being thrown overboard as though the captain had waited till it arrived at complete putrefaction?"—"I never have understood that the underwriters insure fish and other articles against no perils which do not end in a total annihilation of the commodity" (*n*).

"Annihilation by putrefaction" is an absolute total loss.

Part of cargo of wheat

In the next case a cargo of wheat insured, "free of

(*l*) 44 N. Y. 204.

(*m*) Dyson *v.* Rowcroft (1803), 3 B. & P. 474.

(*n*) *Ibid.*

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thrown away as putrid at an intermediate port; *semble*, an absolute total loss of such part.

average," from Quebec to Teneriffe was captured and recaptured, and carried by the recaptors into Bermuda, where, a scarcity prevailing, an embargo was put on the wheat. In order to repair the ship, the cargo was permitted to be unloaded, and the whole was accordingly landed, except about 600 bushels, which were found to be in such a state from the sea water that the magistrates, out of regard to the public health, ordered them to be thrown into the sea. As to this part of the case, the Court of King's Bench intimated a strong opinion (though, as notice of abandonment had in fact been given, the point did not directly arise for their decision) that there was an absolute total loss on the wheat thus thrown into the sea. Lord Ellenborough said: "Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in specie if it subsists only in the form of a nuisance. There is a total loss of the thing if by any of the perils insured against it is rendered of no use whatever, though it may not be entirely annihilated" (*o*).

Position established by Roux *v.* Salvador.

1070. The case of Roux *v.* Salvador, which is now the leading authority on the subject in our jurisprudence, goes further, and shows that if the goods thus necessarily landed at an intermediate port in a sea-damaged state are sold in the market there, from the certainty that, if reshipped and sent on to their port of destination, they will inevitably perish before arriving there by the process of putrefaction; in such case the assured, who receives intelligence at one and the same time of the loss and the sale, may recover as for a total loss without notice of abandonment, although the goods at the time of sale still subsisted in specie and commanded a price in the markets of the intermediate port as and for what they were described as being in the policy, it being

(*o*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447, 454, 455. This case, in so far as it may be considered an authority for the position that there can be a total loss of part of a cargo of memorandum articles shipped and insured in bulk, is now overruled by Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300.

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always understood that the proceeds of the sale, when they come to hand, are a salvage for the benefit of the underwriters.

Hides valued at 1,117*l.* in the policy, and insured "free of average" from Valparaiso to Bordeaux, were necessarily landed in order to repair the ship, and were then found to be in a state of incipient putrefaction occasioned by moisture from a leak in the ship. As this putrefaction could not be stopped by any means practicable at Rio, and the hides would, by the progress of putrefaction, have lost the character of hides before they arrived at their destination, they were sold at Rio for the gross sum of 273*l.* as hides, for the purpose of being tanned, and were so tanned by the purchasers.

The ship was subsequently repaired, and proceeded to Bordeaux with the rest of her cargo; the assured, who had received at the same time notice of the loss and the sale, brought his action as for a total loss without having given notice of abandonment. The Court of Exchequer Chamber, reversing as to this point the judgment of the Court of Common Pleas, held that this was an absolute total loss, for which he was entitled to recover (*p*).

Grounds of decision.

1071. The principles upon which the Court of Exchequer Chamber proceeded in thus deciding are admirably stated by Lord Abinger in giving the judgment of the Court—a judgment which should be attentively studied by all who desire to know the present state of our law on this much litigated point. Without restating here what ought to be read at large in the report, it will be sufficient to say that the main point of decision was this—that, owing to the perils insured against, it had become impossible, when notice of loss was first received, for either the assured or the underwriter to procure the arrival of the hides according to the terms of the policy.

Judgment of Lord Abinger.

"In the case before us," said his Lordship, "the jury have found that the hides were so far damaged by the perils of the sea that they never could have arrived in the form of hides.

(*p*) Roux *v.* Salvador (1836), 3 Bing. N. C. 266; 4 Scott, 1.

Sect. 1071. By the process of fermentation and putrefaction which had commenced, a total destruction of them, before their arrival at their port of destination, became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive total loss, but of an absolute total loss, of the goods: they could never arrive; and, at the same moment when intelligence of the loss was received, all speculation was at an end."

His Lordship then enters into the question whether the fact of the goods, as in this case, subsisting in specie at the time of sale, and being in fact sold as hides, ought to make any difference as to the necessity of giving notice of abandonment; his Lordship decides that notice of abandonment is no more necessary in this case than it would have been "if, instead of being sold in specie, the hides had actually changed their form and been sold as glue, manure, or ashes" (*q*), in which case his Lordship assumes it as an undoubted point that no notice would be requisite (*r*).

In either case such sale, when justified by necessity and a due regard to the interests of all parties, is made for the benefit of the party who is to sustain the loss; and the net amount thereof, after deducting the charges, becomes money

(*q*) 3 Bing. N. C. 282. As to the Mar. Ins. Act, 1906, see *ante*, § 1066, note (*d*).

(*r*) Thus answering in the negative a case put by Benecke; "Suppose fish valued at 100*l*. to sell for 1*l*. as manure: will this be a value so as to exonerate the underwriter?" Pr. of Indem. 379, note. Chancellor Kent answers the same case also in the negative, "for the cargo was of no value as fish, or in contemplation of the contract." Com. vol. iii. p. 296, n. (*a*).

had and received to the use of the underwriter, upon payment by him of a total loss. Sect. 1071.

Following the principle of this decision it was held by the Queen's Bench Division that where a cargo of coals, damaged by sea-water in the course of the voyage, was unloaded at a port of refuge, and, being found in a state that involved great danger of spontaneous combustion if again put on board ship, was necessarily sold where it lay, there was a total loss within the policy without notice of abandonment (*s*).

No amount of damage will entitle the assured to put an end to the adventure and recover a total loss, without abandonment, unless such damage involves their total destruction in specie.

1072. It must, however, very carefully be borne in mind that no degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure and recover a total loss, without notice of abandonment (*t*), on goods warranted free of average, unless such damage involves their total destruction in specie (*u*), either actual or inevitable. If the commodity can be forwarded to its port of destination with any reasonable prospect of arriving there in specie however damaged, the assured who has failed to send it on, or sold it at an intermediate port, cannot recover as for a total loss, at all events, without notice of abandonment.

Wheat, valued at 1,000*l*., was insured, "free of average," from Waterford to Liverpool. The ship, on going down the river from Waterford, struck, and was run aground to prevent her sinking, in a place where her hull was completely under water at every high tide. About a month after the stranding the wheat was got out much damaged: one-third of it was

(*s*) Saunders *v.* Baring (1876), 34 L. T. N. S. 419.

(*t*) A constructive total loss might be recovered by giving proper notice of abandonment, if it could be shown that goods in their damaged state could not be forwarded, and that the cost of conditioning would exceed their value when conditioned.

(*u*) The expression "in specie" is to be understood in a business sense. Goods arriving in an unmerchantable condition are considered to have lost their species, although they may not have changed to anything else, and cannot be said to have ceased to exist. Asfar *v.* Blundell (1895), 1 Com. Cas. 71, 185 (C. A.); [1896] 1 Q. B. 123.

Sect. 1072. thrown away as wholly useless; the other two-thirds were kiln-dried, and might have been sent on to Liverpool and sold there; instead of this, however, they were sold at Waterford for about 250*l*. gross, and 90*l*. net. Lord Ellenborough held that the assured could not recover for a total loss on the wheat without notice of abandonment, because it might have been sent on to its port of destination in a saleable state as wheat (*x*).

Tobacco and sugar were insured, "free of average," from Heligoland to London. Just off Heligoland the ship was wrecked, but the tobacco and sugar were got ashore there and saved, though in a very damaged state; the sugars having been mostly washed out of the hogsheads, and the tobacco (according to the statement of the plaintiff's counsel) entirely spoiled by sea-water, so as to be worth nothing at all to the assured. The Court of King's Bench unanimously held that the assured, although he had given notice of abandonment, could not recover for a total loss (*y*). Lord Abinger remarks on this case that "the tobacco and sugar, though damaged by the sea, was in the hands of the shippers at Heligoland; and, as stated by Lord Ellenborough in his judgment, for anything that appeared, might have been forwarded to their port of destination" (*z*). Lord Abinger probably spoke from recollection of what had been said by Lord Ellenborough in his own hearing, for nothing of the kind appears in the printed report, which is, however, very brief.

1073. Fifty-four hogsheads of sugar were insured, "free of average," from Gottenburg to Stralsund. At Copenhagen, in the course of the voyage, the ship was stranded and bilged. Every one of the fifty-four hogsheads was saved from the sea, and in every hogshead there were some loaves of sugar left, though the total quantity of sugar saved out of the

(*x*) Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 38. See also Cunningham *v.* Marit. Ins. Co., [1899] 2 Ir. R. 257.
(*y*) Thompson *v.* Royal Exch. Ass. Co. (1812), 16 East, 214.
(*z*) 3 Bing. N. C. 280.

Sect. 1073. whole fifty-four hogsheads was little more than enough to fill one: seventy of the loaves were saved dry. The jury found that this was not a total less, obviously because a portion of the cargo was saved in a saleable state as sugar, and might as such have been sent on to its port of destination, and the Court of Common Pleas agreed with this finding (*a*).

The same principle was applied in the following case: Eighty-one bales of waste silk were insured, valued at 2,245*l*., "free of average from Leghorn to Liverpool." The ship was compelled by stress of weather to put into Gibraltar for repairs, and her cargo was necessarily unloaded. Some of the bales were found to be much damaged by salt water, and were consequently sold at Gibraltar by the master, in the exercise of what the jury found to be a reasonable discretion and such as a prudent uninsured owner would have displayed, but not one of the bales was so damaged as to make its whole contents useless for any mercantile purpose. All the silk might, at a reasonable and moderate expense, have been put in a condition to be brought home by another vessel, and some of it was, in fact, brought home to England and sold as silk, though in a very deteriorated state; the Court of Common Pleas held that this was not a total loss, and consequently that the underwriters were not liable (*b*).

The underwriter is never liable, as for a total loss, on sea-damaged goods arriving in specie at their port of destination.

1074. So much for the liability of underwriters in respect of goods warranted "free of average" for a total loss by the perils insured against in the course of the voyage, *i.e.*, before the arrival of the goods at their port of destination. If, however, they do so arrive at their port of destination, Lord Abinger admits, and the following cases show, that "if they remain in specie (*c*), however damaged, there is not a total loss," and consequently the underwriter is exonerated.

(*a*) Hedburgh *v.* Pearson (1816), 7 Taunt. 154.
(*b*) Navone *v.* Haddon (1850), 9 C. B. 30.
(*c*) As to the meaning, however, of "in specie," see Asfar *v.* Blundell, *infra*, § 1076. The expression used in sect. 57, sub-sect. 1, of the Mar. Ins. Act, 1906, is that the goods must be "so damaged as to cease to be a thing of the kind insured."

Sect. 1074.

Boyfield v. Brown overruled. 1. English authorities.

Lee, C. J., indeed, at Nisi Prius, before the introduction of the memorandum into English policies, seems to have held that where perishable goods arrived, but so damaged by the perils of the sea as to realize on sale less than the freight, this was a total loss (*d*). But this case must now be deemed to be overruled by the numerous cases in which the point has been otherwise determined, and uniformly in the same way.

1075. Thus, where fruit was insured, "free of average," from Lisbon to London, and arrived at the latter place so damaged by the perils insured against as to have lost 80 per cent. in value, Lord Kenyon held the underwriters not to be liable. "The cargo," said his Lordship, "arrives at its port of destination; and though it is good for very little, yet it has invariably been held that the voyage must either be lost, or the cargo, if it be one of those mentioned in the memorandum, be wholly or actually destroyed, to entitle the assured to recover" (*e*).

In this case it seems that the fruit, being neither physically destroyed nor totally extinguished in value, was still fruit and saleable as such, though at a very reduced price.

So where a cargo of peas, warranted free of average, reached its port of destination so damaged as to produce only one-fourth of the freight, which became due on their arrival, the defence set up was that if goods arrive in the market to which they are destined, then, though a loss equivalent to a total loss may have happened on them, the underwriters are not liable, and the jury accordingly, under the direction of Lord Mansfield, found for the defendant (*f*).

Here, again, the peas seem to have been sold as peas, and therefore were not totally extinguished, either in specie or in value.

1076. Rice was insured, "free from average," from Charleston to Liverpool; the ship after arriving within the

(*d*) Boyfield *v.* Brown (1737), 2 Str. 1065.
(*e*) M'Andrews *v.* Vaughan (1793), 1 Park, 252.
(*f*) Mason *v.* Skurray (1780), 1 Park, Ins. 253; 1 Marshall, Ins. 218, 219.

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limits of the port of Liverpool took the ground while endeavouring to get into the dock gates there, filled with water and became a wreck; the rice was taken out of her in small craft, as she lay, and sold in Liverpool for 972*l.*, the freight amounting to 1,762*l.* This was held not to amount to a total loss on the rice (*g*). Lord Ellenborough said: "I think it quite clear that this is a case of particular average, and not of total loss. There has been an arrival of the ship with the goods at their destination—the voyage has been performed, and the goods have come into the hands of the consignees; it appears that the rice, which was said to be totally lost, did produce 972*l.*" (*h*). "Though damaged," as Lord Abinger observes, "it was delivered to the consignees, and in a saleable state as rice" (*i*).

Remarks of Lord Abinger.

Goods arriving in an unmerchantable condition are not considered to have arrived in specie.

The words lastly cited from Lord Abinger's observations are of importance. It is now established in England that goods which on arrival are unmerchantable, and incapable of being used for the purposes for which goods of their species are ordinarily used, are not considered to have arrived in specie, although they may be still recognizable and may not have lost their shape and outward appearance, and may not have changed to anything else. In Asfar *v.* Blundell the "Govino" was sunk in the Thames with a cargo of dates on board. The dates remained for three tides under water, and when recovered were found to be saturated with Thames water and sewage, and to have suffered from fermentation and putrefaction so as to be unfit for human food. They were, however, sold and exported for purposes of distillation, and were never unrecognizable as dates. Under these circumstances, Mathew, J., held that the goods had not arrived in specie within the true meaning of the expression, or in such a

(*g*) Glennie *v.* London Ass. Co. (1814), 2 M. & S. 371.
(*h*) Glennie *v.* London Ass. Co. (1814), 2 M. & S. 376. The case of Buller *v.* Christie (1806) (insurance on 1,950 boxes of soap), cited in 2 M. & S. 374, is not law. See the English authorities here collected, and the United States case of Marean *v.* United States Ins. Co. (1814), 3 Wash. C. C. R. 256; 2 Phillips, Ins. s. 1768.
(*i*) In Roux *v.* Salvador (1836), 3 Bing. N. C. 280.

Sect. 1076. condition as to entitle the carriers to freight. "In my opinion," he said, "the dates were lost. They were not merchantable or capable of being used as dates. They had become a mass of vegetable matter in a state of decomposition; their nature had been wholly changed. The suggestion of the defendants that total destruction of the dates was necessary to disentitle the charterers to freight may derive some support from Cocking *v.* Fraser, but it is clearly not the law. The destruction of the merchantable character of the goods to the extent disclosed by the evidence is sufficient to take away the right to freight in accordance with the principle of the decisions in Dakin *v.* Oxley, Roux *v.* Salvador and Duthie *v.* Hilton "(*k*).

2. Law in the United States.

1077. Some of the earlier decisions of the American Courts, proceeding upon the general principle that nothing short of absolute destruction will make a total loss on memorandum articles, if they arrive at their port of destination, appear to have adopted the rule in Cocking *v.* Fraser in all its severity, and go beyond what is now accepted as the law of this country. Thus, where corn, insured "free of average," arrived in a putrid state at its port of destination, the Judge at Nisi Prius told the jury "that if it was so much damaged as to have become of no value for the nutriment of man," the underwriters were liable as for an actual total loss. But the Court in banc held this a misdirection, saying "that so long as the corn physically existed there could not be a total loss on account of damage merely; although it was good for nothing, the insurers were not liable" (*l*). We have, however, already pointed out that the American decisions and opinions on this subject have been by no means uniform, and that in a more recent case the correctness of this decision has been impugned by high authority (*m*).

(*k*) Asfar *v.* Blundell (1895), 1 Com. Cas. 71; affirmed in C. A., *ibid.* 185; [1896] 1 Q. B. 123.

(*l*) Neilson *v.* Columbian Ins. Co. (1805), 3 Caines, 108, cited 2 Phillips, Ins. s. 1767.

(*m*) *Ante*, § 1068. See Wallerstein *v.* Columbian Ins. Co. (1870), 44 N. Y. 204.

Sect. 1078. 3. Law of France.

1078. In France, before the introduction of the Code de Commerce of 1807, when actual total loss (*perte entière*) was by the Ordonnance de la Marine made a ground of abandonment on perishable goods (*n*), the question was vehemently debated whether such a case of actual total loss could ever be said to arise when the goods arrived in specie at their port of destination. Emerigon was decidedly of opinion that it could not. "I have already spoken," he says, "of the case in which a cargo of wheat arrives in port almost entirely rotten: I now add that, even if it arrive entirely so, that is not such a case of total loss as to justify an abandonment" (*o*). Valin (*p*) and Pothier (*q*) inclined to the less rigorous interpretation; and the latter even considered that the loss might be total within the meaning of the 46th Article of the Ordinance if the goods were damaged to half their value.

Opinion of Emerigon.

Of Valin and Pothier.

The French tribunals, before the Code de Commerce, appear invariably to have supported the more rigid construction of Emerigon, that there can be no total loss on perishable goods unless there has been an entire privation or absolute destruction of them in their nature and essence (*destruction totale des effets assurés dans leur nature et essence*) (*r*).

Result of the cases.

From a review of all these authorities it plainly appears that no degree of damage, however great, can amount to an absolute total loss on perishable goods warranted free of average, if they arrive in specie at their port of destination; in other words, the mere fact of their so arriving precludes all

(*n*) Ord. de la Marine, tit. vi. des Ass. art. 46.

(*o*) Emerigon, c. xvii. s. 2, p. 214. M. Estrangin dissents from this opinion. "This doctrine," he says, "is at variance with what Emerigon himself has advanced a little before, viz., that a thing is destroyed when it has ceased to exist in specie." He adds, "if wheat has become manure it certainly can no longer be said to exist in specie." (Si le blé est devenu fumier il n'est certainement plus dans son essence.) Estrangin, note to Pothier, d'Assurance, 428.

(*p*) Comment. on Ord. tit. vi. art. 46, vol. ii. p. 342, ed. 1829.

(*q*) Pothier, d'Assurance, No. 121.

(*r*) See Estrangin's edition of Pothier, in Appendix, p. 419—429, ed. 1810.

Sect. 1078. inquiry into the extent of the damage they have sustained, and entirely discharges the underwriter.

Goods arriving in bulk, but so damaged as no longer to preserve their original character, are an absolute total loss.

1079. In this context a question was raised by Arnould (*s*) as to which it is conceived that even before the passing of the Marine Insurance Act, 1906 (*t*) there was no kind of doubt, namely, whether, if the goods arrive at their port of destination in such a state that, in the language of Lord Abinger, "the species itself has disappeared, and the goods have assumed a new form, losing all their original character" (*u*) —if, in fact, they arrive, in the words of Lord Alvanley, "annihilated by putrefaction" (*x*)—the loss on such goods is not to be considered total, notwithstanding their arrival. If that of which the arrival is insured is a cargo of hides, that which actually comes to port is a heap of corruption, which cannot properly be designated as hides nor be sold as such; the actual thing, then, has not come to port: it is physically destroyed—"annihilated by putrefaction." Is the loss less an actual total loss because the remains of the thing insured have not been thrown overboard or burnt before arrival?

1080. Such, indeed, seems to have been the view of Lord Ellenborough, who said (*y*): "It surely cannot be less a total loss because the commodity subsists in specie, if it subsists only in the form of a nuisance. There is a total loss of the thing if, by any of the perils insured against, it is rendered of no use whatever, although it may not be entirely annihilated." But Arnould (*z*) considered it to be better to lay down the broad position that there can be no total loss on perishable goods, unless the goods either go to the bottom of the sea, or are necessarily destroyed or justifiably sold by the

Arnould's view.

(*s*) 2nd ed. p. 1054.
(*t*) See sect. 57, sub-sect. 1, *ante*, § 1043.
(*u*) 3 Bing. N. C. at p. 279.
(*x*) 3 Bos. & Pull. 474.
(*y*) In Cologan *v.* London Ass. Co. (1816), 5 M. & S. at p. 455.
(*z*) 2nd ed. p. 1055.

assured, from the impossibility of sending them on in specie to their port of destination. **Sect. 1080.**

Phillips (*a*), while agreeing with Arnould that the question whether an article retains its identity is often very perplexing and of a subtle and metaphysical character, nevertheless clearly regards loss of species as constituting in all cases, both as regards ship and goods, a total loss. And, in view of the cases of which Asfar *v.* Blundell (*b*) is an example, Arnould's position appeared to be quite untenable. Any doubt upon the matter is now disposed of by the statutory provision (*c*) that there is an actual total loss where the subject-matter insured is so damaged as to cease to be a thing of the kind insured (*d*).

1081. It was, no doubt, in order to avoid such subtleties as have been above indicated, that the Legislature of France, on introducing the Code de Commerce of 1807, altered that clause in the Ordonnance de la Marine which made "actual total loss" (*perte entière*) a ground of abandonment on perishable goods, and substituted instead thereof the words "loss or deterioration of the commodities insured when such deterioration or loss amounts to three-fourths" (*e*). **Modern French law.**

M. Becane, an editor of Valin, writing in 1828, *i.e.*, more than twenty years after the code became the law of France, thus speaks of the change introduced by it in this respect: "Nothing can be more just than such a regulation; a deterioration so considerable is equivalent to a total loss; and, but for this rule, as an actual total loss (*perte entière*) can hardly occur except in cases of shipwreck, the underwriters **Remarks of M. Becane on this change of the law.**

(*a*) S. 1605.
(*b*) (1895), 1 Com. Cas. 71, 185 (C. A.); [1896] 1 Q. B. 123, *ante*, § 1076.
(*c*) Mar. Ins. Act, 1906, s. 57, sub-s. 1, *ante*, § 1043.
(*d*) Thus, where the flooding of a ship turned a cargo of cement into stone, the Privy Council agreed that there was an absolute total loss of the cement: Montreal Light, &c. Co. *v.* Sedgwick, [1910] A. C. 598.
(*e*) Art. 369. "Perte ou détérioration des effets assurés si la détérioration ou perte va au moins à trois quarts."

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might frequently have raised difficulties which the law has wisely put an end to by a safe and definite rule" (*f*).

It is expressly provided by the Code de Commerce (*g*), "that the clause 'free of average' shall discharge the underwriters from all average loss, whether general or particular, except in cases which give a right of abandonment; and in such cases the assured may choose whether he will abandon or proceed for an average loss." As damage to the goods in quantity or quality to the extent of three-fourths in measure, weight or value is, as we have seen, one of the express grounds of abandonment, it follows that the assured may, by the present law of France upon abandonment, recover for a total loss, whenever the loss or deterioration reaches the required amount.

Absolute total loss of part of the cargo. Principle established by Ralli *v.* Janson.

1082. It is now settled, after considerable fluctuation in the authorities, that "where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such package or packages be entirely destroyed or otherwise lost by the specified perils" (*h*). In the words of the Marine Insurance Act, 1906 (*i*), "Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if

(*f*) Valin, Comment. sur Ord. ed. par M. Becane, 1828, vol. ii. p. 339.

(*g*) Code de Commerce, art. 409.

(*h*) Judgment of the Court of Error in Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300, overruling Davy *v.* Milford (1812), 15 East, 559, on this point, and the dicta of Abbott, J., and Holroyd, J., in Cologan *v.* London Ins. Co. (1816), 5 M. & S. 456.

(*i*) Sect. 76, sub-sect. 1. The only other reference in the Act to total loss of part is in sect. 79, sub-sect. 1.

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the contract be apportionable, the assured may recover for a total loss of any apportionable part."

Three modes of insuring memorandum articles.

There are three cases frequently occurring in practice touching the insurance of memorandum articles:—1. Where a cargo or a quantity of memorandum articles of the same species is shipped in bulk, valued in bulk, and insured in bulk. 2. Where it is shipped in separate packages, but not expressed in the policy by distinct valuation or otherwise to be separately insured. 3. Where, being shipped in separate packages, it is expressed by distinct valuation or otherwise to be separately insured.

Cargo shipped and insured in bulk.

1083. As to the first case it is clear that there can be no total loss on part of a cargo so shipped and insured. In Hills *v.* The London Assurance Company a cargo of wheat, valued at 1,600*l.* and warranted free of average, was shipped in bulk and insured in bulk by one entire insurance. A quantity of the wheat to the value of about 70*l.* was pumped up out of the hold into the sea during a storm and totally lost. This was held not to be an actual total loss of part of the wheat, but only an average loss on the whole, for which the underwriters were not liable (*k*).

Cargo shipped in separate packages, but not separately insured.

1084. The next case was for a long time doubtful, but was at length disposed of by the judgment of the Court of Error in Ralli *v.* Janson. In that case an insurance was effected by two policies on 2,688 bags of linseed, valued at 1,600*l.* (*l*), "free of average," for a voyage from Calcutta to London. The ship met with a hurricane and was driven into the Cape of Good Hope, where 1,023 bags were found to be in such a state from sea-damage that a large portion of the linseed was at once thrown into the sea as rotten and worthless, and the rest was then and there sold and only realized a few shillings,

(*k*) Hills *v.* London Ass. Co. (1840), 5 M. & W. 569.

(*l*) The indorsement on the first policy was "per Waban, 2,688 bags linseed, 1,600*l.*"; and on the second, "per Waban, linseed, 1,600*l.*" It was also stated in the case, though not, as it would appear, very material, "that all the bags were of the same size and contained the same quantity."

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and if sent on in the vessel would have lost the character of linseed before arriving in England. The remaining 1,165 bags (*m*) were brought sound to England. The question was, whether on the 1,023 bags the assured were entitled to recover, notwithstanding the memorandum, as for a total loss of part of the cargo. It was held that they were not (*n*).

Doctrine in the United States.

In the United States the law is the same: namely, that "the underwriter is not liable for any partial loss on memorandum articles unless there is a total loss of the whole of the particular species, whether the particular article is shipped in bulk, or in separate boxes or packages" (*o*).

Separate packages separately insured.

1085. The third case is where a cargo is made up of separate packages, capable of distinct valuation in the outset, and the insurance appears, from the terms of the policy, to be separately effected on each distinct package; in such cases there can be little doubt that the loss will be treated as a total loss on each package lost (*p*).

Clauses frequently inserted to show that the insurance is to be distributively taken.

In practice, accordingly, as we have seen elsewhere, clauses are inserted in almost all policies upon perishable cargoes composed of separate packages, which have the effect of showing that the insurance is to be thus distributively taken: for instance, "to pay average on each package as if separately insured"; or "to pay average on each species as if separately insured" (*q*).

Entwistle *v.* Ellis.

A singular attempt to vary a policy in this particular, by means of the subsequent declaration of ship and value, was properly defeated in the Court of Exchequer. It was a

(*m*) Five hundred had been jettisoned in the hurricane.

(*n*) Ralli *v.* Janson (1856), 6 E. & B. 422; 25 L. J. Q. B. 300.

(*o*) Wadsworth *v.* Pacific Ins. Co. (1829), 4 Wend. 33; and Humphreys *v.* Union Ins. Co. (1824), 3 Mason, 429; 2 Phillips, Ins. s. 1773.

(*p*) Per Lord Abinger in Hills *v.* London Ass. Co. (1840), 5 M. & W. 576.

(*q*) Stevens, Av. 224. "F. P. A." policies on goods sometimes contain a clause, "each craft or lighter to be deemed a separate insurance": see per Bigham, J., in South British Fire and Mar. Ins. Co. of New Zealand *v.* Da Costa (1906), 11 Com. Cas. 81.

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policy "on any kind of goods and merchandise in any ship or ships," "to be valued on rice to be declared, warranted free from particular average, unless," &c. Afterwards the policy was indorsed with this declaration: "(R) 500 bags rice per 'Laidmans,' at 8*s*. 3*d*. per bag, 206*l*. 5*s*."; and as there was a partial loss, though not under circumstances to suspend the warranty free from average, it was contended that the assured was nevertheless entitled to recover as for a total loss of part under this indorsement. The Court, however, gave judgment for the underwriter, holding that the intention of the policy to exclude any right to recover for an average loss could not be varied by a subsequent declaration, which by that intention was to be confined to a statement of ship, mark, and value: Bramwell, B., at the same time expressing a doubt whether this declaration, in the form in which it appeared, could have had the effect contended for (*r*).

General insurance on several separate articles wholly distinct in their nature.

1086. A fourth case has arisen in our Courts; one, namely, in which the insurance is general, but on several separate articles wholly distinct in their nature. The master of the "Lion" had insured 100*l*. on his effects on board, "free of average," from Italy to England. The ship having taken fire, the master succeeded in saving his chronometer and other things; the rest, to the value of 67*l*. 10*s*., was burnt, and the ship and cargo entirely destroyed. The master claimed as for a total loss of part, and the Court of Common Pleas allowed the claim, on the ground that whereas in Ralli *v.* Janson the article insured was of one species, linseed, here the articles insured were each of a distinct and different character from the others; and, therefore, if there was a total loss of any one article, the plaintiff was entitled to recover on it. If not, it would lead to this startling result, that a man who saved the clothes he was wearing would not be able to recover for the loss of his other property (*s*). Similarly the

(*r*) Entwistle *v.* Ellis (1857), 2 H. & N. 549; 27 L. J. Ex. 105.

(*s*) Duff *v.* Mackenzie (1857), 3 C. B. (N. S.) 16; 26 L. J. C. P. 313.

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same Court soon afterwards decided in favour of the assured under a policy on "any goods," where part of the miscellaneous equipment of an emigrant was lost (*t*).

Absolute total loss on freight. General principles.

1087. An insurance on freight is, as we have already seen, nothing more than an undertaking that, if the shipowner is prevented from earning freight by any of the perils insured against, the underwriters on freight will make good, to the extent of their subscriptions, the loss he has thereby sustained (*u*).

To the inquiry, then, as to what constitutes an absolute total loss on freight, it may in general be answered that, whenever the happening of the event, on which the earning of freight depends, is rendered absolutely impossible, or in any practical sense utterly hopeless, by means of the perils insured against, this is a case of absolute total loss. The question, therefore, turns in some measure on the nature of the contract under which freight is payable. If the freight insured be the hire of a ship for an entire voyage, payable under the terms of a charter-party only on condition of the arrival of that particular ship at the port of destination, and such arrival be rendered impossible or hopeless, either by her foundering at sea, or being justifiably sold as irreparable in the course of the voyage, this ought, on principle, to be an absolute total loss on freight, quite irrespective of all questions as to the state of the cargo. Where, on the other hand, the earning of the freight insured is not thus made to depend on the arrival of the ship under the charter-party, but on the delivery of the goods according to the terms of the bill of lading, the chance of the ship's arrival would seem to be less important as the criterion of the right to recover a total loss on freight without notice of abandonment, than the chance that the goods may be forwarded so as to earn freight by another ship (*x*). In such cases, accordingly, if, although the original ship be wholly destroyed or justifiably sold as irreparable, yet the cargo is preserved in such a state that it may be sent on so as to earn freight by a substituted ship, it should seem that the assured, in order to recover as for a total loss on freight, ought, on principle, to give notice of abandonment (*y*).

(*t*) Wilkinson *v.* Hyde (1858), 3 C. B. (N. S.) 30; 27 L. J. C. P. 116.
(*u*) Atty *v.* Lindo (1805), 1 B. & P. N. R. 240, per Mansfield, C. J.
(*x*) Shipton *v.* Thornton (1838), 9 A. & E. 314.

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Transhipment under the policy.

1088. Instead, however, of giving notice of abandonment, the assured may prefer to send on the goods by another vessel to the port of destination, and so fulfil his contract; and if he do so, he may then come against the insurers under the "sue and labour" clause for the whole expense of transhipping and sending on the cargo, including the freight of the substituted vessel, as being the expense of preventing a loss of the whole of the freight which would otherwise have fallen upon the insurer (*z*).

It is not intended to attempt to classify the various ways in which an absolute total loss of freight may arise. It is clear, however, that it may be the result of loss of ship or loss of cargo, or loss of both. And such loss, whether of ship or of cargo, may amount to a total loss, actual or constructive, or may merely consist of partial damage or detention, provided that the freight is thereby prevented from being earned (*a*). For example, if the ship with a full cargo on board has foundered at sea, so that ship and cargo are both hopelessly lost to the assured without any assignable chance of salvage, this is a clear case of absolute total loss on the freight, the earning of which has become impossible under the circumstances. So where the freight insured is the hire of a ship under charter-party, the same consequence follows

Foundering of chartered ship.

(*y*) See Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 103. The rules of Freight Insurance Clubs very frequently provide that there shall necessarily be deemed to be a total loss of freight in all cases of actual or constructive total loss of a vessel entered in the Association.
(*z*) Kidston *v.* Empire Mar. Ins. Co. (1866), L. R. 1 C. P. 535.
(*a*) See, generally, the opinion of Brett, J., in Rankin *v.* Potter (1873), L. R. 6 H. L. 83.

Sect. 1088. if the ship is lost by perils insured against after the assured has acquired an insurable interest (*b*).

Of general ship.

1089. So, even where the freight insured is to become payable on delivery of the goods by a general ship under the terms of the bill of lading, although a full cargo may not be actually on board at the time of loss, yet, if a full cargo have been then contracted for, in this case also the assured on freight may recover as for a total loss, though only a part, or even though none, of the cargo may actually be on board the ship at the time of loss (*c*); if, on the other hand, in such case the full intended cargo be neither shipped on board nor contracted for at the time of loss, there cannot be an absolute total loss of the freight on a full cargo, but only of the freight in respect of which the assured has acquired an insurable interest (*d*).

Absolute total loss of part of freight, by loss of part of cargo.

Capture of ship and cargo, the loss continuing total till action brought.

On the same principle, if the event, on which the earning of the entire freight is made to depend under the charter-party, be the ship's arrival at her port of ultimate destination with a certain description of cargo, and the happening of this event is rendered hopeless by the capture of the ship (unredeemed by subsequent restoration) before this particular description of cargo is loaded on board, this is a clear case of absolute total loss on the whole freight (*e*).

Seizure and sale of outward cargo.

So where, under a policy on ship and freight for a Baltic risk, it appeared that the ship was a general ship, and the freight insured was made payable on delivery of the cargo at the ship's port or ports of discharge in the Baltic, it was held

(*b*) Thompson *v.* Taylor (1795), 6 T. R. 478; Horncastle *v.* Suart (1806), 7 East, 400; Mackenzie *v.* Shedden (1810), 2 Camp. 431.

(*c*) Under the ordinary form of policy, the shipowner can only recover for the freight of cargo which is in readiness as well as contracted for: Mar. Ins. Act, 1906, Sched. I. rule 3 (d). The question whether readiness of the ship and cargo is necessary, in order that there may be an insurable interest in bill of lading freight, is discussed *ante*, §§ 268—271, 278—279a.

(*d*) See the discussion on insurable interest in freight, *ante*, Pt. 1, ch. xii.

(*e*) Atty *v.* Lindo (1805), 1 Bos. & Pull. N. R. 236.

Sect. 1089. that seizure, condemnation, and sale of this cargo under the Berlin decree in the ship's port of discharge, involved an absolute total loss of the outward freight, though the ship, which had been also seized, was repurchased by the master, and ultimately arrived earning homeward freight (*f*); had the policy in this case been on freight for the homeward voyage under charter-party, then, although the cargo first shipped on board at the foreign port had been taken out and sold, yet, if the ship had ultimately arrived at her home port so as to earn freight with another cargo, this would not have been a total loss on freight under such policy (*g*).

Other cases.

On the same principle, where the event on which the earning of freight is made to depend under the charter-party is the ship's completing in safety her entire voyage out and home, then, if the ship be lost on the homeward passage, there will be an absolute total loss on the whole freight; if, on the other hand, the voyage out is distinct from the voyage home, and freight has been earned on the ship's arrival outwards, her subsequent loss on the homeward passage is not an absolute total loss of the whole freight (*h*).

There may also be an absolute total loss of freight where sea perils prevent the ship from loading the agreed cargo, except after such a delay as would frustrate the commercial objects of the affreightment, whereby the contract becomes inapplicable (*i*); or where, owing to outbreak of war or other

(*f*) Wilson *v.* Forster (1815), 6 Taunt. 25; 1 Marshall, 425; *S. P.* in United States, Hurtin *v.* Union Ins. Co. (1806), 1 Washington, C. C. R. 530.

(*g*) Everth *v.* Smith (1814), 2 M. & S. 278; Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102; Scottish Shire Line, Ltd. *v.* London and Provincial Mar. Ins. Co., Ltd., [1912] 3 K. B. 51. See also Barclay *v.* Stirling (1816), 5 M. & S. 6.

(*h*) Mackrell *v.* Simond, 2 Chitty, R. 660 (cases in time of Lord Mansfield).

(*i*) Jackson *v.* Union Mar. Ins. Co. (1873), L. R. 8 C. P. 572; 10 C. P. 125; In re Jamieson and The Newcastle Assn., [1895] 2 Q. B. 90. The case is different where the freight is lost owing to the exercise by the charterers of special rights reserved to them by the charter-party by which they are under particular circumstances excused from loading. See Inman *v.* Bischoff (1882), 7 A. C. 670; Mercantile Ship Co. *v.*

Sect. 1089. cause, the performance of the contract becomes illegal, and in this sense impossible, and no other freight can be obtained on the insured voyage (*j*).

Other cases of total loss of freight, and, in particular, those in which ship and cargo, or either of them, have been sold abroad by the master, will be more conveniently considered under the head of Constructive Total Loss on Freight.

No notice of abandonment is required under a policy on profits.

1090. In a policy on the profit of goods, the underwriter engages that the goods shall not be prevented by the perils insured against from so arriving as to earn a profit: if, then, the goods are so prevented from arriving by the perils insured against, there is a total loss on the expected profits, and this without any necessity for a notice of abandonment.

Nor under a policy on commission.

Commissions stand upon the same footing as profits. Hence, if the goods are prevented from arriving by perils insured against, the assured may recover for a total loss: and as the assured in such case could assign nothing by abandonment, no notice of abandonment is required.

Tyser (1881), 7 Q. B. D. 73. This subject is dealt with more fully in Chapter I. of Part III. In Embiricos *v.* Sydney Reid & Co., [1914] 3 K. B. 45, Scrutton, J., held that the principle laid down in Jackson *v.* Union Mar. Ins. Co. (*supra*) applies whether the contract is entirely executory or partially executed. See also Admiral Shipping Co., Ltd. *v.* Weidner, Hopkins & Co., [1917] 1 K. B. 222 (C. A.), and Tamplin SS. Co. *v.* Anglo-Mexican Co., [1916] 1 K. B. 435; [1916] 2 A. C. 397.

(*j*) Associated Oil Carriers, Ltd. *v.* Union Ins. of Canton, [1917] 2 K. B. 184.

CHAPTER VII.

CONSTRUCTIVE TOTAL LOSS.

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General doctrine of constructive total loss.

1091. A CONSTRUCTIVE total loss (*a*) is as much a total loss as an actual total loss, and consequently, "unless a different

(*a*) "Constructive Total Loss" is peculiar to marine insurance. There may, however, be for some purposes a constructive total loss though there has been no insurance, but the expression has no other meaning than that which is given to it by the law of marine insurance: see Manchester Ship Canal Co. *v.* Horlock, [1914] 2 Ch. 199; Roura and Fourgas *v.* Townend, [1919] 1 K. B. 189. A policy is not necessarily one of marine insurance merely because it may incidentally cover a marine transit: see Moore *v.* Evans, [1917] 1 K. B. 458; [1918] A. C. 185, and see per Lord Atkinson at p. 193 for some general observations as to the rise of the doctrine which he says had its origin in cases of capture.

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intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss" (*b*).

Definition.

A constructive total loss in Insurance Law is that which entitles the assured to claim the whole amount of the insurance, on giving due notice of abandonment (*c*). The following is the definition of such a loss in sect. 60 of the Marine Insurance Act, 1906:

> (1.) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred (*d*).
>
> (2.) In particular, there is a constructive total loss—
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered (*e*); or
>
> (ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

(*b*) Mar. Ins. Act, 1906, s. 56, sub-s. (3); Adams *v.* McKenzie (1863), 13 C. B. (N. S.) 442; and cf. Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. at p. 610. As to policies on bottomry, however, see § 1137, *infra*.

(*c*) This statement was quoted with approval by Bigham, J., in Western Ass. Co. of Toronto *v.* Poole, [1903] 1 K. B. at p. 383.

(*d*) The wording of this sub-section is not consistent with that of sect. 61, which implies that there may be a constructive total loss prior to abandonment. And see Roura and Fourgas *v.* Townend, [1919] 1 K. B. 189.

(*e*) For cases under sub-sect. 2 (i), see Hall *v.* Hayman (1911), 17 Com. Cas. 80, 88; [1912] 2 K. B. 5; British Dominions Gen. Ins. Co. *v.* Duder, [1914] 3 K. B. 835; reversed in C. A., [1915] 2 K. B. 394. In both cases it was not disputed that when a vessel is ashore on the rocks her owners are deprived of the possession of her.

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> In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or
>
> (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Thus, generally speaking, that is a case of constructive total loss where the thing insured has been reduced to such a state, or placed in such a position, by the perils insured against, as to make its total destruction or annihilation, though not inevitable, yet highly imminent, or its ultimate arrival under the terms of the policy, though not utterly hopeless, yet exceedingly doubtful. For instance, though the thing insured may not be absolutely destroyed or irretrievably lost, yet, in the language of Lord Abinger: "There may be a capture, which, though *primâ facie* a total loss, may be followed by a recapture which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination (*f*). There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair; or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination" (*g*).

(*f*) "In matters of business," says Maule, J., "a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost." Per Maule, J., in Moss *v.* Smith (1850), 9 C. B. 103.

(*g*) 3 Bing. N. C. 286. The parties may, of course, define "constructive total loss" for themselves. Thus it is not an uncommon club rule that if any ship insured has been stranded or sunk, and remained in such position for a given period, and during such period it has been found impracticable to save her, the ship shall be held to be a construc-

Sect. 1091. The legal position, when a loss has occurred which can be treated as a constructive total loss, is thus set out in sects. 61 and 62 of the Marine Insurance Act, 1906:—

Effect of constructive total loss.

Sect. 61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss (*h*).

Notice of abandonment.

Sect. 62.—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss (*h*).

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth (*i*), and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer (*j*).

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry (*k*).

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance (*l*).

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the

tive total loss. As to the construction of such a rule, see Sunderland SS. Co. *v.* North of England, &c. Association (1894), 11 Times L. R. 106; Rowland's SS. Co. *v.* Mar. Ins. Co., Ltd. (1901), 6 Com. Cas. 160.

(*h*) See *post*, § 1092.

(*i*) Thellusson *v.* Fletcher (1780), 1 Esp. 72; Parmeter *v.* Todhunter (1808), 1 Camp. 541; *post*, § 1189.

(*j*) *Post*, §§ 1185, 1188.

(*k*) As to what is reasonable time, see *post*, § 1192 *et seq.*

(*l*) See *post*, § 1200.

notice conclusively admits liability for the loss and the sufficiency of the notice (*m*). **Sect. 1091.**

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him (*n*).

(8) Notice of abandonment may be waived by the insurer (*o*).

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him (*p*).

Reasons why notice is necessary.

1092. For the rule that the assured, if he wishes to recover for a constructive total loss, must give due notice of abandonment, there are two grounds: "When the assured has once elected to treat the loss as a total loss, the underwriters can insist upon his abiding by the election, so as to enable them to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice is, that he may tell the underwriters at once what he has done, and not keep it secret in his mind, to see if there will be a change of circumstances. There is another reason: the thing in various ways may be profitably dealt with. Therefore the second reason for requiring notice of abandonment to be given to the underwriters is, that they may do, if they think fit, what in their opinion is best, and make the most they can out of that which is abandoned to them" (*q*).

Assured may always elect to treat the loss as partial.

The assured may, on the other hand, however serious the damage may have been, refrain from giving notice of abandonment, and treat the loss as partial (*r*). Thus, in the case of The Bawnmore, the vessel was insured against marine risks in one policy, and against fire only in another. She sustained injuries by stranding which were not sufficiently serious to constitute an actual total loss, but so serious that

(*m*) See *post*, § 1199.

(*n*) See *ante*, § 1062; *post*, §§ 1162, 1191.

(*o*) See *post*, § 1190.

(*p*) See *post*, § 1191.

(*q*) Per Cotton, L. J., in Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. at p. 480.

(*r*) Mar. Ins. Act, 1906, s. 61, *ante*, § 1091.

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the cost of repairing her would have exceeded her repaired value. Thirty-six hours afterwards, no notice of abandonment having meanwhile been given, she was completely destroyed by fire. The underwriters on the fire policy, which was valued, were sued for a total loss, but contended that, a total loss having been occasioned by the stranding, no second total loss could be sustained during the same voyage. But it was held that the loss by the stranding was, in the absence of a notice of abandonment, only a partial loss, and, however serious this might have been, it was no answer to the plaintiff's claim to recover for a total loss by the fire (*s*).

Conditions of recovering as for a total loss.

After giving notice of abandonment, the right of the assured to recover as for a total loss depends, in English law, upon the point whether the state of things which entitled him thus to give notice of abandonment continued down to the time of bringing the action (*t*). In our law, therefore, there are two main questions to be considered in every case of constructive total loss: 1. Was the state of things such as, *primâ facie*, to entitle the assured, on receiving intelligence thereof, to give notice of abandonment? 2. Did it continue such down to the time of action brought, as to entitle him to follow up such notice and recover as for a total loss?

Upon what intelligence the assured may give notice of abandonment.

1093. The first question then is, upon what kind of intelligence the assured may give notice of abandonment. As to this, it may be answered generally that he has, *primâ facie*, a right to give such notice on receiving intelligence of any such marine casualties as those just referred to, which, though they do not involve the absolute destruction or irretrievable loss of the thing insured, yet render its destruction highly

(*s*) Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105. See also Lohre *v.* Aitchison (1877—1879), 2 Q. B. D. 501; 3 Q. B. D. 558; 4 App. Cas. 755; Pitman *v.* Universal Mar. Ins. Co. (1882), 9 Q. B. D. at p. 208; Mellish *v.* Andrews (1812), 15 East, 16, per Lord Ellenborough. Cf. The St. John's (1900), 101 Fed. R. 469.

(*t*) On the question whether this rule has been altered by the Mar. Ins. Act, 1906, see *infra*, § 1097a.

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probable or its ultimate recovery very doubtful (*u*). These are the only kind of casualties which can justify a notice of abandonment. No amount of damage, however great, which does not threaten the entire destruction of the thing insured (*v*); no amount of difficulty in regaining possession of it, which does not involve an absolute temporary privation of ownership, or alienation of property (*x*), can make a case of constructive total loss. "The assured cannot elect to turn what, at the time when it happened, was only an average loss, into a total one by abandoning" (*y*). "There is no instance," says Buller, J., "where the owner can abandon, unless at some period of the voyage there has been a (constructive) total loss" (*z*). "There is not any principle," says Lord Ellenborough, "which authorizes abandonment, unless where the loss has been actually total, or in the highest degree probable, at the time of the abandonment" (*a*).

Notice may be given immediately if report is probable.

1094. Supposing, however, the case be such as *primâ facie* to justify the assured in giving notice of abandonment, he is not bound, before giving it, to wait for full and accurate information, but may give it at once upon mere report of any casualty which, supposing the intelligence to be well

(*u*) The corresponding words in the Mar. Ins. Act, 1906, are to be found in sect. 60, *ante*, § 1091, which provides (in sub-sect. 1) that the ground of abandonment must be "on account of its actual total loss appearing to be unavoidable," and (in sub-sect. 2 (i))—in a case where the assured is deprived of the possession of his ship or goods—that "it is unlikely that he can recover" them. "Very doubtful" is not the same as "unlikely," and the law has in this respect been altered by the Act: Polurrian SS. Co. *v.* Young, [1915] 1 K. B. 922 (C. A.).

(*v*) Cazalet *v.* St. Barbe (1786), 1 T. R. 187; Furneaux *v.* Bradley (1780), 1 Park, 365. The language of the text, however (which is Arnould's, see 2nd ed. p. 1066), appears to overlook the class of cases of constructive total loss which is recognised in sect. 60, sub-sect. 2 (ii) and (iii), of the Mar. Ins. Act, 1906.

(*x*) Thorneley *v.* Hebson (1819), 2 B. & Ald. 513.

(*y*) Per Lord Mansfield in 2 Burr. 697.

(*z*) 1 T. R. 191. The learned Judge uses the term "total loss" without qualification, but the whole tenor and language of his judgment shows that he was speaking of a constructive total loss.

(*a*) Per Lord Ellenborough in Anderson *v.* Wallis (1813), 2 M. & S. 240.

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founded, would be a clear case of constructive total loss, provided he act *bonâ fide* and such report is sufficiently probable (*b*). It must be given "with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make enquiry" (*c*).

"In cases like this," said Lord Ellenborough, "men must act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falsehood of the intelligence they receive. If I hear of my ship being taken in the East or West Indies, I am not obliged to wait till I certainly know the event, by the testimony of those who were present. Provided the thing has once existed, what I do, believing it to have taken place, must be valid and effectual" (*d*).

Of course, if it turns out that the intelligence upon which the assured acted, in giving notice of abandonment, was totally false and unfounded, the notice of abandonment is entirely inoperative—in fact, is a mere nullity (*e*). The effect of an offer of abandonment, according to Lord Ellenborough, is that, if it appears to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was properly made on assumed facts, if it turn out that none such existed. It may be said to be properly made upon notice received, and *bonâ fide* credited, by the assured, of his ship having been wrecked, whether such intelligence were true or not, and although the letter conveying it turned out to be a forgery; and yet clearly no right

(*b*) Bainbridge *v.* Neilson (1808), 1 Camp. 240. In the United States a report in a newspaper has been held a sufficient foundation for notice of abandonment. Boseley *v.* Chesapeake Ins. Co. (1831), 3 Gill & Johnson, 450. See 2 Phillips, s. 1666.

(*c*) Mar. Ins. Act, 1906, s. 62, sub-s. (3), *ante*, § 1091.

(*d*) See note (*g*), *infra*.

(*e*) Le délaissement fait par erreur ne produit aucun effet, lorsque l'erreur tombe sur quelqu'une de ces choses, qu'il faut connaître pour opérer un abandon régulier et valable, comme si la nouvelle de l'accident se trouvait fausse. 2 Emerigon, c. xvii. s. 6, p. 233.

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of action would vest in him, founded upon an abandonment made on false intelligence. If the facts be all imaginary or founded on misconception, the whole foundation of the abandonment fails (*f*).

Notice must be justified by the facts as they exist at the time it is given.

1095. And in order to make a notice of abandonment valid, not only must the information on which it is founded prove true, but it must also be justified by the state of facts existing (*g*) at the time when it was actually given. Even though the facts upon which it was founded were truly reported, and were in themselves such as to justify the assured in giving notice of abandonment, yet, if they have ceased to exist before the time at which such notice was given, it will have no force or effect whatever. Thus where the assured, on hearing of the capture of his ship, gave notice of abandonment, but the ship had been in fact recaptured though not to his knowledge, before such notice was given, the Court held that it was entirely inoperative, for an abandonment could be made only according to the facts at the time of making it (*h*). Lord Ellenborough said that to give effect to such a notice of abandonment would grievously enlarge the responsibility of the underwriters; it would be

(*f*) Bainbridge *v.* Neilson (1808), 10 East, at p. 341.

(*g*) Sect. 60, sub-sect. 1, of the Marine Insurance Act, 1906, declares that there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss "appearing to be unavoidable." These words cannot mean that an assured can recover merely because he honestly and reasonably believed that a total loss was inevitable, if the real facts would not have justified such a belief. In other words, an assured cannot recover for a constructive total loss which did not exist in fact, merely because he believed it to exist. The words must be construed as meaning that a total loss must have been, to use the words of Lord Ellenborough (see *infra*, § 1184), "in the highest degree probable at the time of the abandonment." In Russian Bank for Foreign Trade *v.* Excess Ins. Co., [1918] 2 K. B. at p. 129, Bailhache, J., seems to have been inclined to think that a notice of abandonment based on wrong grounds might be valid if good grounds existed.

(*h*) Bainbridge *v.* Neilson (1808), 10 East, 329; Parsons *v.* Scott (1810), 2 Taunt. 363; Falkner *v.* Ritchie (1814), 2 M. & S. 290.

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The law in the United States, and also in France, is in this respect the same with that laid down in the cases above referred to (*j*).

And by the facts as they exist at the time of action brought.

1096. But even though the intelligence may have been true, and the state of things at the time the notice was given such as to justify its being given (*i.e.*, though the loss may have continued constructively total at the time the assured gave notice of abandonment), yet the doctrine has been clearly established in the English law that the right of the assured, after having given such notice, to recover as for a total loss, depends entirely on the state of things as it exists at the time of action brought. If before the commencement of the action the thing insured be restored, under such circumstances and in such a state that the assured may, if he pleases, take possession of it, and may reasonably be expected so to do, this defeats his right to recover as for a total loss (*k*). Lord Tenterden thus states the law as understood in this country: "The abandonment is to be viewed with regard to the ultimate state of facts as appearing before the action brought, according to the opinion of the Court in Bainbridge *v.* Neilson. Doubts were expressed as to the propriety of that decision by very high authority (Lord Eldon) in Smith *v.* Robertson (*l*); but, notwithstanding those doubts, the rule as laid down in Bainbridge *v.* Neilson was adopted in the two subsequent cases of Patterson *v.* Ritchie (*m*), and Brotherston *v.* Barber (*n*). We consider the point to have been well settled, and the rule established by these authorities" (*o*).

(*i*) 10 East, 341. As to the effect of a change of circumstances after the notice of abandonment, see *infra*, §§ 1096—1097a.

(*j*) 2 Phillips, Ins. s. 1662; 3 Pardessus, Droit Com. 233.

(*k*) See the cases cited in §§ 1099—1102. Bainbridge *v.* Neilson (1808), 10 East, 329; Patterson *v.* Ritchie (1815), 4 M. & S. 393; Brotherston *v.* Barber (1816), 5 M. & S. 418; Naylor *v.* Taylor (1829), 9 B. & Cr. 718.

(*l*) (1814), 2 Dow, 474.

(*m*) (1815), 4 M. & S. 393.

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The law of France and the United States differs from our own on this point.

1097. This doctrine of English law differs from that of the Continent and of the United States. In France the law is now fixed by the Code de Commerce, which declares (*p*) that no abandonment can operate as an irrevocable transfer of property, unless it be, 1, accepted; or, 2, adjudged to be valid. Boulay-Paty thus explains the meaning and effect of this provision of the Code:—"An acceptance by the underwriter waives any defect in the grounds of the abandonment;" the judgment of the Court decides that good grounds existed for it at the time it was made. If before the abandonment is thus "adjudged to be valid" the thing insured should be restored, the right of the assured to insist on his abandonment is not thereby defeated; for the judgment, when given, has a retrospective effect, and, if it be in favour of the validity of the abandonment, the underwriters are presumed to have acquired the proprietorship of the thing insured, from the moment the abandonment was first notified to them (*q*).

By the existing law of France, then, 1. An abandonment once well made on good grounds is indefeasible, whether it have been accepted or not; 2. If accepted, it is indefeasible, whether it have been made on good grounds or not.

The law as thus explained prevails also in the United States of America. The facts, as they exist at the time a notice of abandonment is given, must be such as to justify it; but if they be so, then the rule is that "an abandonment once right-

(*n*) (1816), 5 M. & S. 418.

(*o*) Per Lord Tenterden in 9 B. & Cr. 718. Cf. Shepherd *v.* Henderson (1881), 7 App. Cas. 49, per Lord Blackburn; Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. 593; Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135; Polurrian SS. Co. *v.* Young, [1915] 1 K. B. 922. It may, perhaps, still be open to doubt whether the doctrine that the state of affairs at the time of action brought must be looked to applies, except in cases of capture and the like. See per Lord Halsbury, [1898] App. Cas. at p. 599.

(*p*) Art. 385.

(*q*) 4 Boulay-Paty, Droit Com. 377. See also 3 Pardessus, Droit Com. 424.

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fully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by any subsequent events" (*r*).

Has the English law on this point been altered by the Marine Insurance Act?

1097a. It is a question of considerable doubt whether the English rule on this point has not been altered by the Marine Insurance Act of 1906. As we have seen, sects. 61 and 62 of the Act provide that when there is a constructive total loss, the assured may abandon the subject-matter insured to the insurer, and treat the loss as if it were an actual total loss, provided that he gives proper notice of abandonment (*s*). There is no statement in the Act that the right to claim for a total loss, which then comes into existence, is liable to be defeated by any subsequent change of circumstances (*t*).

The absence of any provision in the Act that the right to recover for a total loss (which the Act clearly recognizes), is lost by the restitution of the subject-matter insured, affords a strong argument in support of the view that on this point the law of England has been altered by the Act, and assimilated to the law of the United States and the Continent, and apparently of Scotland. This view is confirmed by the statement in sect. 61 of the Act that the assured may treat the loss as if it were an actual total loss. According to the

(*r*) Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, Circuit R. 27; 3 Kent, 324; 2 Phillips, s. 1705; and see per Lord Halsbury in Sailing Ship "Blairmore" Co., Ltd. *v.* Macredie, [1898] App. Cas. 593. So, too, generally on the Continent. As to the Scottish law, see "Blairmore" Co. *v.* Macredie, *supra*, and Smith *v.* Robertson (1814), 2 Dow, 474. The foreign rule was preferred by Judge Carver (see Paper read before the Buffalo Conference of the International Law Association—Clowes & Sons, 1900).

(*s*) *Ante*, § 1091.

(*t*) Such a statement was originally inserted in the Bill, for an additional sub-section to sect. 62 declared that "where the assured has given a notice of abandonment which has not been accepted, the validity of the abandonment must be determined with reference to the state of affairs at the time of action brought." This sub-section was retained while the measure passed through its different stages in the House of Lords; but it was struck out in Committee in the House of Commons, in consequence of objections taken to it by Scottish members, on the ground that on this point the law of Scotland differed from the English law. See Chalmers & Owen, Mar. Ins. Act, p. 91.

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definition of actual total losses in sect. 57 of the Act, they are from their nature indefeasible (*u*). It seems, therefore, arguable that the Act places constructive total losses on the same footing.

On the other hand, it may be urged that there is no express provision in the Act dealing with the question whether the right to claim for a constructive total loss is terminated by the restoration of the property. Moreover, it may be argued that the provision of sect. 62, sub-sect. 6 (*x*), that the acceptance of the notice of abandonment conclusively admits liability for the loss, contemplates that the right to recover for the loss may, in the absence of such acceptance, be defeated by a change of circumstances. Sect. 91, sub-sect. 2 of the Act declares that the rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance. Therefore it is also a tenable view that the law merchant must still determine the question whether or not the right to recover for the loss (the notice of abandonment having been justified at the time when it was given) depends on the state of things at the time of action brought. If this be the correct view, the former English doctrine will still prevail here, and the rule which exists on the Continent and in the United States, if it has hitherto also been the law of Scotland, will continue to be so.

The doctrine of constructive total loss varies, as applied to the different subjects of insurance.

1098. If, from the general doctrine of constructive total loss, we pass to an examination of the cases, we shall find some apparent confusion in the decisions, arising principally from a want of properly distinguishing the different effects of the doctrine of constructive total loss, as applied to the

(*u*) There is some slight authority for the view that in case of an actual total loss by capture, the restoration of the property before action will convert the loss into a partial loss: see Goldsmid *v.* Gillies (1813), 4 Taunt. 803, *ante*, § 1051; but that decision cannot be regarded as a satisfactory one.

(*x*) *Ante*, § 1091. See *post*, § 1199.

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different subjects of insurance. In order to avoid, as far as possible, this confusion, we will consider separately the cases of constructive total loss on the three main subjects of insurance—Ships, Goods and Freight.

The difficulty, it will be seen, relates not so much to the grounds of abandonment in the abstract, *i.e.*, to the kind of casualties which give the right to abandon (*y*), as to the application of general principles to the varying circumstances of each particular case, which must be the apology for a more lengthened citation of authorities than would be requisite under a more scientific and methodical system of law.

Constructive total loss on ship—in cases of capture, arrest, seizure, desertion at sea, &c.

1099. The best general statement of the circumstances which confer on the assured on ship a *primâ facie* right to give notice of abandonment (*z*) is contained in the following passage from the judgment of Story, J., in the American case of Peele *v.* The Merchants' Insurance Company (*a*): "The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owners of the ship, as in cases of capture, &c.; where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes, blockades, and arrests; where there is a present total loss of the physical possession and use of the ship, as in cases of submersion; where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens; where the injury is so extensive, that by

(*y*) The grounds of abandonment (*i.e.*, cases of constructive total loss) contained in the following enumeration taken from the Code de Commerce, are all, excepting the last, admitted to be such in our law:—1. Capture; 2. Shipwreck; 3. Stranding, where the ship's timbers are broken (*échouement avec bris*); 4. Innavigability, produced by perils of the seas; 5. Detention by a foreign power; 6. Or by the home government; 7. Loss or deterioration when amounting to three-fourths of the value of the thing insured.

(*z*) The law on this point is now contained in the Mar. Ins. Act, 1906, s. 60, sub-s. 2, *ante*, § 1091.

(*a*) (1822), 3 Mason, R. 27, cited 2 Phillips, s. 1519.

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the reason of it the ship is useless, and the making repairs would exceed her value."

Capture, *primâ facie*, confers the right of giving immediate notice of abandonment.

We will consider the different cases somewhat in the above order. First, therefore, the assured on the ship has a right to give notice of abandonment immediately he hears that his ship has been forcibly taken out of his possession and control by capture; for from the moment of capture he is deprived of the free disposal of his vessel—at all events for a time, and perhaps for ever (*b*). "The ship," as Lord Mansfield says, "is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy" (*c*). Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right to give notice of abandonment; and he may insist on such notice, and recover as for a total loss, "provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action" (*d*).

But restoration before action determines the right.

If, however, before action brought, the ship be recaptured and restored to the possession or control of her owners, either in an undamaged or only partially damaged state, the assured cannot insist on his notice of abandonment and recover as for a total loss, even though the loss was total at the time he gave such notice (*e*).

The principle of the English law in fact is, as we have already seen, "that the nature of the damnification at the time of action brought is the sole criterion of the right to recover as for a total loss" (*f*).

Hamilton *v.* Mendes.

1100. The following case affords an illustration of this principle:—

Insurance was effected on ship and goods on a voyage from

(*b*) 2 Emerigon, 212.

(*c*) In 2 Burr. 694.

(*d*) Per Lord Mansfield in Hamilton *v.* Mendes (1761), 2 Burr. 1212. See, however, *ante*, § 1097a.

(*e*) See cases cited in Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135.

(*f*) Per Lord Ellenborough in 4 M. & S. 583. See, however, Lord Halsbury's limitation on this principle in Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. 593; and as to the possible alteration of the law on this point by the Mar. Ins. Act, 1906, see *ante*, § 1097a.

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Even where the notice was warranted by the supposed state of facts.

In this case, it will be observed, the assured was aware of the ship's recapture and restoration at the time he gave notice of abandonment, so that neither the supposed nor the real state of facts was such as to justify the notice of abandonment at the time it was made; but even though the supposed state of facts was such as to justify the notice when given—that is, although the assured had at that time only heard of the capture and not of the recapture—yet the subsequent recapture and restoration of the ship in a comparatively undamaged state, if before action brought, will equally prevent the assured from recovering as for a total loss (*i*).

1101. The following are the facts of the case by which this point was first established:—

Bainbridge v. Neilson.

Insurance was effected on ship and freight for a homeward

(*g*) Hamilton *v.* Mendes (1761), 2 Burr. 1198.

(*h*) 2 Burr. 1210.

(*i*) Bainbridge *v.* Neilson (1808), 10 East, 329; Parsons *v.* Scott (1810), 2 Taunt. 363; Naylor *v.* Taylor (1829), 9 B. & Cr. 718. See, however, *ante*, § 1097a.

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Or by the real state of facts.

1102. Subsequently the Courts, notwithstanding the doubts of Lord Eldon in Smith *v.* Robertson (*l*), gave a still further extension to the doctrine, and conclusively established that even where the real state of facts was such as to justify an abandonment at the time of giving notice, yet subsequent restoration before action brought would defeat the claim for a total loss (*m*). In the earliest case, goods insured for a voyage from Liverpool to Quebec were captured with the ship on the 27th September, and not recaptured till the 27th October; in the interim, on the 13th of October, the assured, who then first heard of the capture, gave notice of abandonment, which the underwriters refused to accept. Ultimately, and before action brought, the ship, with the goods on board,

Patterson v. Ritchie.

(*k*) Bainbridge *v.* Neilson (1808), 10 East, 329; see also *S. P.*, Naylor *v.* Taylor (1829), 9 B. & Cr. 718; 4 M. & Ryl. 526; *S. C.* at N. P., Dans. & Ll. 240.

(*l*) (1814), 2 Dow, 474.

(*m*) Patterson *v.* Ritchie (1815), 4 M. & S. 393; Brotherston *v.* Barber (1816), 5 M. & S. 418, confirmed in Naylor *v.* Taylor (1829), 9 B. & Cr. 724; see also Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135, where the earlier cases on this subject are all reviewed by Collins, J. But see *ante*, § 1097a.

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arrived at Quebec and earned freight. The Court held, on the above principle, that the assured could only recover for an average loss, to the extent of the sea-damage and salvage charges on the goods (*n*).

Effect of restoration may be nullified by the condition of the ship.

1103. But as capture, though *primâ facie* a total loss, does not necessarily amount thereto, so neither does recapture or restoration of the ship before action brought necessarily prevent the loss from being total. If the ship after the recapture comes to the hands of the owner, and remains at the time of bringing the action in such a state that, even if no notice of abandonment had been previously given, yet the assured might at that moment have abandoned, he may recover as for a total loss, notwithstanding the existence of her mere hull.

As far as concerns the ship, therefore, the question in all cases of capture (or other forcible privation), followed by restoration before action brought, comes to this: was the state of the ship after restoration, and at the time of commencing the action, such that the assured might at that time have treated the case as one of constructive total loss? If so, then he is entitled, notwithstanding such restoration, either to follow up a previous notice of abandonment, or, if he hears of the loss and restoration at one and the same time, then first to give one, and in either case to recover as for a total loss.

Loss of the voyage.

1104. The main difficulty has arisen in determining for that purpose in what state the restored ship must be. Lord Mansfield, in the decision of this point, gave great weight to a circumstance which, it is now settled, must be altogether

(*n*) Patterson *v.* Ritchie (1815), 4 M. & S. 393; and see the passage from Lord Tenterden's judgment in Naylor *v.* Taylor (1829), 9 B. & Cr. 724, already cited, approving and confirming the rule of Bainbridge *v.* Neilson. In Brotherston *v.* Barber, Bayley, J., seemed even to think it an open point whether the assured could recover as for a total loss, "if the loss, continuing total at time of action brought, became a partial loss only at the time of the trial." 5 M. & S. 424. As to this, see Ruys *v.* Royal Exch. Corp., [1897] 2 Q. B. 135.

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left out of consideration in determining whether the loss on the ship is or is not constructively total—viz., whether, in consequence of the casualty, there had or had not been a loss of the voyage (*o*). That is a phrase of very pertinent meaning in relation to wager policies, which were no other than wagers in the form of policies on the issue or success of the voyage (*p*). In Pole *v.* Fitzgerald, a case upon an interest policy, this point was raised, and Willes, C. J., delivering the judgment of the Court of Error, then for the first time laid it down that in all policies on ship (not being wagers) the insurance is not on the voyage, but on the ship for the voyage, and that in all cases of loss under such policy the question never is, what damage has the assured sustained by the interruption of the voyage?—but, how much damage is done to the ship? This decision was affirmed in the House of Lords (*q*), but Lord Mansfield, notwithstanding, adhered through a long series of decisions to the loss of the voyage as a test of the loss of the ship (*r*). Through the whole time that he presided in the King's Bench, and indeed long afterwards, this seems to have continued to be the recognized doctrine of the Courts (*s*). One of the first cases in which

(*o*) Cf. Hamilton *v.* Mendes (1761), 2 Burr. 1209. "It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total. *If the voyage is absolutely lost or not worth pursuing* —if the salvage is very high—if further expense is necessary—if the insurer will not engage, in all events, to bear that expense, though it should exceed the value or fail of success;—under these and many other like circumstances the assured may disentangle himself and abandon, notwithstanding there has been a recapture."

(*p*) Depaba *v.* Ludlow (1721), Comyn, R. 360; Pond *v.* King (1747), 1 Wils. 191; Dean *v.* Dicker (1746), 2 Str. 1250; Whitehead *v.* Bance (1749), 1 Park, Ins. 165. The cases of Assieviedo *v.* Cambridge (1712), 10 Mod. 77, and Spencer *v.* Franco, before Lord Hardwicke, 1735, seem *contra;* but the former was never decided, and the latter turned mainly on another point. See these cases commented on by Lord Mansfield, 2 Burr. 695.

(*q*) Pole *v.* Fitzgerald (1752), Willes, 641; affirmed in the House of Lords. See *S. C.*, Fitzgerald *v.* Pole, 5 Brown, P. C. 131.

(*r*) Goss *v.* Withers (1758), 2 Burr. 683; Hamilton *v.* Mendes (1761), *ibid.* 1198; Milles *v.* Fletcher (1779), 1 Dougl. 231*a*.

(*s*) See Cazalet *v.* St. Barbe (1786), 1 T. R. 187, in which Buller, J., says, "If either the ship or the voyage be lost, that is a total loss."

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there was a return to the doctrine of the House of Lords in Fitzgerald *v.* Pole was that of Parsons *v.* Scott (*t*), which came before the Court of Common Pleas in 1810; and four years afterwards the case of Falkner *v.* Ritchie was decided in the same way by the Court of King's Bench, then presided over by Lord Ellenborough (*u*). From this period, the law on the point may be considered as settled. The loss of the voyage has nothing to do with the loss of the ship (*x*).

The same principle has received abundant judicial illustration, and may be regarded as conclusively established, in the insurance law of the United States (*y*).

Under what circumstances will restoration nullify a notice of abandonment?

1105. But although it is thus established that loss of voyage has nothing to do with loss of ship, it is equally certain that the mere restitution of the ship's hull before action brought is not, *per se*, sufficient to defeat a notice of abandonment once rightfully made, and reduce a total to an average loss. "No cases say that the bare restitution of the hull of the ship prevents the loss from being total" (*z*). "The ship, after the recapture, must be *in esse* in the country of the owner under such circumstances that he may, if he pleases, take possession of her, and may reasonably be expected to do so" (*a*).

M'Iver *v.* Henderson.

A ship, insured from Liverpool to the African coast, was

So, again, in Rotch *v.* Edie (1795), 6 T. R. 413 (*temp.* Lord Kenyon), in a case of abandonment on detention, the same doctrine was held, viz., that it was a total loss on ship, because the voyage was lost, and the whole adventure frustrated.

(*t*) Parsons *v.* Scott (1810), 2 Taunt. 363.

(*u*) Falkner *v.* Ritchie (1814), 2 M. & S. 290; and by Lord Eldon in Brown *v.* Smith (1813), 1 Dow, P. C. 349; by Lord Tenterden in Doyle *v.* Dallas (1831), 1 Mood. & Rob. 55.

(*x*) See Naylor *v.* Taylor (1829), in Danson & Ll., and note, 248, 254.

(*y*) Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 400; Hurtin *v.* Phœnix Ins. Co. (1806), 1 Washington, C. C. R. 400; Alexander *v.* Baltimore Ins. Co. (1808), 4 Cranch, S. C. R. 370; 2 Phillips, Ins. ss. 1521, 1522, 1523.

(*z*) Lord Mansfield in Milles *v.* Fletcher (1779), 1 Dougl. 232.

(*a*) Bayley, J., in Holdsworth *v.* Wise (1828), 7 B. & Cr. 799; afterwards per Lord Campbell in Lozano *v.* Janson (1859), 28 L. J. Q. B. 343; 2 E. & E. 160; and in Dean *v.* Hornby (1854), 3 E. & B. 190.

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captured by the French, and carried in a dismantled condition to Fayal. She was there claimed as prize, but the Prize Court of Fayal decided in favour of the assured, subject to an appeal, pending which, the master obtained the release of the ship and arrived with her at Liverpool before action brought. The ship, at Liverpool, was still in an entirely dismantled condition, but was worth to be sold as she lay 1,300*l.* The expense of bringing her from Fayal had been 221*l.*; the sum left there to abide the event of the appeal was 427*l.*; and, in the event of its being decided against the assured, he would have lost his deposit and been condemned besides in damages to a much larger amount. Under these circumstances the assured, who had given notice of abandonment on first hearing of the capture and before the ship's liberation, insisted on his right to recover, in respect of such notice, as for a total loss; and the Court of King's Bench gave judgment in his favour (*b*).

Lord Ellenborough said: "The mere restitution of the hull, if the plaintiff may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. If no abandonment had been already made, do not sufficient circumstances exist in this case to warrant an original abandonment at the present moment? . . . It appears to us that there existed at the time of the abandonment, at the time of action brought, and that there continue to exist at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss" (*c*).

(*b*) M'Iver *v.* Henderson (1816), 4 M. & S. 576.

(*c*) Lord Ellenborough, indeed, in the course of his judgment, referred to other considerations, which, as pointed out in Dans. & Ll. 252, show that his Lordship had not quite "purified his mind of the generalities" that he reprobates in Falkner *v.* Ritchie. Thus, in stating the condition of the ship at time of action brought, he says, *inter alia*, "The voyage is lost, the cargo which was to be conveyed in the ship is wholly gone": and in another part of his judgment he dwells on the fact that "the voyage was completely lost" (see 4 M. & S. 584, 585)—circumstances which he had previously admitted could have nothing to do with the loss of the ship.

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Brown v. Smith. Mutinous seizure by crew.

1106. A slave ship was, in the course of her voyage, mutinously seized and run away with by her crew, but subsequently boarded and taken possession of by a British man-of-war and brought into Barbadoes. The government agent there, in the absence of the master and without waiting for orders from England, sold the whole of the cargo and stores that still remained on board the ship, in order to pay the salvage, leaving nothing but the hull and rigging. The House of Lords held that, under these circumstances, the assured (who, immediately on hearing these facts, had given notice of abandonment and sent out orders to sell the ship), was entitled to recover as for a total loss (*d*).

Nothing is said in this case as to the state of the ship, and the decision probably proceeded on the ground that there had been no restoration of the ship to the country of the owners, within the terms of Bayley, J.'s, judgment in the following case:—

Holdsworth v. Wise.

A ship, insured from British America to the United Kingdom, received so much damage from tempestuous gales that the crew abandoned her and went on board of another vessel. Immediately on receiving this intelligence the plaintiff gave notice of abandonment. The day after the crew had left her, the vessel was picked up at sea by a third vessel, and brought into New York, where, with the sanction of the British consul, but without any authority from the assured, she was repaired on bottomry by the agents for Lloyd's in that city. The ship was then brought over to Liverpool before action brought, but was immediately taken possession of on behalf of the lenders on bottomry for 1,200*l*., there being besides an additional charge of 850*l*. on her for the estimated cost of repairing further damage received in the Mersey just before reaching Liverpool. The joint amount of these two sums exceeded the value in the policy. Under these circumstances the Court held that the loss which had once been total by the

(*d*) Brown *v.* Smith (1813), 1 Dow, P. C. 349. Lord Eldon gave judgment. See Dean *v.* Hornby (1854), 3 E. & B. 180; 23 L. J. Q. B. 129.

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desertion of the crew, and in respect of which the assured had given due notice of abandonment, was not turned into a partial loss by the subsequent events, the effect of which could be of no benefit to the assured (*e*).

In this case it is important to observe that the repairs abroad for which his ship was bottomried had been done by strangers, without the authority of the assured. Had they been done by his direction, or by the master acting as his agent at the foreign port, then the fact of the ship's arrival would, as it seems, have precluded a recovery for a total loss, though the amount of the bottomry bond and expenses had together exceeded the worth of the ship to her owners as restored (*f*).

There must have been a total deprivation in order to justify a notice of abandonment.

1107. It must, however, be carefully borne in mind that in order to give the assured even a *primâ facie* right to abandon in respect of capture, seizure, desertion, or other privation of property or possession, whether forcible or not, there must have been, at some one period of time during the risk, a total loss by the complete and actual privation of the owner's possession or control over the ship. If the legal possession of the ship by the owner have never been put an end to by the casualty in respect of which he abandons, he can never recover as for a total loss.

The ship "William," of New York, insured in this country for a voyage from Hull to New York, met with such tempestuous weather, and became so leaky, that the crew, exhausted by working the pumps, deserted her at sea as the only possible means of saving their lives, and were taken on board

(*e*) Holdsworth *v.* Wise (1828), 7 B. & Cr. 794; *S. C.*, 1 M. & Ryl. 673; see also Dean *v.* Hornby (1854), 3 E. & B. 180; 23 L. J. Q. B. 129, a case of capture, recapture and sale abroad by the prize master, in which notice of abandonment having been given on capture, the loss was held total, notwithstanding ship's arrival in England and decree by Admiralty to owners. And cf. Shepherd *v.* Henderson (1881), 7 App. Cas. at p. 71.

(*f*) Chapman *v.* Benson (1847), 5 C. B. 330; 2 H. L. Cas. 696; Fleming *v.* Smith (1848), 1 H. L. Cas. 513, 533. Cf. Rosetto *v.* Gurney (1851), 11 C. B. at p. 188.

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the brig "Hyder Ali." At the same time eight men of the "Hyder Ali's" crew were allowed to board the "William" in the hopes of ultimately bringing her into port and earning salvage. The "Hyder Ali" reached New York in safety, and the owners of the "William," who resided there, immediately gave notice of abandonment to the underwriters. Meanwhile, only two days after the "Hyder Ali's" arrival at New York, the "William" was brought, by the eight seamen who had boarded her, into Newport, Rhode Island (a harbour about two hundred miles off), and there, with the knowledge of her owners, was sold to pay the salvage, which amounted to about two-thirds of the price she sold for. The Court, on the whole of the above circumstances, held that the assured could not insist on their notice of abandonment and recover as for a total loss. For, first, the ship had never effectually been lost to the assured at all, their right of possession and control over her never having in fact ceased; for the eight seamen who boarded her as salvors must be regarded as their agents (*g*), and they had taken possession of her directly she was left by the original crew. Secondly, the ship was restored to her owners, after notice of abandonment, under such circumstances that they might have had possession of her again if they pleased, and might reasonably have been expected to take it; and they could not entitle themselves to recover as for a total loss by permitting the salvors to have recourse to a sale which, not being necessary, was not justifiable (*h*).

Lozano *v.* Janson.

On the other hand, in Lozano *v.* Janson, the ship while on the coast of Africa was seized by a British cruiser, carried to St. Helena, and there condemned by the Vice-Admiralty Court for being engaged in the slave trade. The cargo, which was the subject of insurance, was also condemned, unloaded, and stored in St. Helena, to abide the results of an appeal to the Privy Council. The taking was unlawful, the

(*g*) It is doubtful, however, whether this ground for the decision could be now supported. See Aitchison *v.* Lohre (1879), 4 App. Cas. 755.

(*h*) Thorneley *v.* Hebson (1819), 2 B. & Ald. 513.

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charge being unfounded. But the assured, who had abandoned within proper time, were held entitled to recover, as their property, though in existence, never after had been placed "under such circumstances that if they pleased they might have had possession, and might reasonably have been expected to take possession of it" (*i*).

Arrest, detention, or embargo.

1108. Subject to the same limitations, there can be no doubt that arrest, detention, or embargo of the ship, whether by a hostile or friendly government, gives a *primâ facie* right of abandonment in all cases where there is an apparent probability that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo, may be of long or, at all events, of very uncertain continuance (*k*).

Rotch *v.* Edie.

Thus, where the ships of an American merchant, resident at time of action brought in this country, had been seized and detained by the French government in their port of loading, it was held that under a policy, at and from such port, he might recover as for a total loss, upon due notice of abandonment, more especially as it appeared that the ships, at the time of action brought, were still detained and had then been so for three years (*l*).

If the arrest be only of very short duration, it is no ground for abandonment.

Of course, if the arrest creates only a temporary obstruction of the voyage without giving rise to any permanent loss of control over the ship, it cannot give any right to abandon. Thus where, on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship laden with corn, carried her into Corfu, and after taking out and paying for the corn let the ship go free, this was decided in the Rota Court of Genoa to give no ground of abandonment

(*i*) Lozano *v.* Janson (1859), 2 E. & E. 160; 28 L. J. Q. B. 337.

(*k*) According to the Mar. Ins. Act, 1906, s. 60, sub-s. 2 (1), *ante*, § 1041, there is a constructive total loss where . . . "it is unlikely" that the assured "can recover the ship." The words "within a reasonable time" should probably be implied. See per Pickford, J., Polurrian SS. Co. *v.* Young, *infra*.

(*l*) Rotch *v.* Edie (1795), 6 T. R. 413.

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to the assured on ship (*m*). So where a British ship was detained eleven days by a British man-of-war, to prevent her proceeding to a port where an embargo was laid on all British vessels, it was held that the assured on ship could not abandon on this ground (*n*). And where, during the war of 1912 between Turkey and Greece, a British vessel was seized by the Greeks and detained for six weeks, nominally for adjudication by a Prize Court, and then released, the Court of Appeal, affirming Pickford, J., held that a notice of abandonment was invalid, on the ground that her owners had failed to show any balance of probability that the ship would not be recovered by her owners in a reasonable time (*o*). It was laid down in this case that the Marine Insurance Act, by substituting the test of "unlikelihood" for "uncertainty" of recovery had altered the law to the detriment of an assured claiming for a constructive total loss.

Foreign law.

1109. In France the assured is allowed to give notice of abandonment immediately after capture; but in case of detention by arrest or embargo he is obliged to wait before doing so for different periods fixed by the 387th Article of the Code de Commerce. By the German Code (*p*) periods of six, nine and twelve months are fixed, after which abandonment may be made; but notice of abandonment must be given before the expiration of the respective periods. The Italian Code has similar regulations (*q*). In this country no such period is fixed.

Fowler *v.* Eng. and Scot. Mar. Ins. Co.

To avoid any question as to when notice should be given, and to avoid the expense of litigation whilst the intelligence is uncertain or the loss transitory, seems to have been the intention of the parties to the policy in the following case.

(*m*) Roccus, No. 60, cited 1 Emerigon, c. xii. s. 30, p. 527; and see Boulay-Paty, Com. vol. ii. p. 219.

(*n*) Forster *v.* Christie (1809), 11 East, 205.

(*o*) Polurrian SS. Co. *v.* Young (1913), 19 Com. Cas. 143; [1915] 1 K. B. 922 (C. A.).

(*p*) Arts. 865, 868.

(*q*) Di Commercio, arts. 485, 486.

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A Prussian ship from Riga to London, whilst war was imminent between Denmark and the German powers, was insured against capture, seizure, or detention, or the consequences thereof—"to pay a total loss thirty days after receipt of official news of the embargo or capture without waiting for condemnation." She was forced into Elsinore for repairs, and whilst there the Danish government laid an embargo on Prussian shipping, on the 3rd of February. On the 4th "official news" of the facts reached London, so that the thirty days expired on the 6th of March. Notice of abandonment was given on the 5th of February. On the 13th of March the embargo was raised and the ship restored. It was held, though no action had been brought before 13th of March, that the insurer had expressly bound himself to pay on the expiration of the thirty days if the ship were not then restored (*r*).

Effect of repurchase of ship by the master.

1110. In some of these cases of capture, seizure, and arrest a question has been raised as to the effect of a repurchase of the ship by the master, upon the right of the assured to recover as for a total loss. And the doctrine here appears to be that where the property in the ship has never been devested out of the owners by lawful condemnation (*s*), and the ship, after being legally repurchased by the master acting *bonâ fide* and justifiably for their benefit, is brought back to this country under such circumstances that the owners may if they please take possession of her on payment of the amount of repurchase money, and of any sums that may have been expended abroad in repairing her, they cannot, by refusing to do so, entitle themselves to recover as for a total loss—at all events, in cases where they have given no notice of abandonment, nor even, as it should seem, where they have.

(*r*) Fowler *v.* English and Scottish Mar. Ins. Co. (1865), 18 C. B. N. S. 919; 34 L. J. C. P. 253.

(*s*) Where there has been a lawful condemnation it appears that there would be an actual total loss, which would not be affected by any repurchase by the master. Notice of abandonment would, therefore, be unnecessary. See *ante*, § 1051. Maclachlan, however (6th ed. p. 1043), seems to have taken a different view.

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M'Masters v. Schoolbred.

Thus where a ship, after a condemnation in a neutral port (which, being illegal, effected no change in the property), was lawfully repurchased by the master on account of the owners, and, after being repaired abroad, brought back by him to this country before the commencement of the action, Lord Kenyon held that the plaintiff, who refused to pay the amount of the repurchase money and the costs of the repairs abroad, could not thereby entitle himself to recover a total loss—at all events, as he had given no notice of abandonment—but that he had only a right to recover an average loss to the amount of the sum spent in the repairs and repurchase (*u*).

Doctrine in the United States.

Several cases have been decided in the United States as to the effect of such repurchase where notice of abandonment has been given before the sale in fact took place; the result of which appears to be, that the master in repurchasing is to be regarded as the agent of the owners before notice of abandonment, and after it as the agent of the underwriters (*x*).

Cases of innavigability:

1111. Where the ship is totally wrecked in the course of the voyage—*i.e.*, completely broken up by the perils insured against, so that her hull is dismembered and her planks and timbers scattered on the sea—this, as we have already seen, gives the assured a right to recover as for a total loss without notice of abandonment, and *à fortiori* would entitle him so to recover where notice of abandonment has actually been given. The case is the same where, although the ship's timbers hold together so that she retains the shape of her hull, she is yet so shattered as to be reduced to a mere mass of materials, or "congeries of planks," so that she would require reconstruction rather than repair to make her a sea-going ship again (*y*).

Where the ship is wrecked in pieces, or reduced to a mere congeries of planks, an absolute total loss.

(*u*) M'Masters *v.* Schoolbred (1795), 1 Esp. 237. See also Wilson *v.* Forster (1815), 6 Taunt. 25; 1 Marsh. R. 425. The latter report is the better.

(*x*) See 2 Phillips, Ins. ss. 1580, 1591.

(*y*) Cambridge *v.* Anderton (1824), 2 B. & Cr. 691; Allen *v.* Sugrue (1828), 8 B. & Cr. 561. See *ante*, § 1054. The law is the same in France: 4 Boulay-Paty, Droit Mar. p. 231. By art. 369 of the Code de Commerce, abandonment of the subject-matter insured may be made in case of damage amounting to three-fourths of its value. As to the American rule, see *infra*, § 1117.

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Where wrecked or stranded without such utter disability, only a constructive total loss.

There are, however, other cases: a ship may be stranded or driven ashore without this extreme amount of absolute disability being at once produced, and yet under circumstances which make the chances of her being ultimately extricated from the peril at all exceedingly precarious, or the probable expense of so extricating and repairing her as to be able to keep the sea, as a ship, greater than would be justified by her estimated value when repaired. The provisions of the Marine Insurance Act, 1906, applicable to such circumstances provide that there is a constructive total loss "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred" (*z*), and (in the case of damage to a ship) "where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired" (*a*).

1112. Considerable difficulty has been experienced in discovering a practical test by which to ascertain when the assured on ship in such cases shall be entitled to recover as for a constructive total loss. The point, however, in our own law was considered by Arnould (*b*) as fixed with tolerable certainty by a long course of judicial decisions, the result of which he expressed as follows:—

Principles of constructive total loss in such cases.

First; if, by the perils of the seas, the ship be so damaged as to be incapable of proceeding on her voyage or keeping the sea without repairs, at a place where such repairs cannot be procured—either from want of materials or from the master's total inability, after using his best exertions, to

(*z*) Sect. 60, sub-sect. (1), *ante*, § 1091.

(*a*) Sect. 60, sub-sect. (2) (ii), *ante*, § 1091.

(*b*) 2nd ed. p. 1089.

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obtain either money or credit for the purpose of raising funds to repair—that is a case of constructive total loss on ship.

Secondly; the case is the same when the ship, by the like perils, is driven ashore, or otherwise placed in a position of imminent hazard, and by reason of the casualty reduced to such a state of innavigability that a prudent owner, if uninsured and on the spot, would, in the exercise of the best and soundest judgment that could be formed under the circumstances, rather sell her as she lay than attempt to repair her—either because there is no reasonable probability of her ever being delivered from the peril at all or because the expense of repairing her, so as to be capable of keeping the sea as a ship again, would exceed her value when repaired.

Old rule as to effect of sale by master.

1113. In many of the old cases, the question as to the right of the assured on ship, in respect of such casualties, to recover as for a total loss will be found to have arisen after the exercise by the master of the power which the law gave him in cases of extreme emergency to sell or otherwise dispose of the ship, for the benefit of all concerned. In such cases this question was very generally made to turn on the point whether the sale by the master was or was not justified by the urgent necessity of the case, it being considered that, wherever the circumstances were such as to justify the master in selling, there was a total loss in respect of which the assured might recover from his underwriters.

It is hardly necessary to enter into an elaborate discussion as to whether this view of the law was strictly accurate. In the twentieth century, owing to the perfection of the telegraph system, circumstances will rarely arise such as to justify a sale by the master without instructions from those directly interested. And while considering the old cases, it must be remembered that a total loss was never constituted by the mere fact of sale, but by the state to which the ship was reduced prior to the sale by perils insured against (*c*). In

(*c*) "There is no such head of insurance law as loss by sale": per Bayley, B., in Gardner *v.* Salvador (1831), 1 Mood. & Rob. 117; or, as

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reality the utmost effect of a sale, according to these principles, was probably nothing more than to convert what prior to the sale was a constructive total loss into an absolute total loss, so as to relieve the assured from the necessity of giving notice of abandonment.

Where sale necessitated by want of men or materials for repairing.

1114. Bearing these principles in mind, we proceed to refer shortly to the authorities as to the right of the assured to recover as for a total loss in respect of the innavigability of the ship, under Arnould's two headings. As regards cases falling under the first heading, Valin says, "that the assured on ship has a clear right to abandon if, in the place where the ship goes ashore, or in its neighbourhood, there are neither materials nor workmen for the repairs": "the same right," he says, "also attaches where, though materials and workmen can be found, yet the master has no means of raising funds to pay for the repairs" (*d*).

"If the master," says Tindal, C. J., "has no means of getting the repairs done in the place where the injury occurs, or if, being in a place where they might be done, he has no money in his possession and is not able to raise any, then he is justified in selling, as the best thing that can be done" (*e*); and the learned Judge intimated that under such circumstances there would be a total loss.

Phillips expressed it: "The assured abandons not because the sale has given the right, but because the events which induced the sale had occasioned a total loss." Ins. s. 1571. Arnould, in the corresponding passage (2nd ed. p. 1090), and indeed elsewhere in his chapter on constructive total loss, uses language implying that a vessel after sale may still be only a constructive total loss. If, however, it be true to say that a constructive total loss is a total loss which requires notice of abandonment, then, inasmuch as notice of abandonment is never requisite where nothing can pass thereby to the underwriter (see Mar. Ins. Act, 1906, s. 62, sub-s. (7), *ante*, § 1091), it cannot be correct to consider the loss after sale as constructive merely. See *ante*, §§ 1055—1058.

(*d*) 2 Valin, Ord. Mar. 345—347; Pothier, No. 120, pp. 181—185, ed. 1810; 4 Boulay-Paty, Droit Mar. 278.

(*e*) In Somes *v.* Sugrue, 4 C. & P. at p. 283.

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Where sale due to want of funds or credit, so as to effect repairs.

1115. It may be doubted whether a real physical unprocurability of either men or materials is in practice ever likely to arise in the future (*f*). It is likewise doubtful whether cases will occur in future, where impossibility of repairing arises merely from the inability of the master to obtain funds or credit. Most, if not all, places of sufficient importance to contain supplies of men and materials for repairing are now probably in telegraphic communication with the ship's home port, whence instructions and credit can usually be obtained. And even if such a case were now to occur, it would be at least possible to contend that the total loss would not be due to any peril insured against, but to the impecuniosity or want of credit of the master (*g*), which is not a risk covered by insurance. And even if the master were to sell the vessel as the best course to adopt under the circumstances, it must be remembered that such a sale might be justifiable as between him and his employers, but would not necessarily have any effect as against the underwriters. We have already seen that there is no such thing in insurance law as a loss by sale. In order to recover for a total loss, the owners would have to show that the vessel was, prior to the sale, a constructive total loss.

Where great risk of loss before funds obtainable.

1116. On the whole, however, Arnould was probably correct in coming to the conclusion that, under certain circumstances, a loss which would otherwise have been partial only, might, owing to the impossibility of obtaining funds or credit for repairs, be converted into a total loss. It is conceived, however, that the position could only arise where a vessel, having been rendered innavigable by perils of the sea, was in danger

(*f*) A physical impossibility of repairing might, however, arise owing to the absence of a proper dry dock or repairing yard. In this case there would be, according to Willes, J., an actual and not merely a constructive total loss. See Barker *v.* Janson (1868), L. R. 3 C. P. at p. 305. So, too, Lowndes, Mar. Ins. s. 134.

(*g*) Some authority for this view may perhaps be derived from the cases of Tanner *v.* Bennett (1825), Ry. & Mood. 182; and Powell *v.* Gudgeon (1816), 5 M. & S. 431. See also Sarquy *v.* Hobson (1823), 3 D. & R. 192; (Exch. Ch.), 4 Bing. 131.

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of becoming a total loss, and where the captain was not able to raise funds for repairs sufficient to prevent this happening, and it would take so long to obtain funds from his owners, or in any other practical way, as to expose the vessel to considerable risk of total destruction in the meanwhile.

Arnould's opinion seems to be borne out not only by the eminent foreign text writers whom we have already cited, but also by certain English authorities, the clearest of which is, perhaps, the direction of Tindal, C. J., to the jury in the case of Somes *v.* Sugrue (*h*). The case of Read *v.* Bonham (*i*) is to the same effect, and the judgment of the Privy Council in Cobequid *v.* Barteaux quotes a passage from Arnould containing his view on this point with general approval (*k*).

In the United States the law has been undoubtedly established in accordance with Arnould's view (*l*). It is well, however, to observe that there are many respects in which the American law as to constructive total loss of ship clearly differs from that of this country. The doctrine of "loss of voyage," in particular, has obviously entered into some at least of the American decisions on this point, but that doctrine, as we have seen, is not accepted here.

Where there is no reasonable hope of extricating the ship at all, or where the estimated cost of repairs will exceed the ship's

1117. To deal with cases under Arnould's second heading, it was established by the earlier cases that where the ship, by the perils insured against, is reduced to such a state of innavigability that a prudent owner, if on the spot and uninsured, in the exercise of the best and soundest judgment that could be formed under the circumstances, and acting for

(*h*) (1831), 4 C. & P. 276, cited *ante*, s. 1114.

(*i*) (1821), 3 Brod. & B. 147. See, especially, per Park, J.: "A case of stronger necessity to justify the sale of a ship has seldom been made out. The captain could not procure money for repairs, and it was not to be expected he should let the ship rot."

(*k*) (1875), L. R. 6 P. C. at p. 324. See also The Fanny and Elmira (1809), 1 Edw. 117, per Lord Stowell.

(*l*) 2 Parsons (1868), p. 127; 2 Phillips, s. 1537; Ruckman *v.* Merchants' Louisville Ins. Co. (1856), 5 Duer, 342; American Ins. Co. *v.* Ogden (1836), 15 Wend. 532—both decisions of the Supreme Court of New York.

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value when repaired, the master will be justified in selling, and the assured may recover as for a total loss.

the benefit of all concerned, would rather sell her as she lies than attempt to extricate or repair her—either because there is no reasonable chance of ever extricating her from the peril at all, or because the cost of repairing her so as to make her a navigable ship again would exceed her value when repaired —this amounts to a case of urgent necessity such as to justify the master in selling, and to a case of total loss so as to entitle the assured to recover the whole amount of the insurance. Such is the doctrine derivable from the English cases (*m*).

The same doctrine was established in the United States, and was thus expressed by Story, J.: "If the circumstances were such that an owner, of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, then the sale by the master is justifiable" (*n*).

Difference in the United States.

The great difference between the doctrine in the two countries is this: that in America it is a constructive total loss whenever the cost of repairs exceeds one-half the repaired value; here it is only so when such cost exceeds the full repaired value (*o*).

(*m*) See the *dicta* of Tindal, C. J., in Somes *v.* Sugrue (1830), 4 C. & P. 276, and of Lord Tenterden, in Doyle *v.* Dallas (1831), 1 Mood. & Rob. 54, and the Mar. Ins. Act, 1906, s. 60, sub-s. (2) (ii), *ante*, § 1091. Arnould (2nd ed. p. 1095) considered that even where a justifiable sale had taken place, the case was one of constructive and not absolute total loss, so as to make a notice of abandonment necessary in order to recover. But since Rankin *v.* Potter it has been clear that where there has been a sale no notice is necessary; and see Mar. Ins. Act, 1906, s. 62, sub-s. 7, *ante*, § 1091. In this and other similar passages, Arnould's language has consequently been altered.

(*n*) Per Story, J., in The Sarah Ann (1835), 2 Sumner, 215; cited 2 Phillips, s. 1583.

(*o*) This distinction appears to have been established in America for 120 years at least. See Fuller *v.* M'Call (1795), 1 Yeates, 464; Gardiner *v.* Smith (1799), 1 Johns. 142; Macardier *v.* Chesapeake Ins. Co. (1814), 8 Cranch. 39. Carver, in a paper read in September, 1899, at the Eighteenth Conference of the International Law Association at Buffalo, U. S. A. (see Report: Clowes & Sons, 1900), considers it to

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In considering the decided cases, it will be found that in some, especially of the earlier decisions, the hopelessness of being able to extricate the ship from the peril at all has been the main ground on which the Courts seem to have relied, as justifying the sale and making the loss total; in others, and this applies generally to the later authorities, the principal test has been the cost of repairing the ship as compared with her estimated worth when repaired; in others, again, the two considerations have been blended together.

General doctrine of the right of the master to sell the ship, as stated by Parke, B., in Hunter *v.* Parker.

1118. With regard to the general right to sell the ship, as between the master and owner, the doctrine according to English law was nowhere stated with greater precision and accuracy than by Parke, B., in the case of Hunter *v.* Parker, viz.: "The master has, by virtue of his employment, not merely those powers which are necessary for the navigation of the ship, and the conduct of the adventure to a safe termination, but also a power, when such termination becomes hopeless, and no prospect remains of bringing the vessel home, to do the best for all concerned, and therefore to dispose of her for their benefit" (*p*).

be due, to some extent at least, to Park on Insurances, the first edition of which appeared in 1786. See 7th ed. p. 231; 8th ed. (1842), vol. i. p. 336. The 50 per cent. rule applies also in the United States in the case of damaged goods: see Phillips, s. 1608; Washburn Manufacturing Co. *v.* Reliance Mar. Ins. Co. (1900), 179 U. S. 1. Many of the Continental codes allow a total loss where the damage amounts to 75 per cent.; this percentage is calculated, however, on the ship's value before, and not after repairs. Carver suggests that the doctrine of constructive total loss, as distinct from that of the right of an assured to give notice of abandonment, is the result of a development of the English law. The older idea, on which the foreign codes are based, was that a great disaster, which might or might not amount or approach to a total loss, entitled an assured to pass over to his insurers the whole risk and difficulty and recover from them the whole sum insured. And Carver points out that even in this country Arnould, writing as late as 1857 (2nd ed. p. 1066; see this edition, s. 1091), did not clearly recognize the idea of constructive total loss as independent and complete in itself. In this edition, also, Arnould's language to a like effect has been in several passages retained.

(*p*) (1840), 7 M. & W. 342; treating the case of Reid *v.* Darby (1808), 10 East, 143, as overruled to this extent by subsequent autho-

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It is only necessary here to consider this principle, in so far as it is mixed up with the question of the right to recover for a total loss as between the assured and the underwriters, of which in many of the cases it is made the principal test.

Idle v. Royal Exch. Ass. Co.

A ship bound from Quebec to London encountered such furious gales and made water so rapidly that the master was forced to run her ashore in the St. Lawrence. She took the ground in the full tide-way, so as to be exposed to the whole force of the drift ice, which was floating down in large masses. The master was advised to sell her as soon as possible, as she was in imminent danger of being destroyed by the ice. Accordingly, he sold the ship as she lay, together with her rigging, stores and cargo, for about 2,060*l*. Contrary to all reasonable expectation, the ship survived the winter, and having, in the course of the next spring, been got off by the purchaser at great expense and floated up to Quebec, she was repaired there at a cost of about 550*l*.; and that same season performed a voyage to England, bringing over a full cargo and earning full freight. The plaintiff in the action, who had insured her freight and cargo, and had received information at one and the same time of the casualty and the sale, claimed a total loss on the freight without having given any notice of abandonment.

The jury at the trial found that the master had acted throughout the whole transaction fairly and *bonâ fide*, and that the sale was honestly and properly conducted with a view to the benefit of all concerned.

Judgment in Idle v. Royal Exch. Ass. Co.

1119. On motion for a new trial, it was held by the Court of Common Pleas that the master was justified in selling on the ground of urgent necessity, and that being so, that the loss was total (*q*). Dallas, C. J., said: "Here it is said that

rities. Modern facilities, however, of communicating with owners have undoubtedly affected the right of the master to take this course upon his own motion.

(*q*) Idle *v.* Royal Exch. Ass. Co. (1819), 8 Taunt. 755. It has already been shown that notice of abandonment is unnecessary where a constructive total loss is followed by a sale. See *ante*, § 1113.

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the loss arose out of the act of the owner in selling, and that the sale was not induced by any peril of the sea. This distinction seems to me to be a fallacy: the state of the ship, which led to the sale, was induced by the perils of the sea; she had incurred damage in the course of her voyage which made it necessary to run her on shore, and she was stranded at the time; there was no reason for supposing she would have been got off the rocks, but, on the contrary, every probability of her going to destruction" (*r*).

It certainly seems that in this case there existed, prior to the sale, such a state of circumstances as would now be held to constitute a constructive total loss of the ship; and if so the master would, in the absence of the means of communicating with his owners which we now possess, be justified in selling. When, however, it came up on a special verdict before the Court of King's Bench, that Court expressed a clear opinion that the necessity of the sale could not be inferred from the facts stated, and awarded a *venire de novo* for the purpose of trying whether such necessity existed (*s*).

No constructive total loss unless reasonably clear that ship cannot be extricated from position of peril, or that the cost of repairs would exceed her repaired value.

1120. By the cases we have referred to it is sufficiently clear that if there is either no reasonable chance of restoring the ship at all, or only at a cost exceeding her value when repaired, the assured may recover as for a total loss.

It must, however, carefully be borne in mind that a sale in the olden days was never justified, nor was a constructive total loss established, unless the facts were such as to make it clear beyond all reasonable doubt, either that the ship could never be extricated at all, or only at a cost greater than her repaired value; if this was not so, mere *bona fides* in the master or owner who sold would not justify the sale nor bear out the assured in his claim for a total loss.

Not a "mere measuring cast."

And with regard to the estimated cost of repairs, Tindal,

(*r*) 8 Taunt. 778.

(*s*) 3 Brod. & Bing. 151, note (*a*). See also Hunter *v.* Parker (1840), 7 M. & W. 322; Robertson *v.* Carruthers (1819), 2 Stark. 571; Robertson *v.* Clarke (1824), 1 Bing. 445; Mount *v.* Harrison (1827), 4 Bing. 388.

Sect. 1120. C. J., told the jury in Somes *v.* Sugrue, "that it must not be a mere measuring cast, not a matter of doubt and uncertainty whether the expense would or would not have exceeded the value, but it must be so preponderating an excess of expense, that no reasonable man could hesitate as to the propriety of selling under the circumstances, instead of repairing" (*t*).

So, again, with regard to the probability of ever extricating the ship at all, a total loss was not established and the sale was not justified if the master had formed a hasty judgment, or resorted to that measure without having previously exhausted all the means in his power for the recovery of the ship. Where, by means within his power, she could be so treated as to retain the character of a ship, he could not, by selling her, even *bonâ fide*, convert the average into a total loss; but the underwriters were entitled to have those means used on their account.

Doyle *v.* Dallas.

1121. The following case illustrates these positions:—The ship "Triton," having struck on an anchor in Buenos Ayres roads, sank, so as to be completely under water at high tide, but only partly so at ebb. In the course of the same day, the captain had the ship surveyed by experts, who recommended she should be sold, as the expense of raising her would probably be more than she was worth, and the plaintiff accordingly next day sold her for about 270*l*. Two days after this the purchaser managed to get the ship afloat, and he afterwards repaired her at an expense of about 1,300*l*., so as to be fit for the Brazilian coasting trade, but not for carrying on to England a cargo of hides which the plaintiff had contracted for at the time of the loss. The worth of the vessel before the accident was about 2,500*l*.; what her value was after the repairs is not clearly stated.

(*t*) 4 C. & P. 283. On the facts of this case the jury found for the defendant, but the Court granted a new trial on the ground that the verdict was against the evidence. See also, in illustration of the position in the text, Morris *v.* Robinson (1824), 3 B. & Cr. 196; Cannan *v.* Meaburn (1823), 1 Bing. 243.

Sect. 1121. On this state of facts the plaintiff claimed to recover as for a total loss: Lord Tenterden told the jury to consider whether, at the time of the sale, that measure, in the sound exercise of the best judgment, appeared most beneficial for all parties. "Now the correctness of this judgment," said his Lordship, "would depend on two circumstances: 1. The probability of being able to raise the vessel at all; and, 2. The power of repairing her, if raised, at a price rendering it worth while to do so."

The impossibility of being able to raise the ship at all, was decided on too soon.

The ship need not be so repaired as to be able to carry on her original cargo, but only so as to be able to keep the sea.

With respect to the first of these questions, his Lordship expressed the opinion that the sale took place too soon. And with regard to the second point his Lordship, after adverting to the point made by the plaintiff's counsel—viz., that after all these expenses she was still unfit to sail to England with the hides—said: "I do not think that circumstance enough to justify the sale; the underwriters do not undertake that the ship shall be able to carry this or that cargo. If the ship could have come to England, even in ballast, I think (certainly with any cargo), so that on her arrival she would have been worth the money expended on her, she ought to have been repaired for the purpose. The loss of the voyage will not, in my opinion, make a constructive total loss of the ship." The jury found a general verdict for the underwriters, which the Court refused to disturb (*u*).

The subsequent recovery and repair of the ship by the purchaser, even at a trifling cost, will not necessarily defeat the right of the assured to recover as for a total loss.

1122. In most of the older cases it will be observed that the ship, after the sale, was ultimately got off by the purchaser, and so restored by him as to be rendered navigable as a ship again. Of course, if this were done with comparatively little difficulty, and at a cost far less than her repaired value, it would be one amongst other circumstances to show the jury that the sale was not justified by necessity, and that the assured consequently could not recover as for a total loss; but, generally speaking, it may be laid down as the result of

(*u*) Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48. In this case there was no effectual notice of abandonment. Gardner *v.* Salvador (1831), 1 Mood. & Rob. 116; Domett *v.* Young (1833), 1 C. & M. 465; and Knight *v.* Faith (1850), 15 Q. B. 649, are to a similar effect.

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the cases that the jury, in considering whether the sale was justified, must look mainly (if not exclusively) to the state of the circumstances at the time of sale. "The question is not whether by possibility, if a different conduct had been pursued by the master, the ship might not eventually have been saved, but whether, exercising the best discretion he could on the subject-matter, he was not justified in selling, without entering into a nice and minute calculation" (*x*).

The same doctrine was held in the United States, and is thus stated with admirable clearness by Story, J.: "In the case of a sale of ship and cargo by the master, which can only be justified by urgent necessity, if such necessity does apparently exist at the time and on the spot, I conceive that the master will be justified, although subsequent events may show that a different course might have been attended with success" (*y*).

If the sale was otherwise justifiable, it makes no difference as to the right to recover for a total loss, whether it was by the master or owner.

It further appears from the older authorities (when the point was of importance) that, as between the assured and the underwriter, if the sale was otherwise justifiable, it made no difference whether it were conducted by the master alone, where the assured had no agent, or by the master, with the sanction and attendance of one of the part owners as agent for the rest (*z*), or even by the assured himself, being both master and owner and also plaintiff in the action (*a*), "on the broad ground," says Dallas, C. J., "of a power to act on a sudden emergency, to save as much as could be saved from impending ruin, whether it be the owner or captain will make

(*x*) Per Abbott, C. J., in Robertson *v.* Carruthers (1819), 2 Stark. 572.

(*y*) Per Story, J., in The Ship Fortitude (1838), cited 2 Phillips, s. 1524. See also, to the same effect, the remarks of Kent, C. J., in Fontaine *v.* Phœnix Ins. Co. (1814), 11 Johns. 293; cited 2 Phillips, s. 1577.

(*z*) As in Idle *v.* Royal Exch. Ass. Co. (1819), 8 Taunt. 755.

(*a*) As in Green *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 68; and in Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48. In Knight *v.* Faith (1850), 15 Q. B. 649, the sale was by the master, who was also a part owner.

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no difference, if the circumstances justified the selling and the sale was honestly and fairly conducted" (*b*).

Sale not necessary to constitute a total loss.

1123. In the cases hitherto noticed a sale, whether by the master or by the owner, who is also plaintiff in the action, had in fact taken place before notice of abandonment and claim to recover as for a total loss. It must, however, be remembered that it is not the sale itself which creates the total loss, but the ship's being reduced to such a state as to justify a sale; and it is quite certain that although no sale may have intervened, yet if the state of the ship be such as would have justified a prudent owner, if uninsured, in the exercise of a sound discretion, to sell rather than to repair, from a reasonable certainty that the cost of repairs would exceed the repaired value, this is a constructive total loss (*c*).

Rule of English law: constructive total loss where cost of repairs would exceed the repaired value.

The rule of law, in fact, is clearly settled, as stated by Tindal, C. J., "that where the damage to the ship is so great from the perils insured against, that the owner cannot put her in a state of repair necessary for pursuing the voyage insured (*d*), except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon and treat the loss as a total loss" (*e*). And to the same effect are the words of Lord Watson in a recent case in the House of Lords (*f*), as follows: "The test, as I understand it, is simply this: that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value (*g*) when raised and re-

(*b*) Per Dallas, C. J., 3 Moore, 148.

(*c*) Allen *v.* Sugrue (1828), 8 B. & Cr. 561; Young *v.* Turing (1841), 2 M. & Gr. 593.

(*d*) As to the words, "for pursuing the voyage insured," however, see *ante*, § 1104.

(*e*) In Benson *v.* Chapman (1843), 6 M. & Gr. 810.

(*f*) Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. at p. 603. English and Scottish law are the same on this point. *Ibid.*

(*g*) As to market value, however, see Grainger *v.* Martin (1862), 31 L. J. Q. B. 186; *infra*, § 1135.

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paired would probably be less than the cost of restoration and repair (*h*). That, in my opinion, was the test as explained by the consulted Judges and accepted by this House in Irving *v.* Manning" (*i*). And it is now declared by the Marine Insurance Act, 1906, that there is a constructive total loss of ship "where she is so damaged . . . that the cost of repairing the damage would exceed the value of the ship when repaired" (*j*).

Controversy as to including value of wreck in cost of repairs.

1124. A question over which there was much controversy before the Marine Insurance Act, 1906, came into force is, whether or not, where a vessel has been damaged, her owner, in considering whether he could make out a claim for a constructive total loss, was entitled to add to the cost of repairing the damage the value of the damaged vessel or, as it is commonly called, the value of the wreck, and to maintain his claim for a constructive total loss by proving that the aggregate of such two sums would exceed the value of the ship when repaired. Thus, suppose the value of the vessel in her damaged condition to be 2,000*l.*, the cost of repairing her 10,000*l.*, and the repaired value 11,000*l.*,—is the figure with which this 11,000*l.* is to be compared 10,000*l.*, or is it 12,000*l.*? In the former case there is no constructive total loss, in the latter there is.

Must the value of the wreck be taken into account?

In a case which was determined since the passing of the Act, but independently thereof, as the loss occurred before the Act came into force, the House of Lords (*k*) decided that a shipowner is entitled to add the value of the wreck to the

(*h*) Including, of course, general average expenditure by way of salvage, or otherwise incurred with this object. Kemp *v.* Halliday (1866), L. R. 1 Q. B. 520; *infra*, § 1125.

(*i*) (1847), 1 H. L. Cas. 287.

(*j*) Sect. 60, sub-sect. (2) (ii). The sub-section proceeds to indicate what expenses may and may not be taken into account in estimating the cost of repairs. See *ante*, § 1091.

(*k*) Macbeth & Co., Ltd. *v.* Maritime Insurance Co., Ltd., [1908] A. C. 144, overruling Angel *v.* Merchants' Mar. Ins. Co., *infra*. The present editors in the seventh edition of this work fully discussed this question, and submitted that both on principle and on the weight of authority the value of the wreck ought not to be taken into account.

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cost of repairs, and that it is the aggregate sum which is to be compared with the repaired value. This decision, being of the highest tribunal, must be taken to have definitely settled the controversy on the question what was the law independently of the recent legislation.

Effect of Mar. Ins. Act on question as to including value of wreck

But a difficult question now arises. In cases to which the Act of 1906 applies, has the value of the wreck to be taken into account, or has it not? There are weighty arguments which may be urged in support of either view.

In support of the negative view, it is to be remembered that the Act professes to codify the law, and that what Parliament must have had in mind was the state of the law as it was generally believed to be in 1906, the date of the passing of the Act. Now, the ruling case at that time was a decision of the Court of Appeal, of the year 1903 (*l*), which decided that the value of the wreck was not an item for consideration. It is suggested that Parliament must be taken to have intended to give the force of legislation to this decision.

Secondly, the wording of the material provision of sect. 60, sub-sect. 2 of the Act (*m*), declaring that there is a constructive total loss when the cost of repairing the damage would exceed the value of the ship when repaired, implies at least that there is no such loss under any less stringent conditions. If other items than those mentioned may be taken into account, the provision appears to be illusory. It is also to be noticed that the next paragraph of the sub-section shows what matters should be taken into consideration "in estimating the cost of repairs," as if it were the cost of repairs alone which was contemplated.

In Hall *v.* Hayman (*n*) Bray, J., gave effect to these arguments, and decided that the value of the wreck ought not to be included.

In support of the contrary view it may be urged that the

(*l*) Angel *v.* Merchants' Mar. Ins. Co., [1903] 1 K. B. 811.

(*m*) *Ante*, § 1091.

(*n*) [1912] 2 K. B. 5. Mr. Arthur Cohen adopts the same view: see Lord Halsbury's Laws of England, vol. 17, § 956.

Sect. 1124. sub-section does not declare that there can never be a constructive total loss when the cost of the repairs falls short of the value of the ship when repaired, and that it is at least consistent with the wording that other matters, such as the value of the wreck, may be allowed to enter into the calculation which the prudent uninsured owner is supposed to engage upon. Another argument in support of this view is that the words "cost of repairing the damage" in the Act are themselves capable of including the cost of the wreck, that is to say, that the value of the damaged ship itself, upon which the repairs are to be done, is itself an item in the cost of such repairs,—on the ground, to use the language of Lord Collins (*o*), who seems to have taken this view, that the vessel is herself "a necessary factor in the formation of the repaired ship which it is proposed to bring into being." Nevertheless, the editors submit that to say that the "cost of repairing the damage" to a ship includes her value in her damaged state is to attribute to a very simple expression a meaning which in ordinary language it is incapable of bearing. In view, however, of the meaning which seems to have been attributed by Lord Collins to the expression "cost of restoration and repair" when used in decisions independent of the Act, it may well be urged that to the similar expression used in the Act a similar meaning should be attached.

It is to be observed that Lord Loreburn, L. C., and Lord Collins (*p*) in the House of Lords were careful to say that the rule as to including the value of the damaged ship can only apply "where there has been a wreck or something equivalent to a wreck" (*q*), or, in other words, that it is "the break-up value only of the wreck that can be introduced into the calculation" (*r*). Whether or not, assuming the test to be

(*o*) [1908] A. C. at p. 157.
(*p*) Lord Robertson's judgment does not appear to contain any such limitation to the rule.
(*q*) Per Lord Loreburn, L. C., at p. 148.
(*r*) Per Lord Collins at p. 152.

Sect. 1124. simply the conduct of the imaginary "prudent uninsured owner," such a limitation can be logically justified, is not a matter which it is now relevant to consider. But no doubt the same limitation to the rule would be applied, if the decision of Bray, J., were hereafter overruled, and it were established that the words of the Act are to be construed in conformity with the decision of the House of Lords.

Should pending freight be taken into account?

1125. In estimating "the value of the ship when repaired," Messrs. Lowndes (*s*), Gow (*t*), and McArthur (*u*) are all of opinion that any pending freight must be taken into account, so that if the vessel at the time of the casualty is under beneficial engagements, her value must be considered to be by so much enhanced. This view, which the editors contested in a previous edition of this work, may perhaps have received additional support owing to the adoption by the House of Lords (*v*) of the "prudent uninsured owner" principle in its entirety. It is, however, to be observed that the value of the vessel for the purpose of this calculation is not her value before the casualty, but her value at the date when the repairs are completed. In most cases the delay necessarily incurred in effecting the repairs of a wrecked vessel would probably render the vessel unable to fulfil her engagements as they existed at the time of the casualty, so that there will be no enhancement of her value after the casualty by reason of such engagements. And even apart from this consideration, it is submitted that the value of a ship, in the sense in which the term is used in the Act of 1906, is simply her value as a chattel, and is not affected by contracts for her employment into which her owners may have entered.

Or liability of other interests to contribute?

The fact that some of the cost of repairs or of conditioning may be ultimately recoverable by the owners of the interest

(*s*) Ins. s. 136.
(*t*) Mar. Ins. p. 150.
(*u*) Ins. pp. 148, 149.
(*v*) In Macbeth *v.* Mar. Ins. Co., Ltd., *ubi supra*.

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insured from the owners of other interests in general average, or otherwise, is irrelevant to any question of constructive total loss. If, for instance, the cost of repairing a ship will be 10,000*l.*, and her repaired value will only be 9,000*l.*, this is a case of constructive total loss, notwithstanding the fact that half the cost of the repairs may be eventually recoverable from the owners of the cargo. The final incidence of such expenses should no more be taken into consideration in the case suggested, than in a case where they are recoverable from a wrongdoer. But it could not be contended that a vessel which has been damaged by a collision is any the less a constructive total loss, because the cost of repairing her is recoverable by way of damages from the owners of another ship, by the negligent navigation of which the collision was occasioned. And in accordance with this reasoning it is now declared by the Marine Insurance Act of 1906 (*x*) that "in estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests."

Where operations are for recovery of cargo as well as ship.

Further, it is provided by the Act (*y*) that "account is to be taken of the expense of future salvage operations (*z*) and of any future general average contributions to which the ship would be liable if repaired." For example, if the ship is stranded or sunk, with cargo on board, and the operations to recover her are applicable equally to the cargo, so that the expense becomes general average, that proportion of it which falls to the account of ship is to be considered, in estimating the cost of recovery and repairs of ship. Similarly, the proportion falling to the amount of cargo or of freight would have to be considered, in case of a claim for a constructive total loss on either of those interests (*a*).

(*x*) S. 60, sub-s. (2) (ii), *ante*, § 1091.

(*y*) S. 60, sub-s. (2) (ii), *ante*, § 1091.

(*z*) To the extent, that is, of the ship's liability in respect thereof: see Kemp *v.* Halliday, *infra*.

(*a*) Kemp *v.* Halliday (1865), 34 L. J. Q. B. 233; L. R. 1 Q. B. 520 (Ex. Ch.). As to American law, cf. 2 Phillips, s. 1545.

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Assured, after abandonment, has a vested right to recover for total loss which underwriter cannot defeat.

1126. It has been decided that when once the state of facts contemplated by this rule is established, the assured has a right to abandon and recover for a total loss, and that this right cannot be divested by any action voluntarily taken in their own interest by the underwriters (*b*). The facts of the case were that a ship insured under a valued policy sank in deep water, and the underwriters, after receiving notice of abandonment, by a large expenditure of money, succeeded before action brought in raising the vessel. Having done so, they claimed that they were only liable for a partial loss, inasmuch as the vessel was repairable by the expenditure of less money than her total value. The House of Lords, however, declined to adopt this view, Lord Halsbury, L. C., apparently on the ground that the doctrine whereby restoration before action brought defeats a claim for constructive total loss, applies only to cases of capture and the like, and not to cases where a ship goes to the bottom. The *ratio decidendi*, however, of the other members of the Court (Lords Watson, Herschell, and Shand) was, that to allow insurers to "avoid their liability as for a constructive total loss by their intervening gratuitously and taking upon themselves part of the expenses which, *primâ facie*, fall on the assured, and would otherwise have been taken into account in estimating whether there has been such a total loss," would be a contravention of "the rule of law applicable to contracts, whereby neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil" (*c*).

Questions as to the true construction of the rule as to constructive total loss

1127. Upon the true construction of the rule several questions have arisen which may, perhaps, be conveniently discussed under the three following heads:—

1. Of what nature are the repairs, the cost of which is to

(*b*) See also § 1097a, *ante*.

(*c*) Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] App. Cas. per Lord Watson, at p. 607. It has been similarly held by the highest authority in the United States (against some previous decisions of the State Courts). Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27. Cf. 2 Phillips, Ins. s. 1557.

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by comparison of cost of repairs with repaired value.

exceed the ship's value? 2. How is the cost of repair to be estimated? 3. What is that value of the ship with which such cost is to be compared for the purpose of ascertaining whether the loss is constructively total?

The repairs alluded to in the rule need not be such as are requisite to enable the ship to carry on her cargo, but only to sail home.

First, then, as to the nature of the repairs alluded to in the rule. It is now clearly settled that these repairs are not to be such complete repairs as may be necessary to enable the ship to carry on the same cargo, but only such as are necessary to enable her to keep the sea, as a ship, again (*d*)—in fact, to render her navigable and capable of being carried on, either in ballast or with any kind of cargo, to her port of original destination. Thus, in the case of Reid *v.* Darby, where it appeared that the ship had been sold abroad under a Vice-Admiralty decree, upon a report of surveyors certifying that the ship was totally unfit to proceed with her cargo to her port of destination, and that the expense of such repairs as would enable her to do so would exceed her value when repaired, Lord Ellenborough said, in reference to this part of the case, "it is not found that the ship was not navigable, but only that she was not capable of being navigated home with her then cargo" (*e*). The same circumstance, as we have already seen, has been held by Lord Tenterden not to justify the sale, on the ground that the underwriters indemnify only against the loss of the ship, not of the voyage, and the loss of the voyage, therefore, cannot make a constructive total loss of the ship (*f*).

Reid *v.* Darby.

Doyle *v.* Dallas.

The cost of repairs must be calculated

1128. Secondly, as to the mode of estimating the cost of repairs, various questions have arisen both in this country and

(*d*) So Arnould, 2nd ed. p. 1107. See, however, a ruling of Walton, J., in The Wild Rose SS. Co. *v.* Jupe (1903), 19 Times L. R. 289, at Liverpool Assizes; and also the direction of Kennedy, J., to the jury in North Atlantic SS. Co. *v.* Burr (1904), 9 Com. Cas. 164, and the judgment of the same learned Judge in Agenoria SS. Co., Ltd. *v.* Merchants' Mar. Ins. Co., Ltd. (1903), 8 Com. Cas. 212. The last case, however, was not one of constructive total loss.

(*e*) Reid *v.* Darby (1808), 10 East, 143.

(*f*) Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48. Cf. Thompson *v.* Colvin (1830), Ll. & Wels. 140.

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with reference to all the circumstances attending the ship at the time and place of the casualty.

the United States. It may be taken as a settled rule in this country, that the cost of repairs is to be calculated with reference to all the circumstances attending the ship at the place and time of the casualty—*i.e.*, the question is, what would it have cost to repair the ship where she lies? Thus, where a ship was sold at a port where great difficulty existed in obtaining materials, and at a season of the year peculiarly unfavourable for repairs, Lord Tenterden told the jury to take both these circumstances into their estimation in considering whether the probable cost of repairs was such as to justify the sale (*g*).

So where a Dutch ship, stranded on the Goodwins, and brought into the port of London, would not sell in England for so much as it would cost to repair her here, owing to her being a foreign ship; nor in Holland, for so much as it would cost to repair her there, owing to a usage there not to employ stranded ships again; it was held that the jury were rightly directed to take all these facts into their consideration (*h*).

Estimated cost of temporary and complete repairs may be added together in estimating the cost.

1129. If the condition of the ship at the place of the casualty or at a port of refuge be such as to make temporary repairs necessary in order to enable her to proceed to sea—it being impossible to effect complete repairs on the spot—the owner is entitled to add together the estimated cost of the temporary and complete repairs, and to give notice of abandonment if the aggregate would exceed the value when repaired (*i*).

(*g*) Thompson *v.* Colvin (1830), Ll. & Wels. 140. See also Read *v.* Bonham (1821), 3 Brod. & Bing. 147; Morris *v.* Robinson (1824), 3 B. & Cr. 196; Cannan *v.* Meaburn (1823), 1 Bing. 243; Somes *v.* Sugrue (1830), 4 C. & P. 274.

(*h*) Young *v.* Turing (1841), 2 M. & Gr. 593.

(*i*) So held in the United States, where the aggregate cost of both repairs exceeds half the value. See cases, 2 Phillips, Ins. ss. 1541, 1548. The passage in Phillips appears to have been misunderstood in former editions of this work, and was quoted in support of a proposition which the present editors are not disposed to accept. See 2nd ed. p. 1108; 6th ed. p. 1047.

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Expenses of releasing ship from peril, preparatory to repairing, must be added to the expense of the repairs.

Whenever, in order to render the ship navigable, it would be necessary, not only to repair her, but also, as a preparatory step, to incur expense for the purpose of getting her off rocks, or weighing her up, it seems clear that the estimated expense of so doing ought to be added to the estimated cost of the subsequent repairs, in order to ascertain whether the sale was a justifiable measure and the loss constructively total (*k*).

The whole estimated expense, in fact, of so treating the ship as to make her fit to navigate the seas again is that which a prudent owner, if uninsured, would take into his consideration in making up his mind whether to sell or repair, and must therefore be included in "the cost of repairs," as that phrase is employed in the rule now under discussion.

One-third new for old is not to be deducted in estimating the cost of repairs.

In estimating the probable cost of repairs, no deduction is to be made of one-third new for old. This rule, which was in accordance with the opinion of Story, J. (*l*), and was adopted by the Supreme Court of the United States (*m*), has been recently established by the Court of Appeal (*n*) in this country. It appears to follow, in principle, as a consequence from the test of constructive total loss—viz., that the point to be considered is whether a prudent owner, if uninsured, would sell rather than repair, from a calculation that the cost of repairs would exceed the repaired value. This clearly implies that all considerations as to the cost of repairs are to be disregarded, which have reference to the sum they would cost an owner, if insured.

(*k*) See the previous cases, especially Mount *v.* Harrison (1827), 4 Bing. 388; Doyle *v.* Dallas (1831), 1 Mood. & Rob. 48; Gardner *v.* Salvador (1831), *ibid.* 116; *S. L.* in the United States. See Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 400.

(*l*) In Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27.

(*m*) In Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 399. Phillips, in his 3rd ed. (vol. ii. s. 1543), takes the same view; in his 2nd ed. (vol. ii. s. 278) he had opposed it. So 2 Parsons, p. 129.

(*n*) In Henderson *v.* Shankland, [1896] 1 Q. B. 525. It may, however, be doubted whether the Court decided correctly in applying the rule to a case of general average. See *ante*, § 1025.

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Is the expense of such repairs as the old and decayed state of the ship may have rendered necessary, to be excluded in estimating the cost?

1130. Another question has been raised, both in the United States and in this country, viz., whether, in the case of an old and decayed ship, the jury, in estimating the probable cost of repairs with a view to ascertain whether they would exceed the repaired value, are to be directed to exclude from their estimate the cost of all such repairs as the decayed state of the ship may have rendered necessary.

The better opinion in the United States, and the law as settled in this country would seem to be that, if the necessity of the repairs may fairly be referred to the perils insured against, and the ship is shown or admitted to have been seaworthy when she sailed, the jury need not be told to exclude the expense of such repairs from their estimate, since, but for the casualty which caused the loss, the decayed parts of the ship might have been strong enough for the voyage.

Phillips *v.* Nairne.

The point in our jurisprudence seems to have been first raised, but not disposed of, in the case of Thompson *v.* Colvin (*o*). It arose again in the following case:—A ship, which was admitted to be seaworthy by a clause in the policy, in the course of a voyage from China to London was so much damaged by a hurricane, that she was obliged to put into Mauritius; and there it appeared that, from the damage caused by the storm and the old and decayed state of the ship, she was not worth repairing. But for the storm, however, the decayed state of the ship would not have prevented her from performing her voyage in safety. The assured, who had given due notice of abandonment, claimed to recover as for a total loss. Erle, J., left to the jury the question "whether the cost of repairing the damage arising from the perils insured against would have been greater than the value of the ship when repaired," directing them, if they thought so, to find for the plaintiff, which they did. A new trial was moved for, on the ground that they should have been told that, in estimating the cost of repairs, they ought to exclude from their consideration all such repairs as were

(*o*) (1830), Ll. & Wels. 140.

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made necessary by the decayed state of some parts of the ship. The Court, however, refused the rule, on the ground that the jury had been told to consider the damage done by the perils insured against as the matter on which their estimate should be founded. They added, moreover, that on a careful examination of the evidence they thought no repairs were included in the estimate except such as were fairly referable to perils of the seas (*p*).

Doctrine in the United States as to this point.

1131. The doctrine in the United States on this subject appears to agree with our own, and may be shortly stated to be that, if the ship be seaworthy for the voyage when she sailed, and repairs have been rendered necessary in the course of the voyage by the perils insured against, the increased expense of making such repairs, arising from the old or decayed state of the ship, is not to be deducted in calculating whether the cost of repairing will exceed the ship's value when repaired (or, as the rule is in the United States, half the repaired value).

Thus, in one American case, Livingston, J., remarked, "I adopt, as a general rule, that, if the old injuries (arising, in the particular case, from the ship's bottom being worm-eaten when she sailed) are not such as to make the ship innavigable (unseaworthy), no deduction is to be made on that account from the cost of repair" (*q*). And in another case the Court said that the objection could be made only in reference to the seaworthiness of the ship at the commencement of the voyage (*r*); in a third case the rule is stated to be, "that in case an injury is received by an old and decayed vessel which, independent of the accident, might have run some time; if the repairs cannot be put on her so that the unsound part can be used as formerly, without an expense equal to one-half her value (in our law it would be exceeding her value when repaired), or, in other words, where the injury

(*p*) Phillips *v.* Nairne (1847), 4 C. B. 343; 16 L. J. C. P. 194.

(*q*) In Depeyster *v.* Col. Ins. Co. (1804), 2 Caines, 85; 2 Phillips, s. 1547.

(*r*) Depau *v.* Ocean Ins. Co. (1825), 5 Cowen, 63.

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which the underwriters are obliged to make good is the cause of the decayed parts requiring repairs, that then the assured may abandon; but if repairing the injury, which has arisen from one of the perils insured against, will replace her in the same situation she was in before, no matter how unsound all her other parts may be, then the insured shall not have this right, for all that they can ask is that a ship may be placed *in statu quo*" (*s*).

General result of the authorities as to this point.

1132. The rule, therefore, appears to be this: If the ship was seaworthy when she sailed, the assured may abandon and recover for a total loss wherever, by the perils insured against, the ship is so damaged that she cannot be rendered navigable again, except at a cost greater than her repaired value; and in estimating such cost no deduction is to be made for the increased expense of repairs, arising from her age or state of decay. If, however, she can be repaired so as to keep the sea at a less cost than her repaired value, the assured cannot elect to abandon merely because, owing to her decayed condition, the expenses of complete repairs would be greater than this (*t*).

What is the value of the ship with which the cost of repairs is to be compared?

1133. The third question relates to the value of the ship, with which the cost of repairs is to be compared. In open policies it was never doubted that by these words was meant the real value of the ship when repaired. It was, however, for some time a litigated question in English law whether the standard of comparison was the same in valued policies. It is now conclusively decided that it is, and is so expressly provided by the Marine Insurance Act, 1906 (*u*).

The point first arose distinctly in Allen *v.* Sugrue (*x*), and

(*s*) Per Porter, J., in Hyde *v.* Louisiana State Ins. Co. (1824), 2 Martin (N. S.) 410; 2 Phillips, s. 1547.

(*t*) See, however, *ante*, § 1127, note (*d*).

(*u*) S. 27, sub-s. (4): "Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss."

(*x*) Allen *v.* Sugrue (1828), 8 B. & Cr. 561; *S. C.* at N. P., Dans. & Ll. 188.

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The real value of the ship when repaired is the true test, and not the value in the policy. Manning v. Irving.

subsequently in Young *v.* Turing (*y*). It was finally decided by the House of Lords in Irving *v.* Manning (*z*). In that case the cost of repairs would have been 10,500*l.*, and the marketable value of the ship when repaired would only have been 9,000*l.*; she was, however, valued in the policy at 17,500*l.* The opinion of the Judges on the point, whether the owners, who had given notice of abandonment, could recover the full amount of the insurance, viz., 17,500*l.*, as for a total loss, having been requested by their Lordships, was delivered by Patteson, J. After stating that, had this been the case of an open policy, the assured would, under the circumstances, have been entitled to recover as for a total loss—the amount to be ascertained by evidence—his Lordship proceeds as follows:—

The valuation only settles the amount payable by underwriters.

"What difference, then, is there from the circumstance that the policy is a valued policy? By the terms of it 'the ship, &c., for as much as concerns the assured, by agreement between the assured and assurers, are and shall be rated and valued at 17,500*l.*,' and the question turns upon the meaning of these words. Do they, as contended for by the plaintiff in error (the underwriters), amount to an agreement that, for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired; or do they mean only that, for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to prevent disputes as to the quantum of the assured's interest? We are all of opinion that the latter is the true meaning; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies." His Lordship then, after

(*y*) Young *v.* Turing (1841), 2 M. & Gr. 593.

(*z*) Irving *v.* Manning (1847), 1 C. B. 168; 2 C. B. 784; 1 H. L. Cas. 287.

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taking a view of the cases cited in argument, especially Allen *v.* Sugrue and Young *v.* Turing, thus continued: "The principle laid down in these latter cases is this—that the question of loss, whether total or partial, is to be determined just as if there were no policy at all, and the established mode of putting the question, when there has been what is perhaps improperly called a constructive total loss of a ship, is to consider the policy as altogether out of the question, and to inquire what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against; if he would not have repaired the vessel, it is deemed to be lost. When this test has been applied, and the nature of the loss has been thus determined, the quantum of compensation is then to be fixed.

In determining the question whether the loss be total or partial, the policy is considered as altogether out of the question.

"In an open policy the amount of compensation must be then ascertained by evidence; in a valued one the agreed total value is conclusive; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to recover in case of a total loss.

"It is argued that this course of proceeding infringes on the generally received rule that an insurance is a mere contract of indemnity, for that thus the assured may obtain more than a compensation for his loss, and it is so. A policy of insurance is not a perfect contract of indemnity; it must be taken with this qualification—that the parties may agree beforehand in estimating the value of the subject insured by way of liquidated damages, as indeed they may in other contracts to indemnify."

A policy of insurance is not a perfect contract of indemnity.

The House of Lords adopted the opinion of the judges, and affirmed the judgment of the Courts below.

1134. The principle thus fixed by the highest authority in this country had some time previously been established by the Supreme Court of the United States, the only difference being that in America the loss is held constructively total when the cost of repairs exceeds half the repaired value. The rule is thus expressed by Story, J., in giving the judgment

Same doctrine in the United States.

Sect. 1134. of the Supreme Court: "that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of repairs (with us it would be 'the cost of repairs'), it is to be treated as a technical total loss" (*a*).

Special clause. In consequence of the establishment of this doctrine in the United States, it became usual in the Boston policies to insert a special clause "that the assured should not have a right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss should exceed half the amount insured" (*b*).

Institute Clause. Similarly in this country it is now provided by the Institute Clauses that the insured value shall be taken as the repaired value (*c*) in ascertaining whether the vessel is a constructive total loss (*d*). And most of the insurance clubs have a clause barring claims for a constructive total loss unless the estimated cost of the repairs, &c. is equal to 80 per cent. of the value declared in the policy, although the value of the ship when repaired may be less than the cost of the repairs.

In case of a peculiar ship. **1135.** In the case of an ordinary ship suitable for trade in general, her selling price or market value seems to be a

(*a*) 2 Phillips, s. 1535; Bradlie *v.* Maryland Ins. Co. (1838), 12 Peters, S. C. R. 398; cited 2 Phillips, s. 1539. This point has been decided the other way by the Supreme Court of Massachusetts. Phillips, *ibid.*

(*b*) Phillips, *quâ supra*. It was, perhaps, the intention of the defendants in Forwood *v.* North Wales Ins. Co. (1880), 9 Q. B. D. 732, to protect themselves in a similar manner. The Court, however, held that they had not succeeded in doing so.

(*c*) See North Atlantic SS. Co. *v.* Burr (1904), 9 Com. Cas. 164.

(*d*) For the effect of this clause in an original policy on a policy of reinsurance, from which it is omitted, see Marten *v.* SS. Owners' Underwriting Assn. (1902), 7 Com. Cas. 195. Where in an "increased value" policy there was no valuation of the insured ship though there was a clause which provided that the vessel should not be deemed to be a constructive total loss unless the cost of repairing amounted to 80 per cent. of the value in the hull policy, Rowlatt, J., held that the insured value in the ordinary hull policy did not apply, and that the real value must be taken as the test of a constructive total loss: Holt Hill (Sailing Ship) Co. *v.* United Kingdom Mar. Assn., [1919] 2 K. B. 789.

Sect. 1135. reasonable standard to use, in making comparative estimates on this question of a constructive total loss. But in the case of a peculiar and exceptional vessel, specially built for her owners with a view to a particular trade, it is obvious that her value to sell in the general market would be a very erroneous test. Wood, V.-C., dealing with this question, *alio intuitu*, says: "The sum which the ship would have sold for cannot in all cases be the true criterion of its value. Cases might arise in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic and for that alone; and that description of traffic might be entirely occupied by one company with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the Court to adopt some other criterion. One, I venture to suggest, might be to ascertain the price given for the ship and the subsequent deterioration. Some such criterion would have to be adopted, for otherwise the value of the ship would be what the ship would sell for to be broken up" (*e*).

Grainger *v.* Martin. Such a case as the learned Vice-Chancellor supposed has arisen under a claim against underwriters as for a total loss. The owners had purchased the "Acadia," a vessel of exceptional size and class, for 20,000*l.*, and were employing her at the time when she was obliged by sea perils to take refuge at Mauritius, so damaged that the necessary repairs were estimated at 10,500*l.* She would have sold in the general market, when thus repaired, for 7,500*l.*; her value to sell when the risk attached was 7,500*l.*, but in the policy was fixed at 17,000*l.*; the arbitrator, however, found that 20 per cent. would have been a fair deduction from the cost price for wear and tear, at the date of the policy. She was sold

(*e*) Per Wood, V.-C., in the African Steam Ship Co. *v.* Swanzy (1856), 2 K. & J. 664, a case arising under the limited responsibility sections of the Merchant Shipping Act, 1854. See also The Ironmaster (1859), Sw. 441; The Harmonides, [1903] P. 1.

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at Mauritius unrepaired, and realized 1,350*l.* gross. The arbitrator further found as a fact that "an owner wanting such a ship for the particular purposes of his trade at the time when the 'Acadia' was sold, and having to elect to sell, to repair or to purchase, would have elected to repair—for such a ship could neither have been built nor purchased at that time for so small a sum as 10,500*l.*" The Court below, being empowered to draw inferences of fact, inferred that the actual owners, as they were employing the ship at the time, were such owners as the arbitrator here supposed would have preferred repairing, and therefore held that the plaintiffs had failed to prove a constructive total loss (*f*). This judgment was affirmed by the Court of Error (*g*).

Effect of sale of damaged vessel by holders of bottomry bond.

1136. The mere fact that a vessel, after suffering damage which has been repaired by the master abroad on bottomry, is sold on arrival at her port of destination at the instance of the bond-holders and realizes less than enough to satisfy their claims, is not sufficient to constitute a constructive total loss (*h*). Where, however, the underwriters have dissuaded the assured from persisting in his intention to abandon, and themselves ordered the repairs, they will be liable as for a total loss if, on the ship's subsequent arrival in port charged with a bottomry lien for the repairs, they refuse to discharge the bond, and allow her to be sold to satisfy the claim of the obligees (*i*).

What kind of necessity will justify the master in resorting to a bottomry bond.

As to the kind of necessity that will justify the master in raising money for repairs on bottomry, it has been laid down by Story, J., in a most elaborate and learned judgment, that

(*f*) Grainger *v.* Martin (1862), 2 B. & S. 456.

(*g*) In error, 4 B. & S. 9. Martin, B., and Keating, J., however, dissented.

(*h*) This seems to follow from the decision in Benson *v.* Chapman (1849), 6 M. & Gr. 792; Chapman *v.* Benson (in error), 5 C. B. 330; 2 H. L. 696—where the question, however, was as to a total loss of freight, not of ship. Cf. 2 Phillips, ss. 1554, 1558.

(*i*) Da Costa *v.* Newnham (1788), 2 T. R. 407; Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27, per Story, J. See 2 Phillips, s. 1557.

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there must not only be a necessity for the repairs, but also a necessity of resorting to bottomry as the sole means of defraying them; and that it is only when this is the only or the least disadvantageous mode of borrowing, that the master is at liberty to avail himself of it as a *dernier ressort* (*k*).

In short, as Chancellor Kent states the result of the case, good faith and an apparent necessity under the exercise of the master's judgment at the time are sufficient to justify a bottomry bond (*l*).

The doctrine of constructive total loss does not apply to contracts of or insurances on bottomry.

1137. It should be added that the doctrine of constructive total loss is not applicable to contracts of bottomry, nor to policies effected on bottomry loans. If the ship exist in specie, though in a state which would warrant an assured on ship to abandon, as where the cost of repairs would greatly exceed her value when repaired, the assured on bottomry cannot recover; for the ship must be absolutely and totally destroyed in order to discharge the borrower (*m*): *à fortiori*, capture producing merely a temporary retardation of the voyage, and followed by restoration before action brought, will not discharge him (*n*). On the other hand, so long as the ship exists in specie the claim of the bottomry bond-holders to the salvage will prevail over that of the underwriters on ship to whom she has been abandoned, and such claim will be allowed to extend to the whole salvage, whatever may have been the sum advanced on bottomry (*o*).

Constructive total loss of

1138. As we have seen, the Marine Insurance Act, 1906 (*p*),

(*k*) Judgment of Story, J., in the case of The Ship Fortitude (1838), 3 Sumner, R. 228.

(*l*) 3 Kent, Com. 163, note.

(*m*) Thompson *v.* Royal Exch. Ass. Co. (1813), 1 M. & S. 30; Broomfield *v.* Southern Ins. Co. (1870), L. R. 5 Ex. 192.

(*n*) Joyce *v.* Williamson (1783), 2 Marsh. Ins. 760.

(*o*) Stephens *v.* Broomfield (1869), L. R. 2 P. C. 516. So in America, Ins. Co. *v.* Gossler (1877), 96 U. S. 643.

(*p*) Sect. 60, sub-sect. (1), and sub-sect. (2) (i), *ante*, § 1091, which apply to constructive total loss generally whether of ship or of goods. Sub-sect. (2) (iii), which relates to damage, applies to goods

Sect. 1138. declares that there is a constructive total loss of goods when the assured is deprived of the possession of them by a peril insured against, and either (a) it is unlikely that he can recover them, or (b) the cost of recovering them would exceed their value when recovered.

goods when assured loses possession.

Constructive total loss on goods in cases of capture, &c.

Capture, &c. is *primâ facie* a constructive total loss on goods.

Capture, arrest, or embargo, if likely to be of long continuance (*q*), barratrous seizure, or total desertion at sea by the crew—any forcible dispossession, in short, or effective privation of the control over his property—gives a *primâ facie* right of abandonment to the assured on goods, just as in the case of the ship.

Capture, followed by confiscation or by unpreventable sale and unredeemed by any restoration of the goods or their proceeds before action brought, is, as we have already seen, a case of total loss on goods, without notice of abandonment (*r*).

If, however, after capture, or even after capture and confiscation, the goods subsist in specie, and there is any chance of restitution either of the goods themselves or their proceeds by the issue of any pending negotiation, the assured cannot recover as for a total loss without notice of abandonment (*s*).

Where news received at the same time of capture and restitution the assured cannot abandon.

If, after capture and before notice of abandonment, a final decree of restitution has been made, it has been held in the United States, and no doubt would be so in this country (*t*), that the assured on goods cannot, on hearing at one and the same time of the capture and the decree of restitution, give notice of abandonment, although the goods may not in fact have been at that time actually restored to him, for there

only, corresponding to the preceding paragraph, which applies only to ship.

(*q*) Cf. Rodocanachi *v.* Elliott (1873), L. R. 8 C. P. 649; 9 C. P. 518.

(*r*) Mullett *v.* Shedden (1811), 13 East, 304; Mellish *v.* Andrews (1812), 15 East, 13; Stringer *v.* English, &c. Ins. Co. (1869), L. R. 4 Q. B. 676; 5 Q. B. 599.

(*s*) Tunno *v.* Edwards (1810), 12 East, 488. Cf. Goldsmid *v.* Gillies (1813), 4 Taunt. 803. See, however, as to these cases and the statement in the text, *ante*, § 1051. And as to the words "chance of restitution," see Polurrian SS. Co. *v.* Young, [1915] 1 K. B. 922.

(*t*) See Barker *v.* Blakes (1808), 9 East, 283.

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is then no such prospect that the loss, as to him, will be eventually total, as to justify a notice of abandonment (*u*): and the case is the same where notice of abandonment has been given after the final decree of restitution was in fact made, but before the assured had heard of it (*x*).

So if, after notice and before action brought, captured goods are restored, the right to recover as for a total loss is divested.

1139. But although a *primâ facie* right of abandonment may have been duly exercised by giving notice of abandonment when the circumstances justified it, still the right of the assured to recover as for a total loss depends, in this country, as in the case of the ship, upon the ultimate state of the property at the time of action brought; if before that time the goods, after capture and recapture, have been restored to the assured, or brought into this country under such circumstances that he may, if he pleases, take possession of them, and may reasonably be expected to do so, his right to recover as for a total loss will be thereby divested (*y*).

Naylor *v.* Taylor.

Thus where, after seizure of the ship for breach of blockade, and subsequent rescue by the master and crew, the goods were brought back to their home port of loading in this country, and there warehoused, so that the assured might have had possession of them on paying the salvage expenses, but instead of doing so he let them remain where they were, and, relying on a previous notice of abandonment, brought his action for a total loss—Lord Tenterden and the Court of King's Bench held that he could not recover, as the loss had in fact ceased to be total before action brought (*z*).

(*u*) Adams *v.* Delaware Ins. Co. (1811), 3 Binn. 287, cited 2 Phillips, s. 1662. Cf. Hamilton *v.* Mendes (1761), 2 Burr. 1210.

(*x*) Marshall *v.* Delaware Ins. Co. (1808), 4 Cranch, 202, cited Phillips, *ubi supra;* Bainbridge *v.* Neilson (1808), 10 East, 329.

(*y*) All the cases on this subject are reviewed by Collins, J., in Ruys *v.* Royal Exch. Ass. Corp., [1897] 2 Q. B. 135. They have already been more particularly referred to in this chapter, in dealing with constructive total loss of ship. See *ante*, § 1097a. The editors' suggestion that the law on this point may have been altered by the Mar. Ins. Act, 1906, applies equally with respect to goods and with respect to ship.

(*z*) Naylor *v.* Taylor (1829), 9 B. & Cr. 718; 4 M. & Ryl. 526: *S. C.* at N. P., Dans. & Ll. 240.

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The mere fact, however, of restoration, or subsistence of the goods in specie before action brought will not *per se* divest the right to recover as for a total loss.

Dixon *v.* Reid.

1140. Yet the mere fact that the goods are restored, or subsist in specie, before action brought, is not of itself sufficient, irrespective of all considerations as to the circumstances under which the restoration takes place, to deprive the assured, who has once justifiably given notice of abandonment, of his right to insist on such notice and recover as for a total loss.

A ship timber-laden, insured from Sierra Leone to this country, was barratrously seized by her crew and carried off to Barbadoes, where the ship and part of the cargo were sold (but not for or on account of the assured) to defray the expenses incurred there; the remainder of the timber (186 logs out of 233) was afterwards forwarded to this country by another ship, but not by the directions of the assured or any person authorized by him, and it was sold in this country, but not by him or his orders. After this, having given due notice of abandonment on first hearing of the casualty, he brought his action for a total loss. The Court held this to be a clear case of constructive total loss. "Here," said Lord Tenterden, "by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. From that time it became to him a total loss. The payment of the wages at Barbadoes and the sending home the 186 logs were not acts of the assured or of any person authorized by him" (*a*).

Parry *v.* Aberdein.

So where, after desertion of the ship by the crew, and notice of abandonment duly given, the goods were many months after the loss delivered to the agents of the assured abroad before action brought, but in such a state of damage

(*a*) Dixon *v.* Reid (1822), 5 B. & Ald. 597; 1 Dowl. & Ryl. 207. The citation of this case is retained by the editors from the 2nd edition of this work, p. 1123. The decision, however, as reported, seems to be questionable. It is difficult to see how this case could properly be regarded as one of total loss, inasmuch as it was one of imperishable cargo which reached its destination, and the assured could have taken possession of the greater portion of it before action brought. According to the report of the case in Dowling & Ryland, stress is laid by the Court on the difference between a retardation of voyage due to barratry and one due to the elements,—a difference which to the editors does not seem to be material.

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that they would have been worthless if sent on to their port of destination, even had there been a ship to take them on, which there was not; and they were consequently sold at the foreign port for less than the expenses of salvage—this was held not to be such a restoration of the goods as to prevent the assured from insisting on his abandonment, and recovering as for a total loss (*b*).

The ground of decision in this case was that the total loss occasioned by the desertion of the ship by the crew had never ceased to be a total loss as to the goods. "Can any person say," asks Lord Tenterden, "that the goods, although remaining in specie, were not as effectually lost to the assured, when the ship was deserted, as if they had then gone to the bottom of the sea, or that the subsequent events produced a restoration of them to the owners?" (*c*).

A fortiori if there be no restitution.

1141. Still less doubt will there be if, after capture, seizure, or arrest, followed by recapture, decree of restitution, &c., the goods never have been effectively restored to the possession or within the means of possession of the assured before action brought; the loss once total continues total, as to the assured, down to the time of action brought.

"If, before action brought," said Lord Campbell (*d*), "the goods had been restored to the assured, or he had the means of getting possession of them under such circumstances as ought to have induced a prudent man to take possession of them, his claim could now only have been made for a partial loss. It has often been held, that if the ultimate consequence of a peril insured against is merely the loss of a voyage, or a suspension or retardation of a mercantile adventure, although a notice of abandonment had been justifiably given, a total loss cannot be claimed. But the mere existence of the ship or goods insured, after a total loss and abandonment, so that

(*b*) Parry *v.* Aberdein (1829), 9 B. & Cr. 411.

(*c*) 9 B. & Cr. at p. 416.

(*d*) In delivering the judgment of the Court in Lozano *v.* Janson (1859), 28 L. J. Q. B. 337, 343; 2 E. & E. 160. See the judgment in Dean *v.* Hornby (1854), 3 E. & B. 190.

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possession of them may possibly be resumed by the owner, will not reduce it to a partial loss: McIver *v.* Henderson (*e*), and Cologan *v.* The London Assurance Company (*f*). The true rule seems to us to be laid down by Bayley, J., in Holdsworth *v.* Wise (*g*), that the subject of the insurance must be in 'existence under such circumstances that the assured may, if they please, have possession and may reasonably be expected to take possession of it.'"

Cologan *v.* London Ass. Co.

A ship, with a cargo of wheat insured "free of average" from Quebec to Teneriffe, was captured and recaptured and taken into Bermuda, where part of the wheat was thrown into the sea as putrid. As to the rest, an embargo on all provisions in Bermuda prevented the captain from forwarding it to Teneriffe. The assured in England, on hearing the circumstances, gave immediate notice of abandonment. Subsequently the captain, having failed to obtain leave to carry the wheat to Teneriffe, carried it, by leave, to Madeira, and delivered it there. The assured, relying on their previous notice of abandonment, brought their action for a total loss, and the Court held that they had a right to recover the whole amount claimed (*h*).

Bayley, J., puts the case in a very clear light: "The destination is to Teneriffe; the ship, with the cargo, in her course thither, is captured; recapture follows, but not so as to enable the ship to proceed to Teneriffe, for she is sent to Bermuda, where she is placed under an embargo, from which she is never released, except upon condition of altering her destination to Madeira. Therefore there has been no restitution of any part of the cargo, as it regards the risk insured to Teneriffe" (*i*).

Loss of voyage may effect con-

1142. It was settled law before the passing of the Marine Insurance Act of 1906—and, as will appear shortly, still

(*e*) (1816), 4 M. & S. 576.
(*f*) (1816), 5 M. & S. 447.
(*g*) (1828), 7 B. & Cr. 798.
(*h*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447.
(*i*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 456.

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remains so—that an insurance on goods is a contract to indemnify the assured for any loss he may sustain by his goods being prevented, by the perils of the seas, from arriving in safety at their port of destination (*k*). If, therefore, the assured has given notice of abandonment at a time when the loss was total by the forcible dispossession of all control over his goods, he will not be precluded from afterwards recovering as for a total loss, by their being restored to him, before action brought, under circumstances which make it utterly hopeless for him ever, or within any assignable period, to procure their arrival at their destined port. Loss of the voyage in this sense, *i.e.*, a practical and effective impossibility of ever sending the goods on to their port of destination, is, if caused by the perils insured against, a constructive total loss on goods, though as we have already seen it would not be so on the ship (*l*). This complete hopelessness of ever bringing the adventure on the goods to a successful termination—this forced termination of the risk by the perils insured against—is carefully to be distinguished from that mere temporary retardation of the voyage for the season which, as we shall see hereafter, gives in itself no right of abandonment of goods except where, being perishable and sea-damaged, it is impossible to send them on in the same or any other ship, and therefore necessary to sell them at the port of casualty.

structive total loss of goods.

Barker *v.* Blakes.

1143. Thus, an American (neutral) ship, with a cargo of oil insured from New York to Havre, was seized and carried into Bristol for the purpose of search. While she was there detained, the British government declared the port of Havre to be in a state of blockade, and it so continued from that time until the commencement of the action. Some time after this the oil was given up to the agents of the assured in this

(*k*) Per Bayley, J., *ibid.* 455; per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. at p. 278.
(*l*) In the opinion of Walton, J., expressed in Mansell *v.* Hoade (1903), 20 Times L. R. 150, a difficulty in completing the voyage, though it is not absolutely insuperable, may nevertheless constitute a constructive total loss of goods.

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country, who were unable to get it carried on to Havre, so that it had to be sold in Bristol without prejudice to the rights of the parties. Lord Ellenborough intimated that "the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage; and such loss of voyage, upon received principles of insurance law, as a total loss of the goods which were to have been transported in the course of such voyage" (*m*).

Lozano v. Janson.

The facts of Lozano *v.* Janson were as follows:—A policy was effected on goods at and from London to Loanda, on the coast of Africa. The ship was seized on the coast of Africa as a slaver by a British cruiser, and was carried, with her cargo, to St. Helena, where both ship and cargo were condemned by the Vice-Admiralty Court in the year 1854. The cargo was unloaded, a portion of it, being perishable, was sold, and the rest stored on the island pending an appeal to the Privy Council in England. Possession of the goods could not be obtained at all until December, 1856, and then only on too stringent terms as to giving bail, which the owners refused to comply with. The sentence of condemnation was reversed in 1858, and the assured, who had given notice of abandonment in due time, was held by the Court of Queen's Bench, in 1859, entitled to recover as for a total loss (*n*). The goods had deteriorated in value owing to the long delay, and it was held that, even if something might perhaps have been realized by their sale at Loanda beyond the expenses of forwarding them thither, the assured could not reasonably have been expected to do so—the case not being one of a mere loss of voyage or a retardation of the adventure, but its utter ruin.

(*m*) Barker *v.* Blakes (1808), 9 East, 283.

(*n*) Lozano *v.* Janson (1859), 2 E. & E. 160; 28 L. J. Q. B. 337. See also Anderson *v.* Wallis (1813), 2 M. & S. 240; Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447; Rodocanachi *v.* Elliott (1874), L. R. 9 C. P. 518; Miller *v.* Law Accident Ins. Co., [1903] 1 K. B. 712.

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And it has recently been held by the House of Lords (*o*) that the law in this respect has not been altered by the Marine Insurance Act, 1906, although this class of constructive total loss is not expressly recognized therein. Two British vessels with goods belonging to British merchants for sale in Germany were proceeding from the Argentine to Hamburg when war broke out between this country and Germany, whereby the further prosecution of the voyage became illegal, and this illegality (it was held) constituted a restraint of princes. The goods were insured against the usual perils, including war-risks, and their owners gave notice of abandonment and claimed that the frustration of the voyage, causing the detention of the goods for an indefinite time, amounted to a constructive total loss thereof. Earl Loreburn said: "In 1906 it was well settled that when goods are insured . . . there is a loss if the adventure is frustrated by a peril insured against. It is not merely an insurance of the actual merchandise from injury, but also an insurance of its safe arrival. Was it altered by the Marine Insurance Act, 1906? I do not think the Act altered the law in the particular now under consideration." And this was the view of all their Lordships.

Constructive total loss on goods: where they are sea-damaged and cannot be forwarded—right of master to sell the cargo. Perishable goods.

1144. An insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo (*p*). Hence, where the original ship is disabled in the course of the voyage, and no other can be procured at the port of the casualty or any neighbouring port, the master has a right, where the cargo is of a perishable nature and sea-

(*o*) British and Foreign Mar. Ins. Co. *v.* Sanday, [1916] 1 A. C. 650. Cf. Wilson Bros., Bobbin & Co. *v.* Green (1915), 31 T. L. R. 605; *S. C.* on another point, [1917] 1 K. B. 860. Cf. also Kacianoff *v.* China Traders Ins. Co., [1914] 3 K. B. 1121; and Becker, Gray & Co. *v.* London Ass. Corp., [1918] A. C. 101; *ante*, §§ , .

(*p*) Per Lord Ellenborough in delivering the judgment of the Court in Anderson *v.* Wallis (1813), 2 M. & S. at p. 247. Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. at p. 278. "The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination."

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damaged, to sell it at such port for the benefit of all concerned, and the assured on goods in like case may abandon (*q*), and recover as for a total loss. Where, however, the original ship can be repaired, with any prospect of sending on the cargo, or what remains of it, in a marketable state to its port of destination, or where another ship can be procured, either at the same or a contiguous port, without any very extraordinary delay or sacrifice, the master is at all events empowered, if not bound, to send it on, and he certainly has no right in such case to sell, nor can the assured on goods abandon and recover as for a total loss (*r*).

Imperishable goods.

1145. If the cargo be imperishable, or, though perishable, not so sea-damaged as to be in danger of being spoiled or destroyed by the delay, the mere impossibility of repairing the original ship or procuring another in time to send on the cargo *so as to save the season*, will not entitle the master to sell, nor the assured to recover as for a total loss; mere loss of the voyage for the season is never a constructive total loss on imperishable goods, and can only become so in the case of perishable goods, when they are so sea-damaged that to keep them till they can be sent on would involve their being destroyed, or rendered worthless for all merchantable purposes. If indeed a perishable cargo is reduced by sea-damage to such a state at the intermediate port, that, if sent on to its port of destination, it would perish before arriving there from the progress of rapid putrefaction, the master is justified in selling, and the assured may recover a total loss even without notice of abandonment, although the original ship may not be disabled, but capable of being repaired so as to take on the cargo.

The test, however, of what a prudent owner uninsured would have done under the circumstances, is not applicable to the case of goods sold abroad, at all events where the insurance is "free of average." Nothing under such a policy will make the underwriter liable as for a total loss on memorandum articles, except (1) the impossibility of sending them on so as to arrive in specie, or (2) the impossibility of sending them on except at a cost greater than their saleable value on arrival (*s*).

(*q*) If the goods are sold, notice of abandonment is unnecessary. Farnworth *v.* Hyde (1865), 18 C. B. (N. S.) 835; L. R. 2 C. P. 204. Cf. Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Rankin *v.* Potter (1872), L. R. 6 H. L. 83; Marine Ins. Act, 1906, s. 62, sub-s. 7.

(*r*) Meyer *v.* Ralli (1876), 1 C. P. D. 358.

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Loss of voyage for season.

1146. The Court of King's Bench in the time of Lord Mansfield—proceeding on the doctrine that loss of the voyage, by which expression he appears to have understood the voyage by the particular ship or for a particular season, was loss of the subject insured—gave certain decisions which probably would not now be upheld. Thus in one case, where insurance was on "ship, freight, and cargo, from Tortola to London," and the ship soon after sailing put back into Tortola irreparably damaged, Lord Mansfield allowed the assured to retain their verdict for the whole amount insured, though the greater part of the cargo (sugars warranted free of average) might have been sent on from Tortola to London by other ships then in the harbour. One ground of decision was that the whole cargo could not be sent on (*t*). In another case the decision was that a perishable cargo (also sugars), having after capture of ship been brought by recaptors, during the existence of an embargo there, into a foreign port where, there being no storehouses, it must necessarily have been kept six months on board a leaky ship, was justifiably sold by the master so as to cast a total loss on the underwriters (*u*).

(*s*) Navone *v.* Haddon (1850), 9 C. B. 30; Reimer *v.* Ringrose (1851), 6 Exch. 263; Rosetto *v.* Gurney (1851), 11 C. B. 176; Farnworth *v.* Hyde (1866), 18 C. B. (N. S.) 835; on appeal, L. R. 2 C. P. 204. In the United States, where the assured on goods damaged to more than half their value can abandon and claim for a constructive total loss (see Phillips, s. 1608), the assured cannot claim at all for a constructive total loss of memorandum articles warranted "free of average, unless general." See Washburn Manufacturing Co. *v.* Reliance Mar. Ins. Co. (1900), 179 U. S. 1. In Massachusetts and New York, however, this rule does not prevail, and the assured can recover: see Devitt *v.* Providence Washington Ins. Co. (1903), 173 N. Y. 18; Mayo *v.* India Mutual Ins. Co. (1890), 152 Mass. R. 172.

(*t*) Manning *v.* Newnham (1782), 3 Dougl. 130.

(*u*) Milles *v.* Fletcher (1779), 1 Dougl. 232. This case may perhaps be justified on the facts, though not on the grounds, of the decision.

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Mere retardation or loss of the voyage for the season is never a constructive total loss on imperishable goods, and only so on perishable goods when they are so sea-damaged that they may be spoiled if kept till they can be forwarded.

1147. In both these cases Lord Mansfield lays considerable stress upon the loss of the voyage for the season, as one of the criteria for determining whether the sale was justified and the loss constructively total. The two following cases, however, clearly establish the position that the mere loss or retardation of the voyage for the season, owing to the disability of the original ship and the impossibility of at once procuring others to forward the cargo, never gives the right of sale or abandonment in the case of imperishable goods, and only does so in the case of perishable commodities when from the sea-damage they have already sustained, it appears in the highest degree probable that they will be totally destroyed or spoiled as merchantable articles, if kept at the port of distress till they can be forwarded.

Anderson *v.* Wallis.

"Copper, iron, and nails," were insured "free of average" from London to Quebec. The ship, which sailed late in the autumn, was compelled by tempestuous weather to put back and run into the port of Kinsale, where she was found to be so damaged that she could not be repaired in time to reach Canada that season; not could any ship be procured in which to send on the cargo, till the next spring. The assured gave notice of abandonment, and the cargo, which had been only damaged to a very trifling extent, was sold at Kinsale by their orders. The Court held, on the principles already indicated, that under these circumstances the assured could not recover as for a total loss, for this was a mere temporary retardation of the voyage and the cargo was capable of being conveyed after a delay of only a few months in the very same ship (*y*).

Hunt *v.* Royal Exch. Ass. Co.

1148. And the decision of the Court was the same in the following case, where the thing insured, though perishable in its own nature, was yet not in fact so sea-damaged as to render it likely to be spoiled, if kept till it could be forwarded. The insurance was on flour (*z*), warranted free of average, from

(*y*) Anderson *v.* Wallis (1813), 2 M. & S. 240.

(*z*) Pork was also included in the policy; but as to it no question was made. "This must be considered as a policy on flour only (for the pork is out of the question), warranted free of average": per Lord Ellenborough, 5 M. & S. 55.

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Waterford to St. John's, Newfoundland. The ship had sailed in October, and was compelled to put back into Cork, so disabled as to be obliged to be broken up and sold. The flour was found to be very little damaged, and might have been safely kept at Cork till the spring, to be forwarded then to its destination. Instead of so keeping it, however, the assured had it sold, and, having given notice of abandonment, claimed to recover as for a total loss. The Court, as in the last case and upon the same grounds, held that the loss was only partial (*a*). "Here," said Lord Ellenborough, "was a retardation only of the adventure; it is stated that the cargo could not have been forwarded before the next spring; that is, it might have gone then; for it must be presumed that at such a port as Cork there would be found some vessel for the next season, to forward the cargo to St. John's. . . . I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November to April, so as to incur any material damage operating a destruction of the thing insured" (*b*).

Van Omeron *v.* Dowick.

On the same principle, where a case of cutlasses was sold by the master at an intermediate port, from the impossibility, owing to contrary winds and the necessity of keeping with convoy, of carrying them on in his own ship to their port of destination, this sale was held not justified (*c*); and the decision was the same where a cargo of "crates, earthenware, and Indian blues," destined for the African trade, was sold by the master at the Bermudas (whither his ship had been carried after capture and recapture), because he had lost all his boats, which are necessary for the barter trade, and could not get a sufficient complement of hands (*d*).

Wilson *v.* Millar.

(*a*) Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 47.

(*b*) 5 M. & S. 55.

(*c*) Van Omeron *v.* Dowick (1809), 2 Camp. 42.

(*d*) Wilson *v.* Millar (1816), 2 Stark. 1. See also Underwood *v.* Robertson (1814), 4 Camp. 138; Wilson *v.* Royal Exch. Ass. Co. (1811), 2 Camp. 623.

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Though at one time the state of the cargo be such as to justify abandonment, yet if such right be not then exercised, and part of it be afterwards recovered, the assured cannot sell and recover as for a total loss.

1149. The following case shows that, though at one time the state of the cargo was such as to give a right of abandonment, yet if the right be not then exercised, and any part of the cargo be afterwards recovered in such a state that it may be sent on in a marketable condition to its port of destination, and there are opportunities of so forwarding it, the assured cannot direct a sale and treat the loss as constructively total.

Anderson *v.* Royal Exch. Ass. Co.

Wheat was insured "free of average" from Waterford to Liverpool: in going down the Waterford river the ship struck, and filled so fast that, to save her from sinking, she was run ashore on a bank, where she was completely under water at every high tide: in about a month the wheat was got out in a sea-damaged state: part was wholly spoiled, but about two-thirds were kiln-dried, and might have been sent on to Liverpool in a marketable state as wheat, by a vessel which sailed thither about two months after the casualty. The agent of the assured, however, sold it at Waterford; and the assured brought his action for a total loss. Lord Ellenborough, however, plainly intimated that, although the assured might have treated the case as one of total loss while the wheat remained submerged in the water, yet that the loss had ceased to be total when the wheat had been in fact got out, and might have been forwarded in a marketable state (*e*). On the same ground, in a case where the ship was wrecked at her port of loading, but her cargo, consisting of tobacco and sugars, insured "free of average," was all saved, though in a very damaged state, but it did not appear, though the original ship was disabled and obliged to be broken up, that what was saved of the cargo might not have been forwarded in other vessels—Lord Ellenborough and the Court of King's Bench held that the assured, who had abandoned, could not recover as for a total loss (*f*).

Thompson *v.* Royal Exch. Ass. Co.

(*e*) Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 38.

(*f*) Thompson *v.* Royal Exch. Ass. Co. (1812), 16 East, 214; and see the comments of Lord Abinger on this case in Roux *v.* Salvador (1836), 3 Bing. N. C. 280; see also Navone *v.* Haddon (1850), 9 C. B. 30.

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Constructive total loss where commercially impossible to forward goods.

1150. The cases which we have been considering are cases where the cargo in question has sustained actual damage but where there has been a mere temporary loss of voyage. We have already seen that an insurance on goods for a voyage contemplates the arrival of the goods at their destination (*g*). It follows that there may be a constructive total loss of goods, although the goods themselves may have suffered little or no physical damage, and although they may be actually in the possession and under the control of their owner, and although there be no physical difficulty in forwarding them to their destination, if the expenses of doing so would be so great as to make it commercially impossible for the owner to do so. If, that is to say, perils insured against have occasioned such a condition of affairs, that the expense of forwarding the goods would exceed their arrived value, then, inasmuch as it would be absurd to require their owner to spend more money on them than they would ever be worth, he may recover for a constructive total loss.

What expenses to be taken into account.

1151. So far the law may be considered as established. The real difficulty in relation to this subject has been to ascertain what charges and expenses may be taken into account in determining whether the goods are worth sending on. In Reimer *v.* Ringrose (*i*), a cargo of wheat was so greatly damaged that the master, intending the best for all concerned, sold it at an intermediate port in Norway. The Court of Exchequer laid it down that the expense of drying the wheat and of sending it on might be taken into account, in considering whether it was worth the outlay.

Rosetto *v.* Gurney.

The Court of Common Pleas, however, in a subsequent case, declined to adopt this rule (*k*), except with limitations. In that case a cargo of 3,700 quarters of wheat, valued at

(*g*) *Ante*, §§ 1142, 1143.

(*i*) Reimer *v.* Ringrose (1851), 6 Exch. 263.

(*k*) Judgment of Common Pleas in Rosetto *v.* Gurney (1851), 11 C. B. 188.

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6,400*l*., was shipped and insured in bulk on a voyage from Odessa to Liverpool. Shortly after sailing the ship stranded, receiving very considerable sea damage, and was compelled to put into Constantinople to refit. The repairs and expenses amounted to 1,800*l*., to raise which the master hypothecated the ship and cargo for 1,850*l*. by a bottomry bond, payable ten days after arrival in the port of delivery. The ship again sailed, and before her arrival was wrecked, and carried into Cork by salvors, where the cargo being found to be very considerably damaged, and the vessel not worth repairing, notice of abandonment was given, and both were sold.

The jury found as a fact that 1,700 quarters (about half) of the wheat might have been dried, warehoused, and sent on to Liverpool in a marketable condition; and the Court held that the loss on the wheat was an average loss only, if part of the cargo could have been sent on to the port of destination at less than its market value when there; but that in considering that question, the jury were bound to take into account the following items: 1. The cost of unshipping the cargo; 2. Of drying and warehousing it; 3. Of transhipping it; 4. The increased cost of sending it on (if it could not be forwarded on other terms) at a higher than the original rate of freight (*l*); 5. The amount of salvage allowed in proportion to the value of the cargo saved. If the aggregate of these items exceeded the selling value of the cargo at the port of discharge, then the loss would be total upon notice of abandonment.

Expenses of hypothecation cannot be taken into account.

With regard, however, to the debt and costs paid to the holders of the bottomry bond, the Court held that they could not be taken into consideration in estimating the extent (whether total or partial) of the loss (*m*). "The underwriter," as Cresswell, J., expressed it in the course of the

(*l*) If sent on in the original ship, it is on the original contract, and then nothing is to be added as an average loss; so, if transhipped at a less or the same freight; but if transhipped necessarily at a higher rate, the increase is an average loss.

(*m*) Rosetto *v.* Gurney (1851), 11 C. B. 176, 182, 190.

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argument, "does not insure against a loss by hypothecation" (*n*). "It is a risk," says Jervis, C. J., in delivering the judgment of the Court, "not contemplated by the policy, and which the assured must take upon himself" (*o*).

Rule in Rosetto *v.* Gurney reconsidered and affirmed.

1152. Some doubt existing as to the effect and limit of the rule laid down by the Court in Rosetto *v.* Gurney, especially in respect of freight, that rule was expressly reconsidered, after argument, by the Court of Exchequer Chamber in the case of Farnworth *v.* Hyde (*p*), and, in expressing their concurrence with the rule in that case as being the true rule, they said: "We are all of opinion that where goods are, in consequence of the perils insured against, lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury are to determine whether it is practically possible to carry them on, that is, according to the well-known exposition in Moss *v.* Smith (*q*), whether to do so will cost more than they are worth; and that in determining this, the jury should take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and reshipping the goods; but that they ought not to take into account the fact that if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. We also agree that Rosetto *v.* Gurney (*r*) correctly decides that where the original bottom is disabled by the perils of the seas, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred

(*n*) Per Cresswell, J., 11 C. B. 182.
(*o*) Per Jervis, C. J., 11 C. B. 190.
(*p*) Farnworth *v.* Hyde (1866), L. R. 2 C. P. 204.
(*q*) Moss *v.* Smith (1850), 9 C. B. 94.
(*r*) Rosetto *v.* Gurney (1851), 11 C. B. 176.

Sect. 1152. by the goods owner if he carried them on, but only the excess of that cost above that which would have been incurred if no peril had intervened."

Discussion on Farnworth *v.* Hyde.

1153. The decision of the Exchequer Chamber in Farnworth *v.* Hyde has been the subject of much discussion in recent years (*s*). It has been vigorously impugned by Lowndes (*t*) and by McArthur (*u*), but is supported by Mr. Gow (*x*). In order to illustrate the difficulty, it is advisable to set out the facts and figures with some particularity. The action was brought on a policy on a cargo of wood for a voyage from Quebec to Liverpool. The vessel, soon after leaving Quebec, was driven on shore about 102 miles down the river St. Lawrence, and, being a constructive total loss, was properly sold by auction for a small sum. The cargo was also sold at the same time, and the question in the case was whether the condition and situation of the cargo justified the sale, so as to entitle the assured to recover for a total loss.

The evidence showed that the gross value of the cargo, if it had been sent on and had arrived at Liverpool, would have been 3,785*l.* (*y*). The freight that would have been payable to the shipowner was 1,556*l.*: so that the net value of the cargo to the merchant was 2,229*l.* The cost of sending on the cargo to Liverpool in another ship would have been as follows:—

Cost of landing	£350
Cost of reloading	700
Freight	2,552
	£3,602

(*s*) The discussion contained in this and the following paragraphs is retained from the seventh edition of this work, although the editors are disposed to think that the whole controversy has been settled by the Mar. Ins. Act, 1906. See *infra*, § 1158. If this were clearly so, it would, of course, have been idle to retain this lengthy discussion. The editors, however, do not think that the effect of the recent statute is so clear as to render the discussion superfluous.

(*t*) Mar. Ins. s. 133.

(*u*) Mar. Ins. 151. (*x*) Mar. Ins. 155—159.

(*y*) *I.e.*, 4,300*l.* less a sum to be allowed for depreciation, as to which the Court, in dealing with the case, accepted an estimate of 515*l.*

So that the cost of forwarding would have exceeded the freight originally contracted for by 2,046*l.* These figures show that the sum which the cargo would have sold for at Liverpool would have exceeded the cost of forwarding by 183*l.* only; and this sum the jury and the Court of Common Pleas appear to have considered was too narrow a margin for the cargo-owner to rely upon for his profit, and a verdict for a total loss was therefore given and approved. **Sect. 1153.**

The Exchequer Chamber.

1154. The defendant appealed to the Exchequer Chamber, and during the argument in that Court it was for the first time suggested, by Blackburn, J., that the right question had not hitherto been considered, for that, unless the Court of Common Pleas in Rosetto *v.* Gurney had laid down a wrong rule, the proper comparison was between the extra, as distinct from the whole, cost of forwarding, on the one hand, and the gross Liverpool value, without deducting the original freight, on the other; and that inasmuch as in this case such extra cost was only 2,046*l.*, whereas the goods if they had arrived would have sold for 3,785*l.*, it was impossible to say that the jury were justified in finding that perils of the sea had caused a total loss. This view was eventually adopted by the Court, and the verdict for a total loss was set aside (*z*).

Farnworth *v.* Hyde criticised.

1155. Lowndes and McArthur both consider that the decision of the Exchequer Chamber in this case is based on an undeniable fallacy. "There is no total loss by sea-peril, it is argued," says Lowndes (*a*), "unless the whole value of the cargo is exceeded by the expense resulting from sea-peril: now the whole value of the cargo is its value including, or without deduction of, the freight; and the freight under the original bill of lading is not an expense resulting from sea-peril. The fallacy here is, not perhaps obvious, but undeniable when pointed out. The value of the cargo to the merchant or owner of it is not the gross proceeds, but those proceeds minus the ordinary freight. If, on the other hand,

(*z*) The most material part of the judgment has already been cited.

(*a*) Mar. Ins. s. 133, n. (*l*).

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the question is as to the whole value of the cargo to *some one*, no matter whether the owner of the cargo or of the ship, then to some one the entire cost of forwarding it by another vessel, the original ship having been disabled by the perils insured against, is an expense resulting from those perils. That is to say, in computing the value, the interests of shipowner and cargo-owner are added together, but in estimating the expenses, the interest of the cargo-owner alone is looked at."

McArthur (*b*) takes the same view. "In principle, the original freight should be deducted, in the estimate both of the extra charges and of the value at destination; for the question is, whether the goods can be forwarded so as to realize some portion of their value, or whether the whole value to the owner will be absorbed by the extra cost of forwarding. The value of the cargo to the owner is not the gross, but the net value on arrival, *i.e.*, the market value at destination, less freight and ordinary sale charges. The Court of Exchequer Chamber decided, however, that to give rise to a constructive total loss, the *gross* value of the cargo must be absorbed by the extra cost of forwarding, *i.e.*, the entire cost of forwarding, deducting the original freight. This decision was clearly erroneous, for the original freight may either be brought in or left out on both sides in the calculation, but cannot correctly be brought in on one side only."

Further reasons against Farnworth *v.* Hyde.

1156. The rule advocated by these writers may also be supported by the following argument. The gross value of the goods at their place of destination may for present purposes be considered to consist of two items, their prime cost and the enhancement of their value by reason of their transportation. The insurable value of the goods, which is all the underwriter is deemed to be concerned with, is the prime cost of the goods, or that which by the valuation is agreed to be the prime cost. If, in considering whether there should be an abandonment of that which he has insured, the enhanced

(*b*) Mar. Ins. 151, n.

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value of the goods is to be considered, the expenditure on freight to which the enhancement will be due, should be taken into consideration and deducted (*c*). It is only by the payment of the whole freight, that the goods will have the value which is the basis of the calculation in Farnworth *v.* Hyde.

It should also be borne in mind that an insurance on goods for a particular voyage is not merely an insurance of the goods against physical loss or damage. The undertaking of the underwriter is that they shall not be prevented by perils insured against from reaching their destination. If the ship by which they are insured is prevented by the perils of the voyage from bringing them to their destination, the original adventure is frustrated, and the original contract of affreightment has ceased to exist. Ought not the assured, when he is thus called upon to accept his goods at a different place, to be entitled to abandon, when they will not be worth the cost of transportation to their destination?

This is, in effect, an application of the "prudent-uninsured-owner" principle. Suppose, for instance, that goods which will realize 1,000*l.* at their port of destination are being carried for a freight of 650*l.*, that the shipowner, owing to perils of the seas, justifiably declines to carry them beyond a port of refuge, and that it is ascertained that the goods can only be carried on to their destination by spending 500*l.* in re-conditioning, and 600*l.* for freight from the intermediate port. In such a case a prudent uninsured owner would clearly decline to take goods on further, because by doing so he would be 100*l.* out of pocket. But, according to Farnworth *v.* Hyde, there is no constructive total loss, because the

(*c*) On principle it might well be argued that the assured should be entitled to abandon when the extra expenditure due to perils insured against exceeds the insurable value—*i.e.*, the prime cost or the agreed valuation. This view is, however, not supported by authority, and the editors have reason to believe that it does not find favour either with underwriters or with merchants.

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increased cost, viz. 450*l*., is less than the gross arrived value of the goods (*d*).

Moreover, if the assured cannot abandon under circumstances such as those of Farnworth *v.* Hyde, he will not be indemnified for a great part of the loss caused by perils insured against. We will take the facts and figures of that case, which have been fully set out. There was a depreciation of 515*l*., part of which would no doubt be recoverable, except under a policy against total loss only. The cost of landing the cargo was 350*l*., and this was probably recoverable under the sue and labour clause. But the cost of reloading was 700*l*., and the extra freight was 1,000*l*., and unless the decisions in Great Indian Peninsular Railway Co. *v.* Saunders (*e*), and Booth *v.* Gair (*f*) are reconsidered and overruled, neither of these items of expenditure could be recovered from the underwriter. Thus, in consequence of perils insured against, there would have been a loss of at least 1,700*l*. in carrying out the adventure, which the assured would have to bear himself. When the insurance is against total loss only (and this is the only insurance which can practically speaking be effected on some kinds of goods), the hardship on the assured is obviously even greater.

Arguments in support of Farnworth *v.* Hyde.

1157. On the other hand, the position adopted by Lowndes and McArthur may also in certain cases lead to surprising results. For instance, assume that the goods will realize 1,000*l*., as before, and that the freight is 800*l*.; the voyage has to be abandoned near to the port of departure, as in Farnworth *v.* Hyde, and the goods can only be forwarded at an increased rate of freight, say 900*l*. (*g*). They are themselves, however, but little damaged, so that all extra charges, including re-conditioning, will be covered by 100*l*. Is the owner entitled to abandon? The real reason for abandonment in such a case, it may be said, would be not injury to or loss of the goods, but the high rate of freight in proportion to their value which the owner has agreed to pay. But as to this, Mr. Gow observes: "the underwriter never guarantees that cargo will be worth its freight whether it arrives damaged or sound; why should a freight obligation be imported into his contract in certain cases of damage and loss, when it is really a part of the merchant's obligations which the merchant retains at his own risk in case of arrival of his goods at destination?"

(*d*) Mr. Gow, however, in answer to this argument, suggests that this may be only an additional instance of the inadequacy of the "prudent-uninsured-owner" theory, when applied to marine insurance problems. Mar. Ins. 159.

(*e*) (1861), 1 B. & S. 41; 2 *ibid*. 266.

(*f*) (1863), 15 C. B. (N. S.) 291.

(*g*) It is possible also that there might be no increase, and even a diminution of freight, and such diminution might more than compensate the shipper for the costs of transhipment, &c. The shipper might then be in no worse, or even in a better position as regards his cargo, owing to the loss of the ship. At the same time the market for his goods at the port of discharge may have so far fallen as to make his adventure necessarily an unprofitable one. Could this be a case of constructive total loss, by perils of the sea, of his goods?

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It is clear that in the instance given the physical damage sustained by the goods would not justify abandonment. Such damage is assumed to be comparatively insignificant, and it might indeed be non-existent. Abandonment in such a case is justified, if at all, on the ground that the effect of perils insured against has been such as to render it commercially impossible for the merchant to carry on the goods. A constructive total loss of goods may no doubt be constituted in this way, for it is established in the case of goods, though it is otherwise in an insurance on ship, that an insurer does undertake that perils of the sea shall not prevent the voyage from being brought to a successful termination. But, while so much is conceded, it may be urged, in support of the decision of the Exchequer Chamber in Farnworth *v.* Hyde, that adverse criticism has failed to give due weight to the consideration that a constructive total loss, for which underwriters are to be held liable, must have been due to perils insured against? So far as the freight by the substituted vessel does not exceed that which the shipper originally contracted to

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pay, such freight did not become payable by him by reason of any peril of the sea; it was payable in any event (*h*). The only loss occasioned by such peril is the additional amount which it becomes necessary to pay for carrying the goods in a substituted bottom. There is, therefore, force in the argument that it is only this additional amount which should be taken into consideration. "To hold otherwise," said Channell, B.(*i*), "would be to enable the assured owner of goods to bring into account the whole of the freight wherever the cost of obtaining a substituted bottom exceeded the original freight, however small the excess may be; for, in such a case, the shipowner would never carry on the goods for the purpose of earning his original freight, though he might, perhaps, do so as agent of the goods owner; whilst no part of the freight could ever be charged when the cost fell short of the original freight, in which case the shipowner would forward them. This would be a very unsatisfactory state of the law; and we are of opinion that the case of Rosetto *v.* Gurney (*k*), which prevents that result, was correctly decided."

Against the argument that, inasmuch as an insurance on goods for a voyage is an insurance by a particular vessel, the adventure insured is brought to an end by the loss of that vessel, and that the underwriters on the goods should therefore be liable for a total loss, it may on the other hand be said that logically this involves the proposition that whenever a voyage is frustrated by a total loss of the ship, there may be an abandonment of cargo, irrespective of all considerations as to the practicability of forwarding, which is clearly going too far.

(*h*) See per Blackburn, J., L. R. 2 C. P. at p. 220, citing from Baily on Perils of the Sea. See also per Shee, J., 36 L. J. C. P. at p. 37:—"Why should the underwriter pay for freight of a new ship a sum which would have had to be paid under any circumstances? The underwriter insures not against the loss to the owner, but the loss incurred by the perils of the sea."

(*i*) In delivering the judgment of the Exchequer Chamber, L. R. 2 C. P. at p. 226.

(*k*) 11 C. B. 176.

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How the difficulty arises.

1158. The difficulty illustrated by Farnworth *v.* Hyde is due to the fact, already indicated, that in considering whether there has been a constructive total loss on goods, regard is had not to the actual value of the goods at the port of loading, but to what would probably have been their value on arrival at their destination, had they been forwarded. It is a somewhat anomalous position that it should in this way be necessary to take into consideration a prospective hypothetical value, in order to determine whether or not an underwriter is liable to pay for an actual value in the past. It is clear, however, that it is to this prospective hypothetical value that consideration has always been given.

In any case, the editors, while appreciating the difficulties of Farnworth *v.* Hyde, cannot agree with the suggestion that the decision is based on any obvious oversight. It is quite clear from the course which the proceedings took in the Exchequer Chamber, that it was by no inadvertence that the Court (*l*) came to the conclusion at which they did in fact arrive. It is also clear that Farnworth *v.* Hyde not having been overruled by any superior Court, must be considered as having established the law of the land as it existed until the 1st of January, 1907, when the Marine Insurance Act, 1906, came into force.

Has the Marine Insurance Act altered the law on this point?

The question now is, whether the law, as declared by Farnworth *v.* Hyde, has been altered by the Marine Insurance Act. It is thereby enacted (*m*) that "there is a constructive total loss . . . . in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival." If these words are literally construed—and there seems little reason for doing otherwise—the "cost of forwarding the goods to their destination" must include the entire freight payable for carrying the goods on to their destination from the place of distress, and not merely the excess of that

(*l*) Pollock, C. B., Channell, B., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.

(*m*) Sect. 60, sub-sect. (2) (iii), *ante*, § 1091.

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freight over the freight which would have been payable under the original contract. Whether this result is what was intended by the framers of the Act it is of course impossible to say. Unless, however, it be possible to maintain that the "cost of forwarding the goods" means only the extra cost caused by perils insured against,—that is to say, that "the cost" does not mean all the cost, but only a certain portion of it—it seems impossible to avoid the conclusion that, owing to the Act of Parliament, the decision in Farnworth *v.* Hyde is no longer law (*n*).

Impracticability of sending on the whole.

There is now no doubt that, although the whole of the cargo cannot be sent on (*o*), this circumstance is not conclusive in determining whether a sale by the master is justifiable, or the loss on goods constructively total (*p*).

It is equally clear, and is established by the same authorities, that if a sale of the cargo be not otherwise justifiable, it will not be rendered so by being made under the decree of a Vice-Admiralty Court or any analogous Court abroad (*q*).

Sale of partially damaged perishable cargo, which might have been forwarded.

1159. It remains to consider two authorities which seem hardly consistent with the current of later decisions, and would probably not now be supported to their full extent (*r*). It may be observed that in neither case was there a warranty to be free of average.

Gernon *v.* Royal Exch. Ass. Co.

(*n*) So in Lord Halsbury's Laws of England, vol. 17, § 961, per Mr. Arthur Cohen.

(*o*) This was one of the grounds of Lord Mansfield's decision in Manning *v.* Newnham (1782), 3 Dougl. 130, and arose again in Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 44.

(*p*) Freeman *v.* East India Co. (1822), 5 B. & Ald. 617; Morris *v.* Robinson (1824), 3 B. & Cr. 196; 5 Dowl. & Ryl. 35; Cannan *v.* Meaburn (1823), 1 Bing. 243; Moss *v.* Smith (1850), 9 C. B. 94; Rosetto *v.* Gurney (1851), 11 C. B. 176; Meyer *v.* Ralli (1876), 1 C. P. D. 358.

(*q*) See also Reid *v.* Darby (1808), 10 East, 143; per Dr. Lushington, The Eliza Cornish (1853), 1 Spinks, 36.

(*r*) So Arnould, 2nd ed. p. 1135. As regards the former of the two following cases, however, the editors do not see anything to criticise, except perhaps the verdict of the jury.

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Cargo unmerchantable.

A cargo of sugars was insured from Liverpool to Calais: the ship was forced to put back to Liverpool in a totally disabled state, and the sugars, having been necessarily unloaded, were found, on survey, to be so sea-damaged that no part of them was in a merchantable state, and that they could not have been sent on except as damaged goods, though ships might easily have been procured to forward them in that state. Under these circumstances the sugars were sold at Liverpool for about two-thirds of their sound value, and the assured, who had given due notice of abandonment, claimed to recover as for a total loss. Gibbs, C. J., told the jury at the trial that the assured would not be justified in abandoning, unless the property was reduced to such a state that it could not be applied to the original purpose of the voyage; but that they would be entitled to do so "if it was not in a proper condition for the market"; the jury thought the sugars were not in a fit state to be forwarded, and found for a total loss (*s*).

Hudson *v.* Harrison. Cargo not unmerchantable.

1160. The following case, if, indeed, it ought not to be put wholly on the ground of an acceptance of the abandonment by the underwriters, which was mainly relied on by the majority of the Court, goes further than any other authority in English law, and seems to show that, although ample opportunities of transhipment exist, and part of the goods are still in a merchantable condition, yet they may be sold and abandoned if, upon the whole, it was better for the interests of all concerned not to forward them. A cargo of Cape wines, consisting of 241 pipes and 71 hogsheads (of the invoice

(*s*) Gernon *v.* Royal Exch. Ass. Co. (1815), at N. P., Holt, 52. The Court in banc (6 Taunt. 383) refused to set aside the verdict, but the only ground which the defendant was there allowed to raise was as to the sufficiency of the notice of abandonment. On this case being cited in Navone *v.* Haddon (1850), Maule, J., remarked, "That was not the case of an insurance free from average": 9 C. B. 38. This is undoubtedly so. It appears from the report in Holt, that the ship had stranded before putting back to Liverpool; the case, therefore, was treated as though no warranty had existed, though the policy, as in the similar case of Rosetto *v.* Gurney, had no doubt been framed with the usual average clause.

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value of nearly 8,000*l.*), was insured from the Cape to Bristol, Liverpool or Dublin. Had the ship arrived safely, the assured intended to land 100 pipes at Bristol, and to send on the remainder to Dublin, which was therefore the ultimate port of destination. The ship, however, just before reaching Bristol was driven on the rocks at Portishead, where she finally lay in such a position that the whole of her cargo was under water at high tide. The assured, immediately on hearing of the casualty, gave notice of abandonment, and measures were then taken, with the express sanction of the underwriters, to rescue the cargo: the result was that 229 pipes and 67 hogsheads were got out, of which 71 pipes and 43 hogsheads were sound and full, and 17 pipes and 4 hogsheads were quite empty; the residue had either partially leaked, or were more or less damaged by sea water, but were not in an unmerchantable state, and ships might easily have been procured to take them on to Dublin. The wines were finally sold for the net sum, after deducting salvage and all expenses, of 2,570*l.* 16*s.* 3*d.* The Court of Common Pleas held that the plaintiff was entitled to a verdict for a total loss (*t*); the majority of the Court laid principal stress on the fact that the conduct of the underwriters amounted to an acceptance of the notice to abandon. Richardson, J., however, put his judgment on the ground that there was such a loss as to give the assured a right of abandonment at the time, and that such right had not been divested by subsequent circumstances. "Abandonment was then made under circumstances which fully warranted it. Endeavours were made, at a great expense, to save part of the cargo, but in the result it appears that three-fourths of the whole cargo was spoiled or lost; and in the opinion of all the witnesses, it was for the interest of all parties to finish the adventure at Bristol. This was a total loss of voyage: and though there was a partial recovery of one-fourth of the cargo, the facts being such as rendered it prudent for the owners not to proceed further, this was a loss which warranted the notice of abandonment. It is

(*t*) Hudson *v.* Harrison (1821), 3 Brod. & B. 97; 6 Moore, 288.

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material that that part of the cargo which was damaged by the salt water must have become worse by delay, and consequently by carriage on to Ireland." Undoubtedly this last consideration is material, and may perhaps be deemed sufficiently so to reconcile this case on its facts with the other authorities, even without putting it exclusively on the ground of an acceptance of an abandonment by the underwriter.

Constructive total loss of freight.

1161. There are no words in the Marine Insurance Act, 1906, which deal specifically with constructive total loss of freight.

Its peculiar nature.

The consideration of the subject of total loss, and especially of constructive total loss, of freight, is rendered difficult by the peculiar nature of freight, regarded as a subject of insurance. To use the words of Cleasby, B. (*u*): "It is not, as is usually the case, an interest in anything which exists, and of which possession can be had, as, for instance, a ship or cargo, or even" (in the case then before the Court) "freight of cargo on board, of which the lien on the cargo gives a qualified possession; but in such a case of chartered freight as the present the interest is only a right to have cargo provided; it can only be enforced by action, and is in the nature of a chose in action."

It is, for example, easy to understand what is meant by an abandonment, or a notice of abandonment, of ship or cargo to underwriters, and it is comparatively easy to appreciate, and to apply, principles of law when we are dealing with tangible objects of this nature. With respect to freight, however, though the principles are the same, their application is more difficult. A notice of abandonment of freight can mean little more than a notice to underwriters that they may, if they please, avail themselves of such chance as there may be of earning the freight, which is in danger of being lost. Great difficulty has been felt as to when such notice must be given, and when it may be dispensed with. This may perhaps be tantamount to saying that there is often great difficulty in

Meaning of notice of abandonment of freight.

(*u*) In Potter *v.* Rankin (1870), L. R. 5 C. P. at p. 354.

Sect. 1161. distinguishing between an actual and a constructive total loss of freight. It has even been suggested that notice of abandonment is never necessary in order to claim a loss upon an insurance of freight (*x*), which is likewise probably tantamount to saying that there is no such thing as a constructive as distinguished from an actual total loss of this interest. Such a statement is indeed probably too broad, especially in view of the opinion of Brett, J., in Potter *v.* Rankin (*y*), but the mere fact that such a suggestion should have been made illustrates the complexity of the subject. At any rate, there appears to be no reported case (*z*) where an action for a total loss of freight has been defeated for want of a notice of abandonment.

Facts of Potter *v.* Rankin.

1162. The leading case on the subject of total loss (actual or constructive) of freight, and the necessity of giving notice of abandonment, is now Rankin *v.* Potter (*a*), containing not only a decision of the House of Lords, but also the opinions of the various judges who were called in to advise their lordships. The facts of the case were as follows:—The "Sir William Eyre" sailed in December, 1862, from Greenock to New Zealand. More than a month afterwards she was chartered by her owners to proceed, after discharging at New Zealand, to Calcutta and load a cargo for England at a specified rate which the charterer bound himself to pay. The owners then effected the policy in question, against perils of the sea, &c., upon the freight to be earned on this homeward voyage. The vessel eventually arrived at Calcutta so badly damaged by perils of the sea as to make it impossible to perform the voyage thence to England, and her owners

(*x*) Mount *v.* Harrison (1827), 4 Bing. 388; Idle *v.* Royal Exch. Ins. Co. (1819), 8 Taunt. 755.

(*y*) L. R. 6 H. L. at p. 102; and see also per Atkin, J., in Associated Oil Carriers, Ltd. *v.* Union Ins. Soc. of Canton, Ltd., [1917] 2 K. B. at p. 190.

(*z*) Unless, perhaps, Popham *v.* St. Petersburgh Ins. Co. (1904), 10 Com. Cas. 31, be an instance: see at p. 33 of the report.

(*a*) Potter *v.* Rankin (1868), L. R. 3 C. P. 562; (1870), L. R. 5 C. P. 341; (1873), L. R. 6 H. L. 83 (Rankin *v.* Potter).

Sect. 1162. abandoned her to the underwriters on ship. The owners under these circumstances brought an action as for a total loss of the chartered homeward freight, having meanwhile given a notice of abandonment of freight, which notice, however, it was contended by the underwriters was given too late. The House of Lords, in accordance with the opinion of the majority of the judges, held that no notice of abandonment to underwriters on freight was necessary. It is not quite clear, and perhaps it is not very important to consider, whether the prevalent view was that the case was one of actual and not of constructive total loss, in which case notice of abandonment would naturally be unnecessary, or that though a case of constructive total loss, notice of abandonment was excused because there was in reality nothing to abandon (*b*). Some of the judges prefer to shape their reasons from the one point of view and some from the other.

Actual total loss of freight.

1163. Perhaps the most lucid general exposition of the law applicable to the subject is to be found in the opinion delivered by Brett, J. (*c*): "There may be an actual total loss of freight if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless, when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight (*d*). An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as

(*b*) Sects. 60 and 61 of the Mar. Ins. Act, 1906, appear to imply that it is not necessary that there should be a notice of abandonment in order to constitute a constructive loss. But by sect. 62, sub-sect. 1, failure to give notice, unless excused (see sub-sects. 7 and 8), will prevent the assured from recovering, except for a partial loss.

(*c*) L. R. 6 H. L. at p. 99.

(*d*) These observations would not apply to a case where not only the ship, but also the cargo, is a constructive total loss, and any freight which might possibly be earned by forwarding the cargo would be earned by salvors, independently of the original contract of affreightment. See Guthrie *v.* North China Ins. Co. (1900), 6 Com. Cas. 25, Mathew, J.; (1902), 7 Com. Cas. 130, C. A.

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to time, place, and condition, of earning an equal or some freight for carrying other cargo on the voyage insured." And later (*e*): "It is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required, where there is nothing to abandon which can pass to or be of value to the underwriters (*f*). It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or, if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight."

No notice of abandonment necessary where nothing can pass to underwriters.

When may there be a constructive total loss of freight?

Effect of loss of ship or cargo on an insurance on freight.

1164. It appears, therefore, that an absolute total loss of both ship and cargo necessarily must, but that a total loss, whether absolute or constructive, of either only, may or may not, involve an absolute total loss on freight. In other words, where the circumstances of the case are such as to make the ultimate earning of freight wholly impossible, no notice

(*e*) Page 102.

(*f*) See Mar. Ins. Act, 1906, s. 62, sub-s. 7, *ante*, § 1091.

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of abandonment is requisite in order to enable the assured on freight to recover the whole sum he has insured on that interest (*g*). On the other hand, where the circumstances are such as to make the ultimate earning of freight highly doubtful, without, however, destroying all hope of eventually earning it, then notice of abandonment may be necessary to entitle the assured on freight to recover as for a total loss on that interest.

"There seems little doubt," says Tindal, C. J. "that the assured has the right of abandoning the freight where there has been a constructive total loss of the ship" (*h*); but, as in the case of ship and goods, this right is *primâ facie* merely, and the claim of the assured on freight to recover as for a total loss depends solely on the question whether, in point of fact, freight has or has not been earned at the time of action brought (*i*).

Thus, there can be no doubt that capture, arrest, embargo, restraint of princes, or any other peril insured against, the effect of which either is to break up the voyage altogether or to prevent, or for a very long period suspend, the earning of freight, gives the assured on freight an immediate right to give notice of abandonment to the underwriters on that interest; and, after giving such notice, he may recover against

(*g*) Rankin *v.* Potter (1873), L. R. 6 H. L. (E. & I.) 83; Green *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 68; Idle *v.* Royal Exch. Ass. Co. (1819), 8 Taunt. 755; Wilson *v.* Forster (1815), 6 Taunt. 25; Robertson *v.* Marjoribanks (1819), 2 Stark. 573; Mount *v.* Harrison (1827), 4 Bing. 388; Trinder, Anderson & Co. *v.* Thames, &c. Mar. Ins. Co., [1898] 2 Q. B. 114, where it is pointed out that the observations of Brett, L. J., in Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. at p. 475, cannot be taken to apply to an insurance on freight: per A. L. Smith, L. J., at p. 122; Associated Oil Carriers, Ltd. *v.* Union Ins. Soc. of Canton, Ltd., [1917] 2 K. B. 184.

(*h*) Per Tindal, C. J., in Benson *v.* Chapman (1849), 6 M. & Gr. 810; not affected as to this point by the judgment of the Court of Error or the House of Lords. See this acknowledged by Lord Truro in Scottish Marine Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 334. See also Guthrie *v.* North China Ins. Co. (1902), 7 Com. Cas. 130, C. A.

(*i*) See the editors' observations, *ante*, § 1097a.

Sect. 1164. the underwriters as for a total loss, provided no freight is earned before the commencement of the action (*k*).

Where freight has been actually earned, the underwriters on freight are not liable, though it may not have been earned by the assured. M'Carthy *v.* Abel.

1165. Where, however, freight is eventually earned before the action is commenced (*l*), the right of the assured on freight to recover as for a constructive total loss is divested, although it may not have been earned by him, and may be, as far as he is concerned, an actual total loss. Thus, an insurance was effected on the homeward freight of a ship, which had sailed out in ballast to Riga, under a charter-party: after the greater part of the cargo had been loaded on board at Riga, the ship was seized under the Russian embargo of the 7th November, 1800, and the cargo relanded: on receiving intelligence of this casualty, the assured gave immediate notice of abandonment, both to the underwriters on freight, and also, on the same day, to the underwriters on ship, with whom he had effected a separate insurance: in May, 1801, the embargo was taken off, the original cargo was again put on board, and the ship arrived with it in this country before action brought, earning full freight. Under these circumstances Lord Ellenborough held, that the plaintiff could not recover a total loss against the underwriters on freight: 1. Because freight had in the event been fully earned, and therefore no loss could be properly demandable from the underwriters on freight, "who merely insure against the loss of that particular subject"; 2. If freight could be considered as in any other sense lost to the assured, it had become so by their own act in abandoning the ship to the underwriters thereon, with which act, and its consequences, the underwriters on freight had nothing to do (*m*).

The same view was taken by the House of Lords in the

(*k*) See Thompson *v.* Rowcroft (1803), 4 East, 34, and the other cases on the Russian embargo.

(*l*) See Barque Robert S. Besnard Co., Ltd. *v.* Murton, *infra*.

(*m*) M'Carthy *v.* Abel (1804), 5 East, 388. The head-note to this case is wrong in stating that abandonment of freight was accepted by the underwriters. Had it been so, the latter could have had no defence to the claim for a total loss.

Sect. 1165. Scottish Mar. Ins. Co. *v.* Turner.

case of the Scottish Marine Insurance Co. *v.* Turner (*n*). In that case the "Laurel," during a voyage from Quebec to Liverpool, was seriously damaged by an iceberg. She succeeded, however, eventually in completing her journey and earned her freight, which was received by her owners. A survey of the ship, which was subsequently held, showed that she was not worth repairing, and notice of abandonment was given to her underwriters. It was decided in an action against the latter, that they were liable for a constructive total loss, but were entitled to be credited with the freight received (*o*). The owners, then, being compelled to account to the underwriters on ship for this freight, brought an action on the policy on freight. It was held, however, that inasmuch as freight had been actually earned, it was impossible to support an action for its loss.

The mere fact, however, that salvors succeed in bringing part of an abandoned cargo to its port of destination will not prevent there being a total loss of freight (*p*); and where a notice of abandonment of freight was justified by the circumstances existing at the time when it was given, and when an action to recover as for a constructive total loss was commenced, the fact that some freight was subsequently earned by the shipowner does not divest his right to recover (*q*).

A mere retardation of the voyage gives no right to the assured

1166. A mere retardation of the adventure, by a loss of the voyage for a season, gives no right to the assured on freight to recover as for a total loss, even after notice of

(*n*) (1853), 1 Macq. H. L. Cas. 334. Cf. Benson *v.* Chapman (1849), 2 H. L. Cas. 696.

(*o*) Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159: see Mar. Ins. Act, 1906, s. 63 (2). One of the Institute Clauses on Hull provides that, in the event of total or constructive total loss, no claim shall be made by the underwriters for freight. For the effect of this clause, see Coker *v.* Bolton, [1912] 3 K. B. 315.

(*p*) See Guthrie *v.* North China Ins. Co. (1900), 6 Com. Cas. 25; (1902), 7 Com. Cas. 130, C. A.

(*q*) Barque Robert S. Besnard Co., Ltd. *v.* Murton (1909), 14 Com. Cas. 267.

Sect. 1166. abandonment, if it does not prevent the freight from being ultimately earned before action brought.

on freight to recover, if it be ultimately earned. Everth *v.* Smith.

A British ship was chartered to proceed to a port in the Baltic with her outward cargo, there to unload, and then sail, in ballast, to Riga, where she was to load a homeward cargo from the charterer's agents. An insurance was effected generally on freight for the homeward voyage. The ship, having performed the first part of her voyage according to the charter-party, sailed to Riga in ballast, where she arrived in September, and was immediately seized and detained by order of government, without being suffered to load a cargo. This detention continued till the frost set in, in consequence of which the ship was kept at Riga all the winter, and never got a loading from the charterer's agents at all: next spring, however, the master procured a loading from other persons, with which, before action brought, he returned to England, and earned full freight. The assured claimed a total loss, but the Court held he could not recover.

And, in order to satisfy the policy on freight, the freight earned need not be the particular freight contracted for.

The insurance being on freight generally, "the underwriter," said Lord Ellenborough, "did not insure that any particular freight should be brought home, but if any freight is brought home, a loss has not happened for which he undertook to indemnify the assured. In this case," continued his Lordship, "the only inconvenience that has arisen is to be attributed to the protraction of the adventure; but that was decided, in Anderson *v.* Wallis and M'Carthy *v.* Abel, not to constitute a loss. It is certainly a loss of the particular trade which the assured had personally in contemplation, but it is not within the intention of the policy. The mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured, or a posterior freight, makes no difference: if freight has been fully earned there can be no loss properly demandable of the underwriters" (*r*).

(*r*) Everth *v.* Smith (1814), 2 M. & S. 278. See *S. P.* in Barclay *v.* Stirling (1816), 5 M. & S. 6; and Scottish Shire Line, Ltd. *v.* London & Provincial Mar. Ins. Co., Ltd., [1912] 3 K. B. 51. As to the effect of a receipt of pro ratâ freight upon the right of an assured to recover for a total loss of freight insured, see Price *v.* Maritime Ins. Co., Ltd. (1900), 5 Com. Cas. 332; [1901] 2 K. B. 412, C. A.

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1167. In a case, indeed, that came before Sir Vicary Gibbs, the year after this decision, that learned person intimated, in the course of the argument, that, when the freight of a ship is insured, as soon as the cargo is put on board it becomes an insurance on the freight of that cargo (*s*): but the year following, Lord Ellenborough decided the case of Barclay *v.* Stirling on the same principle as that laid down in Everth *v.* Smith (*t*): and it was subsequently acted upon by Lord Tenterden (*x*), and may therefore be considered to be as firmly upheld by authority, as it is reasonable on principle.

If freight is in the event actually and fully earned, the mere fact that it is swallowed up at the port of destination by the charges of a bottomry loan, raised by the master abroad, as agent of the owners, for the repair of his ship, does not constitute a constructive total loss as against the underwriters on freight (*y*).

Constructive total loss on freight, where ship or goods are lost. Effect of transhipment.

1168. If, in the course of the voyage, the original ship be disabled or lost, so that the master has no power of repairing her, he has the right to send on the goods by another ship, if such can be procured (*z*). If he do so send them on in performance of his contract to carry, he thereby earns the original freight, and is entitled to charge the insurers with the expense of doing so (*a*). In respect of the shipper, it is doubtful whether the shipowner's performance of that contract, after his ship is finally disabled, is anything more than

(*s*) In Green *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 68.
(*t*) Barclay *v.* Stirling (1816), 5 M. & S. 6.
(*x*) Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102.
(*y*) Benson *v.* Chapman (1849), 6 Man. & Gr. 792; 5 C. B. 330; 2 H. L. Cas. 696, *post*, s. 1174.
(*z*) Shipton *v.* Thornton (1838), 9 A. & E. 314.
(*a*) Kidston *v.* Empire Ins. Co. (1867), L. R. 1 C. P. 535; in error, 2 C. P. 357.

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an option as distinct from a legal obligation (*b*); but in respect of the insurer on freight, it seems the shipowner is in these circumstances under an obligation either himself to perform the contract, or by timely abandonment to enable the insurer, if he choose, to perform it or have it performed for his own benefit (*c*). The mere loss or disability of the original ship, if the goods may be sent on in another, although it may give the assured a *primâ facie* right of abandonment, does not necessarily involve a constructive total loss of freight.

Substituted cargo.

Similarly, the mere loss of cargo does not necessarily involve a total loss of freight, if the ship can obtain another cargo for the same voyage.

Where both ship and cargo are sold abroad.

1169. If both ship and cargo have been sold abroad, under such circumstances of urgent necessity as to justify their sale, the assured may, as we have seen, without any notice of abandonment, recover as for a total loss on the freight (*d*).

If sale unjustifiable, no total loss of freight, either actual or constructive.

Where, however, the sale is not thus justified by necessity, but the ship might have been repaired, or the cargo sent on, so as to earn freight, the shipowner ought not to be allowed to throw on the underwriter on freight a total loss caused, not by the perils insured against, but by the unauthorized act either of himself, or of the master as his agent; and in such a case mere notice of abandonment, unaccepted, cannot alter the rights of the parties. "If the loss of freight be not total in its nature, abandonment cannot make it so" (*e*).

The principle, in short, seems to be this: where the sale of ship and cargo is justified, notice of abandonment to the underwriter on freight is unnecessary; where such sale is not justifiable, it is inoperative unless accepted or acted upon.

(*b*) See Shipton *v.* Thornton (1838), 9 A. & E. 314; Carver on Carriage, s. 305; 2 Phillips, Ins. ss. 1625, 1632; Kidston *v.* Empire Ins. Co. (1867), L. R. 2 C. P. 364; Hansen *v.* Dunn (1906), 11 Com. Cas. 100. The American law possibly differs herein from that of this country.

(*c*) See Potter *v.* Rankin (1873), L. R. 5 C. P. 341; L. R. 6 H. L. 102.

(*d*) Idle *v.* Royal Exch. Ass. Co. (1819), 8 Taunt. 755.

(*e*) Per Parke, B., Chapman *v.* Benson (1847) (in error), 5 C. B. at p. 363.

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Parmeter *v.* Todhunter.

1170. The case generally cited as showing notice of abandonment to be necessary, in order to recover for a total loss on freight, where ship and cargo had been sold abroad, is that of Parmeter *v.* Todhunter, which was a policy of insurance "on the freight of the ship 'Portsea,'" insured from Berbice to London. The ship, in the course of her voyage, was captured, recaptured, and carried into Grenada, where she was sold with the whole of her cargo. The plaintiff, who had given no valid notice of abandonment, claimed a total loss. It was contended that no notice was necessary, *sed non allocatur*, for the goods might have been brought home in another ship, and so freight have been earned (*f*). It is clear, by what fell from Lord Ellenborough, that the circumstances of this case were not such as to make the sale of the whole ship and cargo justifiable. The case, therefore, is rather an authority for the position that there is no total loss on freight by an unjustifiable sale of ship and cargo, than for the position that notice of abandonment is requisite where ship and cargo have been justifiably sold.

Green *v.* Royal Exch. Ass. Co.

The next case in which the point arose—Green *v.* The Royal Exchange Assurance Company—is quite consistent with that last cited. In this case the insurance was on freight by the ship "Defiance" at and from the Canary Islands to London. The ship, having sailed on her voyage with a full cargo on board, was, in consequence of sea-damage, obliged, on arriving at another port in the Islands, to unship her cargo; and, the ship being found so disabled that it would be impossible to bring her home with her original cargo without repairs, which could not be procured where she was, both ship and cargo were sold. The purchaser of the ship, having partially repaired her, brought her home with a small cargo; her captain (who was also owner and plaintiff in the action) bought another ship of small burden, in which he also brought goods to London, but none of the original cargo. In an action against the underwriters on freight for a total loss,

(*f*) Parmeter *v.* Todhunter (1808), 1 Camp. 541.

Sect. 1170. two objections were made to his right of recovery: 1. That he had given no notice of abandonment; 2. That the sale was not justified by necessity. The Court, as to the first objection, which was supported on the authority of Parmeter *v.* Todhunter, held that there was nothing in it; but, as to the second, a new trial was granted, in order that the jury might consider whether the sale of the ship, under the circumstances, was such a measure as a prudent owner, if uninsured, would have resorted to; or whether he would not have repaired and sent her on, so as to earn freight (*g*). "I think," said Gibbs, C. J., "the assured ought to have acted as if the adventure had not been insured; and, if a man of common prudence would have repaired her for his own advantage, not being insured, he should have done so on account of the underwriters; otherwise he would have been selling the ship for the purpose of throwing the loss" (of freight) "on the underwriters" (*h*).

Idle *v.* Royal Exch. Ass. Co.

1171. In Idle *v.* Royal Exchange Assurance Company, the insurance was on the freight of the ship "Ajax," for a voyage from Quebec to her port of discharge in the United Kingdom. The ship and cargo having been sold abroad by the master and one of the part owners under circumstances which, in the opinion of the Court of Common Pleas, justified the sale on the ground of urgent necessity, that Court held that no notice of abandonment was necessary to entitle the assured on freight to recover a total loss (*i*). When, however, the same case came before the Court of King's Bench on a special verdict, that Court directed a *venire de novo*, on the ground that the necessity of the sale was not distinctly found in the special verdict, and could not be inferred from the facts stated; and Bayley, J., added, on the same occasion, "That the question, whether the circumstances amounted to an abandonment, might also be left open" (*k*); *i.e.*, whether,

(*g*) Green *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 68; 1 Marshall, R. 447.
(*h*) 1 Marshall, R. 452.
(*i*) Idle *v.* Royal Exch. Ass. Co. (1819), 8 Taunt. 755.
(*k*) 3 Brod. & Bing. 151, n. (*d*).

Sect. 1171. even with notice of abandonment, the assured would have had a right to recover as for a total loss on freight.

Mount *v.* Harrison.

These cases seem to be, in fact, mere illustrations of the principle, afterwards finally established in Rankin *v.* Potter, that notice of abandonment of freight is unnecessary in cases where the underwriters could not possibly derive any advantage by receiving such notice (*l*). Such, too, appears to have been the *ratio decidendi* in the case of The Olive Branch, where freight was insured from the Cape of Good Hope to London. The ship, while loading in Table Bay, was driven ashore, and sold under circumstances of such urgent necessity as, in the opinion of the Court, fully to justify the sale; the cargo, one-third of which was loaded on board at the time of loss, and the rest engaged, was immediately sent on to England in another vessel. The plaintiff claimed a total loss on freight: it was objected that he should have given notice of abandonment; but the Court, under the circumstances of the case, thought it unnecessary, and the plaintiff recovered the whole amount of his insurance (*m*).

Notice of abandonment unnecessary where ship properly sold and freight cannot possibly be earned.

It must be assumed in this case that the event upon which the earning of the freight insured was made to depend, was the arrival of the ship under the charter-party: if the freight insured had been made payable on the delivery of the goods, in terms of the bill of lading, it should seem, as the goods were actually sent on, and arrived so as to earn freight, by another ship, that this was precisely the case contemplated by Lord Ellenborough in Parmeter *v.* Todhunter, and that, as the loss on freight became, in the event, less than total, the assured would not have been entitled to claim as for a total loss (at all events, without notice of abandonment); that which he should have abandoned being the chance of the cargo arriving, so as to earn higher freight than that which

(*l*) Or, in the words of the Mar. Ins. Act, 1906, s. 62, sub-s. 7, "notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him."
(*m*) Mount *v.* Harrison (1827), 4 Bing. 388.

Sect. 1171. the shipowner would have to pay for the hire of the ship in which it was sent on. Where, under similar circumstances, the master sold, not only the ship, but also the cargo, from the impossibility of sending it on, except at an exorbitant rate of freight, this was held in the United States, and as it seems justly, an absolute total loss of freight.

If master sells the goods, when he ought to forward them, the loss on freight thereby caused cannot be thrown on the underwriter.

1172. Where the original ship can be repaired in a reasonable time, or the cargo may be sent on in a substituted ship, at a reasonable amount of cost and trouble, and with a fair hope of its ultimately arriving in specie, or in a merchantable state, at its port of destination, the master ought to send it on and is not justified in selling; and the shipowner will not be entitled on the ground of the master's negligence or improper conduct, in selling the goods instead of forwarding them, to give notice of abandonment and recover as for a total loss on freight (*n*).

So, in the case of Mordy *v.* Jones, where the original ship, after putting back to refit, had been repaired so as to be capable of taking on the goods, and the goods, though sea-damaged, were capable of being forwarded, though not without involving a considerable delay and an expense equal to the freight, it was decided in this country that the master could not, by selling instead of taking them on, throw the loss of their freight on the underwriter (*o*). The expense, though equal to the freight, might yet have been far below the selling value of the goods; that, therefore, was not an expense such as entitled the master to sell them; but he was entitled to carry them on and to earn freight, and if he voluntarily surrendered this advantage, he could not then turn round on the insurers of freight and claim for a loss,

(*n*) See the United States decisions, Saltus *v.* Ocean Ins. Co. (1815), 12 Johnson, R. 107; Bradhurst *v.* Columbian Ins. Co. (1812), 9 Johnson, R. 17; Griswold *v.* New York Ins. Co. (1806), 1 Johnson, R. 205; 2 Phillips, ss. 1639, 1640.

(*o*) Mordy *v.* Jones (1825), 4 B. & Cr. 394; Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102. In the case of Mordy *v.* Jones, the merchant had himself consented to the goods being left behind and sold, as the best step under the circumstances.

since the loss was not the effect of any of the perils insured against (*p*). If, however, such expense were so great as to involve a constructive total loss of the goods, he could recover as for a total loss of freight, at any rate by giving notice of abandonment (*q*).

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Constructive total loss of goods may justify abandonment of freight.

1173. Mere inability to send on the entire cargo is no case of constructive total loss on freight. A ship valued at 12,000*l.* was insured from Valparaiso to England; freight valued at 4,000*l.* was insured on the same voyage by a separate policy. The ship having sailed with a full cargo, was compelled by stress of weather to put back to Valparaiso, where the master —finding on survey that to repair her so as to bring home the entire cargo would cost more than the value of the freight, though less than the value of the ship when repaired—sold the ship; the cargo, 800 tons, was sent on in other ships and ultimately arrived at Liverpool, earning freight to the amount of about 3,600*l.* This was held not to be a total loss, either of ship or freight (*r*).

Mere inability to send on the entire cargo is not a case of constructive total loss on freight. Moss *v.* Smith.

1174. If the master, instead of sending on the cargo in another vessel or selling it where it lies, repairs the original ship on bottomry, and the repaired ship subsequently arrives before action brought, earning full freight, but subject to a lien under the bottomry bond to an amount greater than the joint value of the ship as repaired and the freight as earned, this is not a constructive total loss on freight. The freight of a general ship was insured for a homeward voyage from Pernambuco to Liverpool; the ship received such damage in coming out of Pernambuco Harbour as to be totally disabled for the voyage without repairs; the master, instead of selling, repaired the ship on bottomry and afterwards brought her on to Liverpool, where she arrived before the commencement of the action, earning full freight, but burdened with a

Where freight is earned, but received by bottomry bondholder instead of by assured, the latter cannot recover. Benson *v.* Chapman.

(*p*) Mordy *v.* Jones, *supra;* Philpott *v.* Swann (1861), 30 L. J. C. P. 358; 11 C. B. N. S. 270.

(*q*) Michael *v.* Gillespy (1857), 26 L. J. C. P. 306.

(*r*) Moss *v.* Smith (1850), 9 C. B. 94.

Sect. 1174. charge on the bottomry bond which exceeded the joint amount of the ship's value as repaired and of the freight earned. The plaintiff, who had given due notice of abandonment on first hearing of the probable expense of repairs, allowed the ship to be sold and the freight paid over on behalf of the obligees on the bottomry bond, and then sued the underwriters on freight as for a total loss. When the case first came before the Court of Common Pleas, that Court held (on the authority principally of Holdsworth *v.* Wise) that this was a constructive total loss on freight (*s*); the Court of Exchequer Chamber, however, reversed the judgment (*t*), and the reversal was sustained by the House of Lords (*u*). The receipt of the freight by the holder of the bottomry bond was treated as a receipt of freight by the plaintiff, and the case was put upon the point that the freight was not actually lost by the perils insured against, for it was in point of fact actually earned; if lost to the plaintiff at all, it was by his own acts and omissions. "The underwriters on this policy," it was said, "engage only that freight shall be earned, and it has been earned" (*x*).

Effect of abandonment of ship on the freight underwriters.

1175. The effect of an abandonment to the underwriters on freight, when there is a separate insurance and a separate abandonment on the ship, was long a subject of vexed discussion in this country, but has now been finally set at rest. The case supposed is, that the ship is insured with one set of underwriters, and the freight with another; a constructive total loss of ship takes place, the assured abandons the ship to the underwriters on ship, and the freight to the underwriters on freight; the ship, after the abandonment has been made and accepted by both sets of underwriters, arrives

(*s*) Benson *v.* Chapman (1843), 6 M. & Gr. 792.
(*t*) Chapman *v.* Benson (1847), 5 C. B. 330.
(*u*) Benson *v.* Chapman (1849), 2 H. L. Cas. 696.
(*x*) Opinion of the Judges in Benson *v.* Chapman (1849), 2 H. L. Cas. 722—724. The principle here decided seems identical with that of Scottish Mar. Ins. Co. *v.* Turner and similar cases, which will be found considered in the next following pages.

Sect. 1175. earning freight: the question is, which set of underwriters shall take the benefit of the freight so earned? (*y*). The question was a good deal litigated in several cases (*z*) which arose out of the Russian embargo of 1800, and was at last determined in Case *v.* Davidson, the facts of which were as follow:—

Case *v.* Davidson.

The defendant (shipowner) had insured a general seeking ship with one set of underwriters, and afterwards her freight with another set of underwriters, by two separate policies. The ship having been captured, the defendant gave immediate notice of abandonment to both sets of underwriters on the same day, which notice they respectively accepted. Afterwards, the ship, having been recaptured, arrived earning freight; and the two sets of underwriters settled with the defendant as for a total loss, under an agreement that the ship should be sold, and the defendant hold the proceeds of her sale, and also the freight actually earned, for the use and benefit of the parties legally entitled thereto. The money realized by the sale having been paid over to the underwriters on ship, they now further claimed to recover from the defendant the amount of the freight held by him, under the agreement already mentioned. A majority of the Court of King's Bench held that they were entitled to recover (*a*); and this judgment was confirmed by the Court of Exchequer Chamber (*b*).

Abandonees of ship take all pending freight ultimately earned.

In the Court below, the grounds on which Lord Ellenborough, Abbott, J. (afterwards Lord Tenterden), and Holroyd, J., rested their judgment were mainly these: That an abandonment to the underwriter on ship transfers to him not merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage; that, as

(*y*) See now Mar. Ins. Act, 1906, s. 63, sub-s. 2, *infra*, § 1176, affirming the law established by the cases here cited.
(*z*) Thompson *v.* Rowcroft (1803), 4 East, 34; Leatham *v.* Terry (1803), 3 B. & P. 479; M'Carthy *v.* Abel (1804), 5 East, 388; Sharpe *v.* Gladstone (1805), 7 East, 24; Ker *v.* Osborne (1808), 9 East, 378.
(*a*) Case *v.* Davidson (1816), 5 M. & S. 79.
(*b*) Davidson *v.* Case (1820), 2 Brod. & Bing. 379.

Sect. 1175. abandonee of ship, "he has all the rights of the shipowner cast upon him by operation of that emphatic word in the law merchant, 'abandonment;' and, being so entitled, has a right, if he uses the ship for completing the voyage, to her earnings, as against all the world;" that it is a principle clearly established, that if the ship be sold the vendee is entitled to freight as an incident to the ship; that abandonment is equivalent to a sale of the ship, and therefore operates a complete transfer of all rights consequent upon a sale, including freight. Upon these grounds they held that the plaintiff, as abandonee of ship, became entitled immediately to all the freight ultimately earned, as a necessary consequence of the abandonment, and was therefore entitled to recover the amount he claimed (*c*).

1176. This decision of the Exchequer Chamber was fully supported by the House of Lords in the case of the ship "Laurel," in which the principle was affirmed that "Freight, while the ship is in a course of earning it, is a benefit or advantage incident to the ship, and therefore becomes the property of the underwriters on ship, paying for a total loss."

Stewart v. Greenock Mar. Ins. Co.

The short facts of the case were these:—The "Laurel," in the course of a voyage from Quebec to Liverpool, struck upon an iceberg in the Atlantic on the 27th July, and was very considerably injured. She reached Liverpool, however, and while in the river there grounded outside the dock gates on the 11th of August, and was afterwards taken into dock, and, on the cargo having been discharged, was surveyed. After

(*c*) See 5 M. & S. 82—84, 86—90. Bayley, J., dissented from the rest of the Court, principally on the ground that, as the underwriter on ship insures only the body, tackle, and apparel of the ship, he has no right, therefore, to expect from an abandonment more than he has insured (see *ibid.* 84—86). The established doctrine is also commented upon and explained by Brett, M. R., in Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. at p. 716:—"It does not seem to me that the payment of freight under these circumstances is made under the original contract of affreightment. It is a payment for work and labour done, and the original contract of affreightment, where it exists, is invariably taken by the tribunal which tries the question as the measure of the value of the work and labour done."

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the survey the owners abandoned to the underwriters on ship, and claimed as for a total loss. The jurors found as a fact in the case that there was, under the circumstances, a total loss of the "Laurel," which, as she lay in dock, was properly abandoned and not worth repairing. It was held by the House of Lords that the underwriter on the ship was entitled, on settling for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo (*d*).

Scottish Mar. Ins. Co. v. Turner.

The shipowner, having been thus deprived of his freight by operation of law, brought his action against the underwriter on freight to recover the whole amount insured in the freight policy, as for a total loss on that interest. The Court of Session gave judgment in his favour, but that decision was reversed by the House of Lords, on the short ground that, the condition of the freight policy being simply that freight should be earned, and freight having been actually earned, the condition of the freight policy had been fulfilled, and the fact that the freight had been paid not to the plaintiff (the shipowner) but to the underwriters on ship was held to make no difference (*e*).

Underwriters on freight not liable if freight has been actually earned.

Two meanings of "loss of freight."

"The expression, the 'loss of freight,'" says Lord Truro in delivering his opinion in the House, "has two meanings, and the distinction between them is material:—

"1. Freight may be lost in the sense that, by the perils insured against, the ship has been prevented earning freight.

"2. Freight may be lost in the sense that, after it has been

(*d*) Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159. Lord Cottenham puts this throughout his judgment as a case of actual total loss of ship; and the case, therefore, is an authority for the position that in such case freight, when earned, vests in the underwriter on ship paying for a total loss.

(*e*) Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. 334; confirming the case of M'Carthy *v.* Abel (1804), 5 East, 388. In order to avoid the effect of this decision, it is provided in the Institute Clauses and in some club policies that a total loss of freight is to be paid in the event of the total loss of ship. For an example, see U. K. Mutual Assoc. *v.* Boulton (1898), 3 Com. Cas. 330; and Coker *v.* Bolton, [1912] 3 K. B. 315, where it was held that the words "in full" in the Institute Clause do not deprive the underwriters of benefit of salvage.

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earned, the owner has been deprived of it by some circumstance unconnected with the contract between the assured and the underwriter on freight. For a loss of freight in the first sense the underwriter on freight is responsible; for a loss of freight in the second sense he is not" (*f*).

Effect is given to the decisions in sect. 63, sub-sect. 2, of the Marine Insurance Act, 1906, which declares that, "upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss." The Hull Institute Clauses, however, provide that in the event of total or constructive total loss, no claim is to be made by the Hull underwriters for freight, whether notice of abandonment has been given or not. Any freight received by the shipowner may therefore be payable by him as salvage to the freight abandonees (*g*).

The freight transferred by the abandonment is the whole freight pending at the time of the casualty, and ultimately earned by the ship.

1177. The freight transferred by the abandonment is the whole freight pending at the time of the casualty which gave occasion to the abandonment, and ultimately earned by the ship (*h*). This follows from the principles—1. That an abandonment, if accepted and effectual, clothes the abandonee with all the rights of ownership from the moment of the loss that gave the right to abandon, and substitutes him from that time in the place of the assured (*i*); 2. That freight earned

(*f*) Per Lord Truro in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. 340.

(*g*) Even though they, by the Freight Institute Clauses, have agreed, in case of total loss of the vessel, to pay the amount underwritten by their policy "in full": Coker *v.* Bolton, *supra*.

(*h*) Mar. Ins. Act, 1906, s. 63, sub-s. 2, *supra*, § 1076.

(*i*) 2 Emerigon, c. xvii. s. 6, p. 232, and *ibid.* p. 256, goes further, and says it makes the abandonee owner from the commencement of the risk (*dès le principe*); but this is incorrect according to English law, see Miller *v.* Woodfall, *infra*.

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under an entire contract is never apportionable, except by express stipulation (as where it is agreed that a portion of the freight shall be paid on the ship's arrival at an intermediate port), or by act of the parties (as where the merchant shipper agrees to take his goods at the port of distress, in which latter case freight *pro ratâ* is due).

Abandonment does not transfer freight earned *pro ratâ*, or by delivery of part cargo before the casualty.

If some freight has been actually earned before the casualty took place, by payment of part or delivery of part of the cargo, under the terms of the charter-party, at an antecedent port, or by an agreement between the shipowner and the merchant whereby freight *pro ratâ* has become due on part of the goods, the freight so paid or so apportioned would not vest in the abandonee of the ship (*k*). Similarly "where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss" (*l*)—not for their carriage over the whole voyage.

Nor damages in respect of loss of freight recovered by shipowner from wrongdoers.

1178. It is also to be noticed that abandonment does not necessarily divest the shipowner of all rights which he may have in connection with the ship abandoned; it is only rights which are strictly incidental to his ownership which are so transferred (*m*). For example, the defendants, owners of the "Queen of the East," insured her with the plaintiffs for a voyage for which she was chartered, and also insured with other underwriters the freight expected to be earned. The freight was never earned, owing to the vessel colliding with the "Cassandra" and becoming a constructive total loss. For this collision the "Cassandra" was solely to blame, and the defendants recovered from the owners of the latter vessel damages for the loss of their ship, and also for the loss of her

(*k*) The Red Sea, [1896] P. 20. And cf. Luke *v.* Lyde (1759), 2 Burr. 882, and Thompson *v.* Rowcroft (1803), 4 East, 44, per Le Blanc, J.

(*l*) Mar. Ins. Act, 1906, s. 63, sub-s. 2.

(*m*) *Id.* s. 63, sub-s. 1: "the interest of the assured in whatever may remain of the subject-matter insured, and the proprietary rights incidental thereto."

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freight. The plaintiffs, having paid the defendants for a total loss of the "Queen of the East," claimed to be entitled to receive from them the damages recovered from the owners of the "Cassandra" under both heads. It was decided, however, that the expected freight was not an incident of the ownership of the vessel, and that the right thereto and to recover damages for its loss did, therefore, not pass to the plaintiffs, as underwriters on ship, by virtue of the abandonment (*n*).

Rights of abandonees of ship as to freight earned by substituted ship.

It further follows from the principles just stated, that if the pending freight be ultimately earned by a substituted ship, the original vessel being totally disabled, the original owners, as parties to the charter-party, are the persons entitled, and not the abandonees of ship (*o*), unless these latter can show that the master in hiring another ship acted as their agent, a thing not to be presumed. Of course, if there be no pending freight, although there be cargo on board, as where the assured is owner both of ship and cargo, the abandonees of ship recover nothing in the name of freight or for use of the ship, except for so much of the voyage as is accomplished with the cargo on board after the abandonment (*p*). In case the claims of the abandonee of ship be not enforced, the abandonee of freight, who has adjusted a total loss, may claim from the assured, as salvage, any freight ultimately earned less the necessary expenses of earning it (*q*).

1179. Our law, as fixed by the decisions, seems undoubtedly to present the anomaly, "that the assured on freight may, by making a distinct contract with a third party, deprive the

***Pro ratâ* freight in the United States.**

(*n*) Sea Ins. Co. *v.* Hadden, C. A. (1884), 13 Q. B. D. 706; and see *post*, § 1232. In Mason *v.* Marine Ins. Co. (1901), 110 Fed. R. 452, the Circuit Court of Appeals held that the underwriters on ship were entitled to the damages recoverable from the wrong-doing vessel for loss of chartered freight, and distinguished Sea Ins. Co. *v.* Hadden on grounds which the editors consider untenable.

(*o*) Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273; 4 H. & N. 455.

(*p*) Mar. Ins. Act, 1906, s. 63, sub-s. 2, *ante*, § 1176; Miller *v.* Woodfall (1857), 27 L. J. Q. B. 120; 8 E. & B. 493. See Brown *v.* North (1852), 8 Exch. 1.

(*q*) Barclay *v.* Stirling (1816), 5 M. & S. 6.

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underwriter on the freight of the salvage to which he would have been entitled had no such contract been made" (*r*). In the United States this inconsistency is sought to be avoided by making an apportionment of the freight earned before and after the event which occasions the abandonment. The rule there has long been understood to be, that, on an accepted abandonment of ship, the freight earned previous to the loss, apportioned *pro ratâ itineris*, is to be retained by the shipowner, or by his representative, the underwriter on freight, to whom it has been abandoned, and that only the freight earned subsequently to the time of loss vests in the abandonee of ship (*s*).

It certainly seems that this rule is more free from objections than our own; nor does there appear to be any great difficulty in its practical application. Thus, in a case where ship and freight had been abandoned to the respective sets of underwriters, on account of the capture of the ship after she had performed eight-ninths of the voyage insured, the Court held that the underwriters on the freight were entitled, in virtue of the abandonment, to all the vessel's earnings previously to the casualty—that is to say, eight-ninths,—and those on the ship to the remaining ninth (*t*). This case is almost identical with that put by Bayley, J., in order to illustrate the unfairness of the English rule, according to which the underwriter on the ship in such case would receive the whole benefit and earnings of the voyage, although he would only be at a few days' expense for provisions, &c. (*u*).

(*r*) So Arnould, 2nd ed. p. 1153, citing 2 Phillips, Ins. ss. 1649, 1740; but the effect of the decision in Scottish Mar. Ins. Co. *v.* Turner (*ubi supra*) is to throw the loss not on the underwriter on freight, but on the shipowner.

(*s*) 3 Kent, Com. 332, and see the cases cited by him, of which the principal are: United Ins. Co. *v.* Lenox (1802), 1 Johnson, 377; 2 Johnson, 443; Marine Ins. Co. *v.* United Ins. Co. (1812), 9 Johnson, 186. See also the cases collected and commented on, 2 Phillips, Ins. ss. 1738—1742, and *per cur.*, Mason *v.* Marine Ins. Co. (1901), 110 Fed. R. 452.

(*t*) Leavenworth *v.* Delafield, 1 Caines, 578, cited 2 Phillips, s. 1741.

(*u*) In 5 M. & S. 86.

Sect. 1180. Law in France.

1180. In France, insurances on pending freight (*fret à faire*) were formerly prohibited (*x*), so that the question could not arise as between the two sets of underwriters (*x*); but the general question as to the effect of an abandonment of the ship on pending freight gave rise to a great deal of embarrassed litigation.

The Code de Commerce originally enacted that the freight of the goods saved (*fret des marchandises sauvées*) vested on abandonment in the abandonee of ship, even though paid in advance (*y*). This provision of the Code de Commerce was, however, expressly repealed by the Law of 12th August, 1885, which at the same time legalized the insurance of the net freight (*le fret net*) (*z*).

Deductions from freight when it vests as salvage.

1181. With regard to the deductions to be made from the freight ultimately earned, when it vests as salvage in the abandonees (*a*), the following points have been decided:—

Sharp *v.* Gladstone.

In a case in which ship and freight, on detention under the Russian embargo of 1800, had been abandoned to the respective underwriters, and where it was assumed that each set of underwriters were to be considered as in the place of the assured for the respective interests insured, the shipowner claimed to make the following deductions from the freight ultimately earned before paying it over as salvage to the underwriters on freight, who had paid him a total loss:—

Deductions claimed.

1. Expenses of shipping the cargo together with expenses of the ship and crew at St. Petersburg and Elsinore. 2. Insurance on same. 3. Wages and provisions of master and crew from the time they were liberated in Russia till discharged in Liverpool. 4. Their wages during their detention under the embargo. 5. Charges paid at Liverpool on ship and cargo. 6. Insurance on ship for the homeward voyage. 7. Diminution of ship's value by wear and tear.

(*x*) By Art. 347 of the Code de Com., before it was amended in 1885.
(*y*) Art. 386, now repealed. See *infra*.
(*z*) See Code de Com. Art. 334, as amended.
(*a*) The Mar. Ins. Act, 1906, s. 63; sub-s. 2, *ante*, § 1176, simply says that the abandonees are entitled to the freight "less the expenses of earning it incurred after the casualty."

Sect. 1181. Deductions allowed.

The Court held: 1. That the expenses of shipping the homeward cargo, being altogether for the benefit of the underwriters on freight, should fall exclusively on them. 2. That the expenses of ship and crew, and the insurance thereon, the wages and provisions of the master and crew between their liberation from the embargo and the ship's discharge, and their wages during the detention, should be deducted from the salvage, and apportioned between the two sets of underwriters according to their respective interests. 3. The charges on ship and cargo in the port of discharge, the cost of insuring the ship for her homeward voyage, and the diminution of her value thereon by wear and tear, the Court held could not be charged on the freight (*b*).

Barclay *v.* Stirling.

In another case, where, the ship having been cast away in the course of the voyage, a separate abandonment was made to both sets of underwriters, but the abandonees of ship, in consideration of the assured's taking less than a total loss, renounced all claim to benefit of salvage, it was held that the underwriters on freight, who had paid a total loss, were entitled to the freight ultimately earned by the repaired ship's arriving with a substituted cargo, after deducting the necessary expenses of loading such cargo on board at the port of repairs, and the wages of the crew during the loading. Any expenses, however, incurred while the ship was detained merely for the purpose of necessary repairs were not to be deducted from the freight, but set to the account of the shipowner, to be made good by the underwriter on ship (*c*).

(*b*) Sharp *v.* Gladstone (1805), 7 East, 24.
(*c*) Barclay *v.* Stirling (1816), 5 M. & S. 6.

CHAPTER VIII.

ABANDONMENT.

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Distinction between abandonment and notice of abandonment.

1182. In this chapter the term "abandonment" is used, and the effects of abandonment are considered, in relation to cases of constructive total loss. Abandonment is, however, an incident of all cases of total loss, whether actual or constructive. "Whenever there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity" (*a*).

Sect. 63, sub-sect. 1, of the Marine Insurance Act, 1906, declares that—

> Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(*a*) Per Brett, L. J., in Kaltenbach *v.* Mackenzie (1878), L. R. 3 C. P. D. at p. 471. See also per Blackburn, J., in Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 118.

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The law, however, does attach a peculiar incident to cases of constructive total loss under a marine policy by insisting that the assured in order to recover shall not only abandon, but shall also give a proper notice of abandonment (*b*). The reasons for this rule have been already explained in the chapter on Constructive Total Loss (*c*). At this point it is only necessary to point out that the expressions "abandonment" and "notice of abandonment" are sometimes used without due regard to the distinction which really exists between them (*d*).

Right to give notice of abandonment formerly discouraged in the English Courts.

1183. A great disinclination was formerly shown by the English Judges to encourage or extend the application of the doctrine (*e*). Lord Ellenborough on one occasion spoke of it as "a desperate risk cast on the underwriter, who is to save himself as well as he can" (*f*); and during the whole time he presided in the Court of King's Bench he uniformly endeavoured to restrain the practice within narrower limits.

The modern tendency of our Courts, however, has unquestionably been to give a reasonable facility and extension to the practice of abandonment; and there can be no doubt that, if restrained within due limits, this practice gives a direct encouragement to mercantile enterprise.

Utility of abandonment.

To all, indeed, who are engaged in commercial speculations, it is of the last importance to have a ready and quick command over their capital, so as to be enabled at once to withdraw it from any adventure that appears likely to be losing, and

(*b*) See Mar. Ins. Act, 1906, s. 62, sub-s. 1, *infra*, § 1184. Sect. 57, sub-sect. 2, makes it clear that this provision relates to constructive total loss only. Sect. 63, sub-sect. 1, seems also to relate only to constructive total loss, the case of actual total loss being dealt with in sub-sect. 1 of sect. 79, *infra*, § 1225, the provisions of which appear, however, to be applicable also to constructive total loss.

(*c*) See Kaltenbach *v.* Mackenzie, per Cotton, L. J., at p. 480.

(*d*) *E.g.*, per Lord Ellenborough in Mellish *v.* Andrews (1812), 15 East, 16, "Abandonment is only necessary to make a constructive total loss."

(*e*) See the opinions of Lord Mansfield in Goss *v.* Withers (1758), 2 Burr. 683, and Buller, J., in Mitchell *v.* Edie (1787), 1 T. R. 616.

(*f*) In Bainbridge *v.* Neilson (1808), 10 East, 341.

Sect. 1183. invest it in another that promises to be lucrative. Suppose, then, a merchant or shipowner to have received information of some marine casualty, such as capture or stranding, which renders the total loss of his property highly probable, but not absolutely certain, what is he to do under such circumstances? To have his funds locked up during the whole time he is waiting the ultimate issue of the accident would be almost as disastrous as the absolute total loss of his property—in fact, more so, for in the latter case he would have an immediate claim on the underwriter for the amount of his subscription. The claim, therefore, which he would have a right to make in case of an absolute total loss, the law allows him to make in these cases of probable and highly imminent total loss; it allows him to release himself from his embarrassment, and deal with the underwriters on the same terms as though a total loss had actually occurred, on condition of his abandoning to them all his interest in the subject insured and all his rights of recovering it (*g*).

Meaning of "constructive total loss."

Hence it is that those cases in which alone abandonment is either required or allowed are called cases of constructive total loss, for, although in such cases the total loss is only highly probable, the law by its construction attributes to them the same effect which is attached to cases where the total loss is absolute, viz., that of entitling the assured immediately to demand from the underwriter the whole amount of the insurance (*h*). What amounts to a constructive total loss forms a difficult and intricate matter of investigation.

Notice of abandonment necessary in cases of constructive total loss.

1184. The sixty-second section of the Marine Insurance Act, 1906, provides (*i*) that, "subject to the provisions of this section (*k*), where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so, the loss can only be

(*g*) Per Lord Mansfield in Goss *v.* Withers (1758), 2 Burr. 683; Hamilton *v.* Mendes (1761), *ibid.* 1127.

(*h*) 2 Boulay-Paty on Emerigon, c. xvii. s. 2, p. 217.

(*i*) Sub-sect. 1.

(*k*) See sub-sects. 7, 8, 9, *ante*, § 1091.

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treated as a partial loss." In other words, "where the thing insured subsists in specie and there is a chance of its recovery, in order to make it a total loss there must be an abandonment" (*l*).

Assured not obliged to abandon.

"A party," says Lord Ellenborough, "is not in any case obliged to abandon, neither will the want of abandonment oust him from his claim for that which is, in fact, either an average or a total loss, as the case may be." "Where there is an abandonment, the risk is thrown upon the underwriters; where there is none, a party takes the chance of recovering according to his actual loss. Abandonment is only necessary to make a constructive total loss" (*m*).

In cases of absolute total loss it is nugatory.

It is only, indeed, in cases where the assured wishes to recover the whole amount of the insurance, upon the occurrence of a loss which does not produce the absolute destruction of the thing insured, that a notice of abandonment is either necessary or allowable (*n*). In cases of absolute total loss it is considered, as we shall presently see, to be a mere idle ceremony (*o*).

In cases of partial loss inoperative.

And in cases of partial loss, however great may be the amount of the damage, it is wholly inoperative; for it is a fixed principle in this branch of the law that no merely partial loss—no loss, that is, which neither immediately

(*l*) Per Lord Ellenborough in Tunno *v.* Edwards (1810), 12 East, 491; and see the judgment of the House of Lords in Fleming *v.* Smith (1848), 1 H. L. Cas. 535; and that of the Court of Queen's Bench in Knight *v.* Faith (1850), 15 Q. B. 659.

(*m*) Per Lord Ellenborough in Mellish *v.* Andrews (1812), 15 East, 16. See also per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 287; Woodside *v.* Globe Mar. Ins. Co., [1896] 1 Q. B. 105; Lohre *v.* Aitchison (1877-1879), 2 Q. B. D. 501; 3 Q. B. D. 538; 4 App. Cas. 755.

(*n*) Under some circumstances an assured may be entitled to recover the whole amount insured as particular average, *e.g.*, in the case of an undervalued ship. See *ante*, § 1023; and The St. Johns (1900), 101 Fed. R. 469. The underwriter cannot insist on abandonment, even after payment of the whole amount of the insurance, unless the payment has been for a total loss: *ibid.* See *ante*, § 1092.

(*o*) It is expressly provided by the Mar. Ins. Act, 1906, s. 57 (2), that "in the case of an actual total loss no notice of abandonment need be given."

Sect. 1184. produces, nor ultimately tends to produce, the total destruction or privation of the thing insured—can be converted into a constructive total loss by means of abandonment (*p*). "There is not any principle," says Lord Ellenborough, "which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of the abandonment" (*q*).

An abandonment must be of the entire interest covered.

1185. One of the first principles in this branch of Insurance Law is that an abandonment by the assured must extend to his whole interest in the thing insured, as far as that interest is covered by the policy.

Thus, where a single policy of insurance is effected on ship and cargo "indiscriminately," *i.e.*, where a gross sum is insured on the two interests jointly, without distinctly specifying how much is insured on each separately, it is stated by Emerigon that neither the ship nor the cargo can be separately abandoned (*r*).

But where it is specified in the policy that part of the whole valuation is to apply to the ship and part to the goods, and no goods have in fact ever been loaded on board, but the risk is run on the ship only, the ship alone may be abandoned; but the assured can only recover to the extent of the valuation on the ship (*s*).

So, where one sum is insured indiscriminately on a general class, as "goods," no portion can be separately abandoned.

So, where a cargo consisting of different classes of merchandise is insured in a single policy for one gross sum, the insurance is one and entire, and the abandonment consequently must extend to the whole cargo. Thus, if 1,000*l.* be insured "on goods" generally, and the goods in fact consist partly of sugars and partly of indigoes, the assured cannot, in case of wreck or other constructive total loss,

(*p*) Cazalet *v.* St. Barbe (1786), 1 T. R. 187; Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

(*q*) In Anderson *v.* Wallis (1813), 2 M. & S. 240.

(*r*) 2 Emerigon, c. xvii. s. 8, p. 250. This position seems on principle to be correct, though Phillips (s. 1659) considered the point as doubtful; and see Amery *v.* Rodgers (1794), 1 Esp. 208.

(*s*) Amery *v.* Rodgers, *supra*.

abandon his sugars and retain his indigoes, or *vice versâ* (*t*). Sect. 1185.

Except where a distinct sum is insured on each distinct kind.

If, however, a specific and distinct sum be insured on each kind of commodities, as "1,000*l.* on the sugars and 1,000*l.* on the indigoes," each may be separately abandoned (*u*).

1186. Marshall went further, and said that if the several kinds of commodities are each separately valued in the policy they may each be separately abandoned, even though a specific and distinct sum may not be insured upon each (*x*). Accordingly, in the United States, where one gross sum was insured "on 150 boxes of sugars valued at 6,000*l.*, five hampers of mace valued at 5,000*l.*, and four tons of logwood valued at 250*l.*," it was held that the assured might abandon each article separately (*y*).

This rule was doubted by Phillips, who contends that the insurance in such case is one and entire, though the valuation is distinct, and that consequently the abandonment ought to be entire also (*z*). In this country, however, there seems little doubt that the rule as laid down by Marshall is that to be acted upon, especially in cases where perishable commodities are shipped in separate packages; when, as we have seen, the insurance is in practice taken to be distinct on each species, even without a special clause to that effect (*a*). Chancellor Kent, after noticing the doubt raised by Phillips, thus cautiously lays down the rule:—"Unless the different sorts of cargo be so distinctly separated and considered in the policy as to make it analogous to distinct insurances on distinct parcels, there cannot be a separate abandonment of part of the cargo insured" (*b*).

(*t*) Est unica assecuratio omnium mercium. 2 Emerigon, c. xvii. s. 8, p. 249. So in the United States in case of a general insurance on a cargo consisting of beef, butter, soap, candles, apples and potatoes. Guerlain *v.* Col. Ins. Co. (1811), 7 Johns. 527, cited 2 Phillips, Ins. s. 1660.

(*u*) *Ibid.*

(*x*) 2 Marshall, Ins. 612.

(*y*) Deidericks *v.* Commercial Ins. Co. of New York (1813), 10 Johns. 234.

(*z*) Ins. vol. ii. s. 1661.

(*a*) See Stevens, Average, 237.

(*b*) Com. vol. iii. p. 329.

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Marshall's rule, however, appears to be recognized by the Marine Insurance Act, 1906, which provides (*c*) that, "where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for."

If there be two separate policies upon constituent parts of the same cargo, it is hardly necessary to say that there may be an abandonment of either part separately, though both policies are effected with the same set of underwriters (*d*).

Abandonment only operates up to the extent of the insurance.

1187. Abandonment, however, cannot transfer the interest of the assured any further than that interest is covered by the policy (*e*). Accordingly, where a general insurance has been effected "on cargo" to a certain amount, and the value of the interest at risk becomes increased by fresh goods being taken on board in exchange for the original cargo (as in the course of a bartering voyage), in such case, if a loss occurs which gives a right to abandon when the cargo at risk is double the original value, that which will be thereby transferred to the underwriter as salvage is not the whole of the cargo at risk at the time of the loss, but only half thereof, or the value at risk at the time of the insurance and covered by the policy (*f*). It appears equally clear that where a ship is only partially insured, so that her owners remain to some extent "their own underwriters," the effect of a notice of abandonment will be to make the owners and the underwriters joint tenants of the property, in the proportion which the amount uninsured bears to that insured (*g*).

So clearly is the general rule established, that if the under-

(*c*) Sect. 79 (1).
(*d*) 2 Emerigon, c. xvii. s. 13, p. 271.
(*e*) Boulay-Paty, Droit Mar. 286.
(*f*) Pothier, d'Assurance, No. 133.
(*g*) See Mar. Ins. Act, 1906, s. 81, *infra*, § 1215. The Commonwealth, [1907] P. 216. The contrary has been held in the United States by the Circuit Court of Appeals in Mason *v.* Marine Ins. Co., (1901), 110 Fed. R. 452.

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writers demand an abandonment of more than is insured, this will not prevent the assured from abandoning up to the extent of the sum insured, and, having done so, recovering as for a total loss (*h*).

It must also be remembered that an abandonment only relates to the property actually at risk at the time of the disaster; if, therefore, in the course of the voyage, a part of the goods originally insured have been landed and sold before the occurrence of the casualty, the abandonment does not relate to them, but only to the goods on board at the time of the loss (*i*). In such case the assured, on the one hand, can make no claim against the underwriters in respect of the goods so landed, and, on the other hand, is only bound to abandon the goods which were actually at risk when the loss occurred (*k*).

Every abandonment must be absolute and unconditional.

1188. An abandonment must operate not only as a transfer of the whole interest of the assured in the subject of the insurance, but it must be such as to effect that transfer absolutely and unconditionally. "Every abandonment," says Valin, "must be pure and simple and not conditional, otherwise it would not act as a transfer of ownership, which is of the very essence of abandonment" (*l*).

(*h*) Havelock *v.* Rockwood (1799), 8 T. R. 268. But such demand is no waiver of notice of abandonment. *Ibid.*
(*i*) 2 Emerigon, c. xvii. s. 8, p. 250.
(*k*) 4 Boulay-Paty, Droit Mar. 289.
(*l*) 2 Valin, tit. vi. des Assurances, art. 60, p. 418. See also 2 Emerigon, c. xvii. s. 6, p. 231; Mar. Ins. Act, 1906, s. 62, sub-s. (2), *post*, § 1189. In this country abandonment, according to Lord Truro, does not vest the property in ship. The Registry Acts prevent the passing of this property except in a certain way; the owners, however, become on abandonment trustees for the underwriters: Lord Truro in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 342. Moreover, under the Mar. Ins. Act, 1906, s. 63, sub-s. (1), in conformity with what was probably the law previously thereto, abandonment does not of itself transfer ownership, but merely entitles the insurer to take over the abandoned property, so that underwriters, by disclaimer or otherwise, may always refuse to become owners of the abandoned property, and so escape the liabilities attaching to such ownership. Similar language is used in sect. 79 (1) of the Act.

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Who can abandon.

Hence it follows that no one can be entitled to make an abandonment who has not at the time of the loss an absolute right of ownership in the subject insured (*m*).

Mortgagor of ship?

Thus it has been decided in the United States that where the assured has abandoned all his interest to one set of underwriters, he cannot afterwards abandon to other underwriters on the same subject (*n*). So again it has been there held that if the assured, by mortgaging his ship, has voluntarily deprived himself of the power of conveying an absolute title, he cannot abandon to the underwriters on ship, but can recover only for the damage he has actually sustained as a partial loss (*o*). But by the British statute the mortgagor remains owner and conveys an absolute title, subject only to all adverse rights appearing on the registry (*p*). And one part owner having effected the insurance for all the others has *primâ facie* authority to give notice of abandonment for all; in such a case, however, it is a question of agency (*q*).

Acceptance of notice of abandonment by some underwriters; rejection by others.

Where a vessel is insured with different underwriters, of whom some accept a notice of abandonment, but others, after refusing to accept it, successfully resist a claim for a constructive total loss, it seems that the former become in some way interested as owners in the vessel in the proportion which the amount subscribed by them bears to her full value. But it is not clear what their exact legal position in such a case would be. A British ship can only be owned in 64th shares, but if underwriters to the extent of 5,000*l.* on a vessel worth 25,000*l.* settle as for a constructive total loss, although they are entitled to the ownership to the extent of one-fifth,

(*m*) The Mar. Ins. Act, 1906, however, possibly meets the difficulty which must sometimes arise where an assured who has not an absolute ownership desires to abandon, by providing in sect. 63, sub-sect. 1, *ante*, § 1102, that abandonment entitles the insurer to the "interest of the assured" (as distinct from the complete ownership) in the subject-matter insured.

(*n*) Higginson *v.* Dall (1816), 13 Mass. 96; 2 Phillips, s. 1516.

(*o*) Gordon *v.* Massachusetts Fire and Marine Ins. Co. (1824), 2 Pick. (Mass.) 249.

(*p*) Merchant Shipping Act, 1894, s. 34.

(*q*) Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 47.

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how can legal effect be given to their rights? A case of partial acceptance of a notice of abandonment was that of the "Krishna," before the Court of Session in Scotland. The vessel was stranded in 1879; her value was 9,000*l.*; she was insured with one set of underwriters for 8,000*l.*, and with the plaintiff for 500*l.* The plaintiff accepted notice of abandonment, but the judgment against the 8,000*l.* underwriters was for a partial loss only (*r*), and the vessel was afterwards repaired at a cost of 20 per cent. on her value. In 1883 the plaintiff brought an action to recover from the shipowners the portion of the value of the vessel to which his acceptance of the notice of abandonment entitled him. It was held that he was entitled to recover one-eighteenth of her value—*i.e.*, the proportion which 500*l.* bore to 9,000*l.*—less the 20 per cent. which her owners had spent on repairs. It was impossible in this case to constitute him the actual owner of any part of the vessel, inasmuch as her owners had recently mortgaged her to an extent exceeding her value (*s*).

Consignee of bill of lading.

Whether the consignee of a bill of lading has a right to make abandonment of the goods depends on the question whether the possession of the bill of lading gives him a right to absolute and unconditional possession of the goods. In several cases, indeed, tried before Lord Ellenborough, which arose on the American embargo of 1807, and in which it appears that the consignees in England of the bills of lading had abandoned goods detained by that embargo, Lord Ellenborough thought it might be difficult to make out that they had such an interest as would entitle them to abandon, because they were to have no control over the goods till their arrival; his Lordship, however, gave no decision on the express point, and the cases were decided against the right of the consignees on other grounds (*t*).

Form of notice of abandonment.

1189. "Notice of abandonment may be given in writing,

(*r*) See Shepherd *v.* Henderson (1881), 7 App. Cas. 49.

(*s*) Whitworth *v.* Shepherd (1883), 12 Ct. of Sess. (4th Ser.) 204.

(*t*) Conway *v.* Gray (1809), 10 East, 536, and cases there cited.

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No precise form requisite, but must be direct and unequivocal.

or by word of mouth (*u*), or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer" (*x*).

Whether given orally or in writing it is an indispensable requisite that it shall communicate unequivocally, and in plain terms, that the assured offers to abandon to the underwriters all his interest in the thing insured. Lord Ellenborough, indeed, went so far as to say: "The abandonment must be direct and express, and I think the word 'abandon' should be used to make it effectual." In the case then before the Court the broker had communicated to the underwriters that the voyage had been broken up by the capture of the ship and cargo, and requested them to settle as for a total loss and to give directions as to the disposal of the ship and cargo; Lord Ellenborough held this not to be sufficient as a notice of abandonment (*y*).

Currie *v.* Bombay Native Ins. Co.

The Privy Council, however, have disapproved of this decision, in a case in which the notice given was in these terms: "With regard to the 'Northland,' we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements." Counsel for the insurers, with the express approval of the Court, admitted upon argument that this notice was sufficient (*z*).

Thellusson *v.* Fletcher.

But where the broker showed the underwriter a letter from the assured, merely stating that the ship had been forced ashore and a quantity of sugars damaged, and the underwriters thereupon desired that the assured would do the best

(*u*) Parmeter *v.* Todhunter (1808), 1 Camp. 542; see also Read *v.* Bonham (1821), 3 Brod. & Bing. 147. Lord Ellenborough considered that it would have been well to prevent oral notices of abandonment entirely, but admitted that in practice they were held to be operative.

(*x*) Mar. Ins. Act, 1906, s. 62, sub-s. 2. See Hall *v.* Hayman (1911), 17 Com. Cas. 81.

(*y*) Parmeter *v.* Todhunter, *supra*.

(*z*) Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 72.

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he could for the damaged property, this was held by Lord Kenyon to be an insufficient notice of abandonment (*a*).

King *v.* Walker.

In a later case the letters of the captain, a part-owner, were shown, as they arrived, by the other part-owners to the underwriter, and among them, one stating his intention to abandon, and that he had abandoned the ship and had sold her; and, in a postscript, adding, "give the underwriters due notice"—meaning, as the Court construed it, of abandonment—this was held to be sufficient notice of abandonment (*b*).

Russian Bank *v.* Excess Ins. Co.

Where, however, the owners of a cargo insured for a voyage from Novorossisk, a port in the Black Sea, to England, after the closing of the Dardanelles in the late European War and the requisitioning of the ship at Novorossisk had made the prosecution of the voyage impossible, telegraphed to the brokers who had insured the cargo for them: "Agreeable release underwriters from all risks if underwriters will pay difference between present value in Novorossisk and insured value," and this telegram was shown to the underwriters, the Court of Appeal held that the telegram was an offer of compromise, and said that it was impossible to hold that it was intended to be a notice of abandonment if the offer was rejected (*c*).

Presumption that notice of abandonment has been given.

1190. Though a demand for a total loss in itself does not in this country operate by implication as a notice of abandonment, yet such a demand, followed by payment as for a total loss, is evidence that an offer of abandonment has been made and accepted (*d*).

In the United States the Courts have held that where the

(*a*) Thellusson *v.* Fletcher (1793), 1 Esp. 72.

(*b*) King *v.* Walker (1864) (in error), 33 L. J. Ex. 325, reversing on this point the judgment below; *ibid.* 167; 2 H. & C. 384; 3 *ibid.* 209.

(*c*) Russian Bank for Foreign Trade *v.* Excess Ins. Co., 24 Com. Cas. 55; [1919] 1 K. B. 39.

(*d*) So Arnould, 2nd ed. p. 1163, citing Houstman *v.* Thornton (1816), Holt, N. P. 242, which case, however, does not seem to be very much in point.

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nature of the transaction is such as to leave no reasonable doubt of the intention of the assured to abandon, and of that intention being understood by the underwriters, it shall be implied that a proper offer of abandonment has been made, though no formal notice can be proved to have been given (*e*).

Notice may be waived.

It is now expressly provided by the Marine Insurance Act, 1906, that "notice of abandonment may be waived by the insurer" (*f*).

The grounds of abandonment should be sent with the notice.

The notice of abandonment ought to contain, or be accompanied with, a short statement of the grounds of abandonment, in order that the underwriters may determine whether to accept it or not; and in the United States it has been held (but not in this country) that the assured cannot avail himself of any other grounds of abandonment than those so stated (*g*).

(*e*) Thus, in the Supreme Court of the United States, a letter to the underwriters, containing a statement of the loss and subsequent sale of part of the property, and also a claim for the balance of the amount insured, less the salvage, was held to be a sufficient notice of abandonment. Patapsco Ins. Co. *v.* Southgate (1831), 5 Peters, 604. So payments made upon a claim for a total loss have been held there to waive all defects and form of notice. Watson *v.* Ins. Co. of North America (1803), 1 Binney, R. 47. See also De Farconnet *v.* Western Ins. Co. (1903), 122 Fed. R. 448. So the underwriters calling for papers to prove a total loss after claim made. Calbreath *v.* Gracy (1805), 1 Wash. C. C. R. 219. See cases collected, 2 Phillips, ss. 1680 *et seq.*

(*f*) Sect. 62, sub-sect. 8.

(*g*) See Suydam *v.* Marine Ins. Co. (1806—7), 1 Johnson, R. 18, 2 *id.* 138, and the other cases collected, 2 Phillips, s. 1684. It appears, however, exceedingly doubtful whether this would be so held in England: with us the great criterion of the right to recover as for a total loss is the state of the property at the time of action brought (or perhaps, now, at the time when the notice is given: see *ante*, § 1097a). Supposing it, then, to be in such a state as to give a right to abandon, the assured might recover for a total loss, although the original ground of abandonment had then ceased to exist. If, however, the rule as above laid down in the United States only means that the grounds stated in the notice of abandonment must at some time really have existed, and that unless they have done so the notice is invalid, the law here would, it is conceived, be exactly the same as it is there. This note is reproduced from the 2nd edition of this work. In Russian Bank for Foreign Trade *v.* Excess Ins. Co., [1918] 2 K. B. 123, at p. 129, Bailhache, J., seems to have inclined to the view that a notice of abandonment based on wrong grounds might be valid, if good grounds existed for giving a notice. Nevertheless, the present editors submit that a notice of abandonment based solely on a loss alleged to have been occasioned by one peril would not support a claim for a loss due to a peril of an entirely different nature. See also *ante*, § 1094.

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No deed of cession requisite to complete the abandonment.

Supposing a notice of abandonment to have been duly given, no deed of cession or formal transfer is necessary to enable the assured to perfect his abandonment and recover as for a total loss. A valid notice, in case it be accepted, or the loss continue total down to the time of action brought, operates in fact as a complete transfer of property (*h*) at the date of the notice, except where the Registry Acts of Shipping interpose a barrier, and even then the registered owner becomes immediately trustee for the underwriters (*i*).

Notice of abandonment unnecessary where there is nothing which upon abandonment can pass to underwriters.

1191. "Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him" (*j*). "I think," said Blackburn, J. (*k*), "it is from the nature of things confined to cases where there are some steps which the underwriters could take if they had notice. . . . . If there was nothing they could do, no notice is required." The commonest case where this doctrine applies is where there has been a constructive total loss of ship or of cargo, such as to prevent any freight being earned upon the voyage insured, which freight is thus totally lost. Perhaps the true way of putting the case under these circumstances is to say that in such an event there is not merely a constructive but an absolute total loss of freight, and this seems to have

(*h*) See, however, § 1213, *infra*.

(*i*) Cf. the Merchant Shipping Act, 1894, s. 34, and per Lord Truro in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 342.

(*j*) Mar. Ins. Act, 1906, s. 62, sub-s. 7.

(*k*) In Rankin *v.* Potter (1873), L. R. 6 H. L. at p. 124. See also per Lord Chelmsford at p. 155; and Trinder & Co. *v.* Thames, &c. Ins. Co., [1898] 2 Q. B. at p. 131. In the latter case the somewhat stricter rule laid down by Brett, L. J., in Kaltenbach *v.* Mackenzie (3 C. P. D. at p. 475), is reconciled with the rule elsewhere laid down by denying its applicability to cases of constructive total loss of freight: per Smith, L. J., at p. 132.

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been the view of Brett, J. (*l*). But whether we prefer to regard it as a case of absolute or of constructive total loss, it is clear that the real reason why no abandonment is necessary is because the notice of abandonment would in such a case be merely a vain and useless form.

Consequently, where a ship was chartered in this country to bring home a cargo from Calcutta to London, and a policy was effected on that homeward freight but to cover the outward voyage from Clyde to New Zealand and thirty days after arrival there, and a constructive total loss of ship occurred during the currency of that policy, as the owner was not bound in these circumstances to repair his ship and did not do so, there was a total loss of the homeward freight and nothing to abandon, so that notice of abandonment would have been unmeaning and was held unnecessary (*m*). So, if the assured learn at the same time of the damage to ship or goods and of their justifiable sale, there is then nothing which he can abandon and a notice is unnecessary (*n*).

On the contrary, abandonment must be resorted to and notice thereof must be given if there be anything to abandon, "as, for instance, in the case of freight where the cargo is already on board, and the shipowner would have the right of sending it on to its destination in another ship and so earning freight" (*o*).

Notice of abandonment need not be given to re-insurer.

It has been decided that upon a constructive total loss of ship no notice of abandonment need be given by the original underwriters to underwriters on a policy of re-insurance (*p*). And it is now expressly provided that "where an insurer has re-insured his risk, no notice of abandonment need be given

(*l*) L. R. 6 H. L. at p. 102.
(*m*) Rankin *v.* Potter, *supra*.
(*n*) Farnworth *v.* Hyde (1866), 18 C. B. N. S. 835; Roux *v.* Salvador (1836), 3 Bing. N. C. 266; Mullett *v.* Shedden (1811), 13 East, 304; Mellish *v.* Andrews (1812), 15 East, 15.
(*o*) Per Cockburn, C. J., in Potter *v.* Rankin (1870) (coram Ex. Ch.), L. R. 5 C. P. 341, 371; and per Brett, J., L. R. 6 H. L. at p. 102.
(*p*) Uzielli & Co. *v.* Boston Marine Ins. Co. (1884), 15 Q. B. D. 11, C. A.

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by him" (*q*). The reason for this, as given by Phillips (*r*), is that the re-assured has nothing to abandon until and unless he accepts the abandonment of the assured, and to compel him in all cases to do so would be to the disadvantage, and not to the advantage, of the re-insurer.

Time within which notice of abandonment must be given.

1192. As the effect of a valid notice of abandonment is to give the underwriters a title to the abandoned property (or salvage); and as the ultimate value of such property may be considerably affected by the promptitude with which measures are taken to effect either its sale or recovery, it is obviously just that the assured, if he means to abandon, and thereby throw upon the underwriters the ownership of the thing insured, should give them notice of his intention to do so within a reasonable time after receiving intelligence of the loss, in order that they may take immediate steps for turning the property thus cast upon their hands to the best account (*s*). The Marine Insurance Act, 1906 (*t*), provides that "notice of abandonment must be given with reasonable diligence (*u*) after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry."

There is no fixed rule.

The great practical difficulty has been to lay down any rule as to the time which the assured shall be allowed for making up his own mind whether he will abandon or not. The cases, in fact, show that there is no fixed rule in this country on this subject, but that what shall be considered reasonable time for this purpose must depend, in some degree, upon the certainty of the news of the disaster, and upon the nature of the casualty itself.

(*q*) Mar. Ins. Act, 1906, s. 62, sub-s. 9.
(*r*) Ins. vol. ii. s. 1506. See also Western Ass. Co. of Toronto *v.* Poole, [1903] 1 K. B. at p. 385, per Bigham, J. The reasons for the rule, however, do not appear to be very satisfactory.
(*s*) Per Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. 281.
(*t*) Sect. 62, sub-sect. 3.
(*u*) See sect. 88.

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If the intelligence is certain, notice ought to be given immediately.

First: If the intelligence is certain, and the disaster one such as capture, arrest, or detention, which is manifestly, *primâ facie*, a constructive total loss as long as it continues, though the time it may continue is uncertain, the assured ought to give notice of abandonment immediately upon receipt of the intelligence.

If doubtful, the assured has more time.

Secondly: If, on the other hand, the information be doubtful, or the casualty of such a description that it does not necessarily, and *per se*, give a right to abandon—as in the case of the stranding or partial wreck of the ship, or the damage done by sea-water to perishable goods—the assured may wait a reasonable time for more accurate information as to the nature of the loss, or the actual extent of the damage.

Only in order to verify the intelligence or ascertain the real nature of the loss, can delay be allowed.

For these two purposes alone can any delay be allowed him: he may not delay in order to observe the state of the markets (*x*); for any profit which may ultimately be made in this way ought, in justice, to belong to the underwriters: neither can he lie by and treat the loss as an average loss, until the recovery of the property becomes hopeless (*y*), and then give notice of abandonment; for the underwriters are of right entitled to all those chances of recovery, which might arise from the speediest and most immediate endeavours for that purpose; in fact, in the words of Lord Kenyon, he must "make his election speedily whether he will abandon or not, and so put the underwriters in a situation to do all that is necessary for the preservation of the property, whether sold or unsold" (*z*).

Election to claim a partial loss is final.

Where the owners of a ship, lying sea-damaged in a foreign port, have once elected to treat the loss as partial, they cannot afterwards turn it into a total loss, by virtue of a notice of abandonment, merely because they find on the ship's arrival

(*x*) Gernon *v.* Royal Exch. Ass. (1815), 6 Taunt. at p. 387; Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. at p. 480, per Cotton, L. J.

(*y*) This is Arnould's text; but when the recovery becomes hopeless, the loss, it is submitted, becomes an actual total loss. See Mellish *v.* Andrews, *post*, § 1194.

(*z*) In Allwood *v.* Henckell (1795), 1 Park, 399; cf. Stringer *v.* English, &c. Ins. Co. (1869), L. R. 4 Q. B. 676; 5 *ibid.* 599.

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that the cost of her repairs is more than she will fetch in the market (*a*).

Of course, if the assured is not proved to have had intelligence of the loss until nothing is left to abandon, no defence founded on his not having given notice of abandonment at all, or in due time, can be a bar to his claim for a total loss (*b*).

Undue delay after certain intelligence.

1193. First: where, in the case of an insurance on perishable goods, "free of average," the ship was compelled to put back in distress, and, after two surveys, was condemned as irreparable: Lord Ellenborough held, that a notice of abandonment not given to the underwriters till five days after the assured knew of the condemnation of the ship, was too late (*c*).

So where, in an insurance on ship, a delay of sixteen or seventeen days elapsed after the result of a final survey was known, before notice was given, such notice was held too late (*d*).

In order, however, to constitute *laches* on the part of the assured, he must have had full means of being informed of the real state of the loss, at the time when it is contended that he ought to have given notice of abandonment. Hence, where the owner of an East Indian ship, which had been sold as irreparable at Calcutta, gave notice of abandonment three days after he had received the first accurate information of the loss, that was held sufficient, although it appeared that the captain of the ship had arrived in London, where the owner resided, ten days previously, and probably might, but was not proved to, have communicated to the owner on his arrival, the facts of the loss (*e*).

(*a*) Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

(*b*) Abel *v.* Potts (1800), 3 Esp. 242; Rankin *v.* Potter (1873), L. R. 6 H. L. 83; Mar. Ins. Act, 1906, s. 62, sub-s. 7.

(*c*) Hunt *v.* Royal Exch. Ass. Co. (1816), 5 M. & S. 47.

(*d*) Aldridge *v.* Bell (1816), 1 Stark. 498. See also Russian Bank for Foreign Trade *v.* Excess Ins. Co., [1918] 2 K. B. 123, 129, 131.

(*e*) Read *v.* Bonham (1821), 3 Brod. & Bing. 147. It is the view, however, of the editors that in cases of justifiable sales no notice of

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1194. Lord Ellenborough and the Court of King's Bench held, in two successive cases, that where the ground of abandonment was the ship's seizure and detention, the assured was bound to give notice immediately on first receiving intelligence of the seizure and detention (*f*).

Thus, where a ship and cargo were seized in a foreign port, on the 7th of December, 1810, and the assured first heard of the seizure on the 8th of January, 1811, but did not give notice of abandonment till nine days after—Lord Ellenborough thought that the notice was given too late to entitle the assured to recover for a constructive total loss, but as the cargo, in which alone the assured was interested, was finally condemned on the 30th of April, the Court subsequently held that the assured could recover for an actual total loss (*g*).

Fleming *v.* Smith.

A ship having been compelled by sea-damage in May, 1842, to put into Mauritius to refit, the master wrote to his owners, telling them of the damage sustained, of the necessity for extensive repairs, of his intention to borrow money on bottomry, and of the sum required for that purpose. These letters were received at intervals between September and December, 1842. The owners wrote in answer to the master, approving of the course he proposed to take. On the 27th of March, 1843, the ship arrived, and was at first taken possession of on behalf of the owners. It being soon found, however, that the cost of repairs would much exceed her market value, the owners abandoned her on the 30th of March. It was held, that under the circumstances this abandonment was too late (*h*).

A ship at the port of Saigon had become a constructive total loss, and one of her owners residing at Singapore, and possessing adequate authority to abandon, received certain

abandonment is necessary. See *ante*, § 1112, and Mar. Ins. Act, 1906, s. 62, sub-s. 7.

(*f*) Mullett *v.* Shedden (1811), 13 East, 304; Mellish *v.* Andrews (1812), 15 East, 13.

(*g*) Mellish *v.* Andrews (1812), 15 East, 13.

(*h*) Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

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intelligence of the ship's condition on the 7th February; after that date he ordered the master to have her sold, without, however, any immediate necessity for doing so, and then, on the 11th March following, notice of abandonment was given to the underwriters in London; it was held that notice of abandonment had not been given in due time (*i*).

It was suggested in that case that the telegraph ought to have been used immediately after the day on which the condition of the ship was definitely known, if a telegraph to Europe existed; and if there were no telegraph, then that notice should have been sent by the next post (*k*).

It appears, therefore, that in this country the assured is bound to give notice of abandonment immediately on first receiving intelligence which is certain and definite, as, for instance, of capture, detention, or disability, without waiting to see the further issue of the casualty. If under such circumstances the assured elect to delay, with a view to the advantage to be derived from recovery of the property and the completion of the contract of affreightment, he treats the loss already suffered as a partial loss, and cannot afterwards, under the same circumstances, abandon and claim for a total loss.

Revival of the right to give notice.

1195. A change of circumstances, however, may revive the right of abandonment and of giving notice accordingly. And there may be cases in which a mere protraction of time during which an assured is kept out of possession of his property may amount to such a change of circumstances as will operate such a revival.

Stringer *v.* English, &c. Ins. Co.

The case in which these questions were agitated was this:—The plaintiffs, in 1863, had effected a policy with the defendants for 5,000*l.* on goods valued at 11,500*l.*, by the "Dashing Wave," from Liverpool to Matamoras; and during the continuance of the risk the ship was seized on the 5th November, 1863, by a United States cruiser and carried

(*i*) Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. 467.

(*k*) *Ibid.* 477, 478.

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into New Orleans, where the cargo was libelled in the Prize Court as lawful prize. Instead of abandoning, as they might have done, on hearing of this casualty, the plaintiffs intervened in the suit. On the 16th June, 1864, the Court gave judgment against the captors and decreed restitution. On the 1st July, the captors appealed; the decree for restitution was suspended; and on the 12th of the following September, the plaintiffs gave defendants notice of abandonment, which was not accepted. From that time onwards, the defendants were kept informed by the plaintiffs of the events as they occurred, and were asked in December, 1864, and again in February, 1865, to give bail for the cargo, as otherwise it would be sold. The plaintiffs themselves refused to give bail, under circumstances affecting the money currency of the United States such as made their refusal appear to the English judges not unreasonable, and on the 25th May, 1865, under an order of the Prize Court, the cargo was sold. Notice of abandonment to the defendants was thereupon renewed by the plaintiffs, who forthwith commenced their action on the policy. The judges, both in the Queen's Bench and in the Exchequer Chamber, appear to have thought that there might be such a change of circumstances affecting the subject insured, as would revive the right to abandon, but being of opinion that the plaintiffs were justified by the circumstances in not putting in bail, the Courts held that the sale by order of the Prize Court amounted in law to an absolute total loss, rendering abandonment therefore unnecessary (*l*).

In the United States.

In the United States the question appears to have frequently arisen and to have been decided, not only in cases of capture and detention, but in cases of stranding, submersion, and other disaster, in favour of such a revival of the right under an adequate change of circumstances affecting the subject insured (*m*).

(*l*) Stringer *v.* English, &c. Mar. Ins. Co. (1869), L. R. 4 Q. B. 676; *ibid.* 5 Q. B. 599. This case is cited with approval by Blackburn, J., before the Lords in Rankin *v.* Potter (1873), L. R. 6 H. L. 116.

(*m*) 2 Phillips, Ins. ss. 1659, 1672, 1674.

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If information uncertain, or the casualty indecisive, reasonable time allowed.

1196. Secondly: If the information itself be uncertain, or the nature of the casualty such that the assured cannot be expected to make up his mind as to the expediency of abandonment without an opportunity of first ascertaining the nature and extent of the damage, reasonable time ought to be allowed him for that purpose; and a notice of abandonment will not be held too late, which is not delayed longer than may be necessary for enabling such an investigation to be made (*n*).

Thus, where some time was necessarily spent after the ship's arrival in ascertaining the state of a damaged cargo, the notice of abandonment was not held to be too late because postponed till after such survey was completed; for, as Gibbs, C. J., said, "It is very true that the assured must always elect in the first instance, whether he will consider the loss as partial, and take to the property himself, or as total, and abandon to the underwriter. This is the law in all cases where the assured has his election, by abandoning or not abandoning, to treat the loss as total or partial. But it is equally true that the first instance means after the assured has had a convenient opportunity of examining into the circumstances which render abandonment expedient or otherwise; because it is on the result of that examination that he is to make up his mind, whether he will abandon or not" (*o*).

The assured cannot lie by in order to ascertain whether it will be most for his advantage to abandon or not.

1197. But, such postponement of notice being for the sake of investigating the real state of the damaged property, the right to delay ceases upon the accomplishment of that object (*p*).

"Let it not be supposed," says Gibbs, C. J., "that I accede to the proposition that the assured may use this latitude as an opportunity to judge of the state of the

(*n*) See the observations of the Privy Council in Currie *v.* Bombay Native Ins. Co. (1869), L. R. 3 P. C. 79.

(*o*) Gernon *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 383.

(*p*) Per Dallas, C. J., in Hudson *v.* Harrison (1821), 3 Brod. & Bing. 106.

Sect. 1197. markets, and, as the markets fall or rise, to elect whether he will abandon or not abandon. He has no right to govern his conduct by any such rule: the only examination he may make is into the actual state of the cargo, to ascertain what is the degree of damage, without reference to the state of the markets" (*q*).

Thus, where the assured on goods, upon hearing that they had been sold under a Vice-Admiralty decree abroad, for the benefit of whom it might concern, immediately sent out powers of attorney to remit the proceeds home; but four months afterwards, finding the sales less productive than he expected, gave notice of abandonment: this notice was held too late (*r*).

So, where the proceeds of goods were received by a person to whom for three years the assured continued to look for payment, without giving any notice of abandonment, and then only gave such notice when they ascertained that the party to whom they had so given credit had become insolvent: this notice was held too late (*s*).

So, where a ship laden with wheat was partially sunk, and the assured, instead of abandoning immediately on receiving this intelligence, first employed themselves for nearly a month after the loss in getting out the wheat on their own account, and then, when nearly the whole of it was got out, on finding it more damaged than they expected, gave notice of abandonment, Lord Ellenborough and the whole Court held the notice too late (*t*).

Upon the same principle, where the voyage is delayed or

(*q*) Gernon *v.* Royal Exch. Ass. Co. (1815), 6 Taunt. 387. The rule is the same in the United States: Livermore *v.* Newburyport Marine Ins. Co. (1804), 1 Mass. 281.

(*r*) Allwood *v.* Henckell (1795), 1 Park, 399. Lord Kenyon inclined to think that an abandonment was necessary in this case, just as if the property had not been sold.

(*s*) Mitchell *v.* Edie (1787), 1 T. R. 608, as explained by Lord Abinger in Roux *v.* Salvador (1836), 3 Bing. N. C. at pp. 288—290; Saunders *v.* Baring (1876), 34 L. T. 419.

(*t*) Anderson *v.* Royal Exch. Ass. Co. (1805), 7 East, 38; and see Fleming *v.* Smith (1848), 1 H. L. Cas. 514.

Sect. 1197. broken up, but the property saved, the owner must give notice of abandonment in the first instance, and cannot first wait to see whether he can prosecute the adventure, and then elect to abandon when he finds that he cannot. Hence, where a ship in which oil had been insured from New York to Havre was carried into a British port and kept there till Havre was declared by the British Government in a state of blockade, a notice of abandonment was held too late which was not given till five weeks after the notification of the blockade, "the latest event," Lord Ellenborough said, "to which the loss" that gave the right to abandon, "is capable of being referred" (*u*).

Effect of delay due to default of owner or master.

1198. A question of a very mixed description arose out of the facts respecting the "Sir W. Eyre" (*x*). On her way from Greenock to Dunedin in New Zealand, she grounded at Bluff Harbour, and was got off after a time, not without difficulty, and, it was feared, considerable damage. She then proceeded to Dunedin, where, as the extent of her injuries could not there be ascertained, she was temporarily repaired, and would thereupon have prosecuted her voyage to Calcutta, had not the master been without funds to meet his expenses amounting to 1,000*l.* at Dunedin. Quite half of that amount was owing to default of the owner or master under the Passenger Acts. The ship, after being detained for nine months waiting for remittances from Europe, at length sailed for Calcutta. Upon her arrival there her injuries were ascertained to be such that the master was entirely justified in giving notice of abandonment to the underwriters. The question was whether such notice was given in time.

Willes, J., in delivering the judgment of the Court of Common Pleas, says, "We admit that this is not a question of hours or even of days, but whether there was substantial delay out of the ordinary course of maritime affairs. We do not go on the mere lapse of time; we must look for something

(*u*) Barker *v.* Blakes (1808), 9 East, 283.

(*x*) Potter *v.* Campbell (1868), 16 W. R. 401.

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more substantial, in order to see whether the delay will excuse the underwriters. I think the argument may very well be stated as one which recommends itself by its equity, that not only all the reasonable incidents of maritime adventure may be taken into account in determining the question of what is reasonable time, but also that you may, in each particular case against the underwriters, take into account all the consequences that flow from the damage upon which the question arises. . . . She was detained at Dunedin for nine months, in respect of disbursements of upwards of 1,000*l*., only one-half of which is imputed to the account of the underwriters; of the rest a great proportion was to be traced to the default of the owner or master; for example, penalties for breaches of the English Act, percentage of passage money ordered to be returned, and the like. The delay was for the want of money to meet these disbursements. It seems impossible to arrive safely at the conclusion that the ship would have been detained nine months in New Zealand if she had only been burthened with her ordinary expenses and the expenses caused by the damage. But for the expenses incurred by default of her owner or master she would probably have sailed for Calcutta months before." On these considerations the Court held that the notice of abandonment given after her arrival at Calcutta and the ascertainment there of her injuries, came too late (*y*).

Underwriters cannot withdraw acceptance of notice of abandonment.

1199. The law of England agrees with that of France and the United States in holding that "where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice" (*z*).

Effect of acceptance.

Thus, in Smith *v.* Robertson, the broker gave notice of abandonment to the underwriters, on the 19th of October,

(*y*) Accord. per Blackburn, J., as to this case in Rankin *v.* Potter (1873), L. R. 6 H. L. 117, 119, 123.

(*z*) Mar. Ins. Act, 1906, s. 62, sub-s. 6. Arnould added (2nd ed. p. 1172) "unless made under a mistake of fact."

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the day after receiving intelligence of the ship's capture; the underwriters, on the 24th, notified to the broker "that they were satisfied." On the same evening advice was received of the ship's recapture, and shortly afterwards she was brought into port, where she discharged her cargo and earned freight. Lord Eldon held that the underwriters were bound by their acceptance, and "could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss" (*a*).

What amounts to an acceptance.

As, therefore, an acceptance by the underwriters has these important effects, it is desirable to ascertain what acts on their part will constitute an acceptance. In England there is no established form in which it must be conveyed. "The acceptance of an abandonment must be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance" (*b*).

1200. The question whether an abandonment has been accepted is primarily a question of fact. But the circumstances of the case may be such that a jury may be properly told, as a matter of law, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted. And further, although they may not really have accepted the abandonment, they may have so acted that a judge may very properly tell a jury that, having acted in a certain way, and having thereby altered the rights, the condition, and the interests of the owner, yet in point of law they ought to be dealt with as if they had accepted it (*c*). In the language of the Marine

(*a*) Smith *v.* Robertson (1814), 2 Dow, 474; see also Hudson *v.* Harrison (1821), 3 Brod. & Bing. 153. The effect of an acceptance is well expressed by Boulay-Paty:—"Par leur acceptation volontaire il s'est fait un pacte entre les parties qui a tout terminé." 4 Boulay-Paty, Droit Com. 380.

(*b*) Mar. Ins. Act, 1906, s. 62, sub-s. 5.

(*c*) Per Lord Penzance in Shepherd *v.* Henderson (1881), 7 App. Cas. at p. 64. See *ante*, § 1190, n. (*e*).

Sect. 1200. Insurance Act, 1906 (*d*), acceptance of the abandonment will in such a case be implied from their conduct.

Acquiescence in the abandonment must distinctly appear.

The evidence ought distinctly to show their acquiescence. Thus where, on being informed of the loss, they merely requested that the assured would do the best they could with the damaged property, this was held not to amount to an acceptance (*e*).

Acceptance may be inferred from acts without word or writing.

On the other hand, where the insurers, upon notice of abandonment received by them, took possession of the wrecked vessel, brought her away, did repairs upon her, and kept her in their possession for some time until she was sold under a claim of salvage, this was held to be clear evidence of acceptance of the abandonment, whereby they had waived a breach of warranty and made themselves liable for the loss (*f*). In short, whenever the underwriters, after receiving notice of abandonment, do any act in consequence thereof which could be justified only under a right derived from it, and without giving any notice of their object, such act has been held in the United States, and it seems would be held in this country, to be itself decisive evidence of an acceptance (*g*), or at least of an estoppel to the same effect.

Mere silence does not amount to an acceptance.

1201. At one time it was thought to be the duty of the underwriter, if he refused to accept the abandonment, to signify his refusal to the assured. Lord Eldon, in Smith *v.* Robertson, seemed to consider that, as the assured was bound to make his election at once to abandon, there might be "a corresponding obligation" on the part of the underwriter

(*d*) S. 62, sub-s. 5, *ante*, § 1199.

(*e*) Thellusson *v.* Fletcher (1793), 1 Esp. N. P. 72.

(*f*) Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224. See per Lord Penzance, Shepherd *v.* Henderson (1881), 7 App. Cas. 49, 64.

(*g*) Per Story, J., in Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27; Cincinnati Ins. Co. *v.* Bakewell (1844), 4 B. Munroe, R. (Ken.) 541; cf. Soelberg *v.* Western Ass. Co. of Toronto (1902), 119 Fed. R. 23; and see cases cited in 2 Phillips, Ins. s. 1693; Provincial Ins. Co. of Canada *v.* Leduc, *supra*. *Secus*, where the conduct of the underwriters could be otherwise justified, cf. Shepherd *v.* Henderson, *supra*.

"to accede to the abandonment *de præsenti*" (*h*), "evidently showing," says Park, J., "that he thought the underwriter should say at the earliest opportunity whether he will accept the abandonment or not" (*i*). **Sect. 1201.**

Accordingly, by the Court of which Park, J., was a member, the silence of the insurers for two months after receipt of notice of abandonment was held to amount to acquiescence in it (*k*).

On the other hand, in America, Story, J., laid down the rule that underwriters are not bound to signify their decision. "If they say and do nothing, the proper conclusion is that they do not mean to accept" (*l*). And the Privy Council recognized this opinion of Story, J., as being the rule of law in this country—that the insurers are not bound to signify their acceptance, and that if they say and do nothing the proper conclusion is that they do not mean to accept (*m*). This view, as we have seen, has been adopted in the Marine Insurance Act, 1906, which declares that "the mere silence of the insurer after notice is not an acceptance" (*n*).

Revocation of acceptance of abandonment or withdrawal of notice by assured.

1202. It appears from sect. 62, sub-sect. 6, of the Marine Insurance Act, 1906 (*o*), that "where notice of abandonment is accepted, the abandonment and the acceptance are irrevocable," except presumably by the mutual consent of the parties. If not accepted, the notice is defeasible either by the subsequent restoration of the property (*p*), or by acts on the part of the assured clearly showing that he himself has

(*h*) In Smith *v.* Robertson (1814), 2 Dow, 479.

(*i*) Per Park, J., in Hudson *v.* Harrison (1821), 3 Brod. & Bing. 108.

(*k*) Hudson *v.* Harrison, *supra*.

(*l*) Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27, cited 2 Phillips, s. 1691.

(*m*) Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224, 237.

(*n*) Sect. 62, sub-sect. 5, *ante*, § 1199.

(*o*) *Ante*, § 1199.

(*p*) Cologan *v.* London Ass. Co. (1816), 5 M. & S. 447. Such restoration must be before action brought. Ruys *v.* Royal Exchange Co., [1897] 2 Q. B. 135. See, however, § 1097a, *ante*.

Sect. 1202. waived his right to insist on it, by treating the loss as partial and not total.

When withdrawal of notice will be inferred.

It must, however, be carefully borne in mind that no acts done by the master, while acting as agent of both parties and for the benefit of all concerned, in attempting to recover or repair the damaged property after notice of abandonment has been given, can operate as such waiver. But if the master appears to have been acting, not as the agent of both parties and for the benefit of all concerned, but under the directions or for the benefit of the assured exclusively (*q*)—or if the acts and interference of the assured with the use and management of the subject insured be such as manifestly to show that he intended to act for his own interest as owner, and not for the benefit of the underwriters—there appears little doubt that such acts and interference would operate as a withdrawal of his notice of abandonment (*r*).

1203. No dealings, however, of the master or of the assured with the abandoned property will have this effect, unless they unequivocally and unmistakably amount to acts of ownership (*s*). Thus where, on receiving intelligence that their ship and cargo had been carried by a mutinous crew into Barbadoes, and that the government agent there had sold the cargo, but not the ship, the assured in this country immediately gave notice of abandonment, and then wrote to the agent at Barbadoes, directing him to sell the ship also, and remit the proceeds of the sale both of ship and cargo to England, "as otherwise, they (the assured) could not settle with the underwriters," this was held by Lord Eldon and the House of Lords not to be a withdrawal of the previous notice of abandonment (*t*).

So where a ship was brought into her home port in a disabled state, and being on survey found irreparable, except at a cost which would have exceeded her repaired value, was sold by the assured after notice of abandonment, without the concurrence of the underwriters—this seems to have been admitted not to be a withdrawal of the abandonment (*u*).

(*q*) Cf. Fleming *v.* Smith (1848), 1 H. L. Cas. 513.

(*r*) So decided in the United States in Columbian Ins. Co. *v.* Ashby (1830), 4 Peters, S. C. R. 139; see 2 Phillips, s. 1732.

(*s*) See Columbian Ins. Co. *v.* Ashby (1830), 4 Peters, S. C. R. at p. 143.

(*t*) Brown *v.* Smith (1813), 1 Dow, Parl. Cas. 349.

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So in the United States, where the assured, after the underwriters had refused to accept a notice of abandonment made on good grounds, sold the ship under circumstances that justified the sale, not for his own benefit but for that of all concerned, this was held not to amount to a withdrawal of his notice (*x*). Where, on the contrary, he sold her for his own benefit, this was considered as a clear case of withdrawal (*y*); so where he bought her in at the sale and then despatched her on another voyage (*z*). In one American case, Story, J., laid it down that if the assured, after notice of abandonment, were to proceed to repair the ship without consulting the underwriters, that would be a withdrawal of the notice; for the reasonable inference would be that the assured in such case was repairing her for his own benefit (*a*). The same point was decided in the Supreme Court of Error in New York, where a master, acting as agent for the owners, repaired at the Isle of France a ship, which had been abandoned by the assured at New York on first hearing of the casualty (*b*).

(*u*) Allen *v.* Sugrue (1828), Dans. & Ll. 190, n. (*a*); and see Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159.

(*x*) Walden *v.* Phœnix Ins. Co. (1810), 5 Johnson, 310.

(*y*) Abbott *v.* Sebor (1802), 3 Johnson, N. Y. Cas. 45; see 2 Phillips, Ins. s. 1699.

(*z*) Ogden *v.* Fire Ins. Co. (1813), 10 Johnson, 177; and (in error) 12 *ibid.* 25; 2 Phillips, s. 1699.

(*a*) See Peele *v.* Merchants' Ins. Co. (1822), 3 Mason, 27.

(*b*) Dickey *v.* American Ins. Co., 3 Wend. 658, cited 2 Phillips, Ins. s. 1701. The learned author adds: "By repairing, the loss ceases to be a total one; making an abandonment and proceeding at the same time to repair involves an inconsistency, since by the abandonment the assured declares the ship to belong to the underwriter, and by repairing any further than merely to preserve the ship from destruction he makes it his own."

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May the underwriter repair and restore so as to defeat abandonment?

1204. The insurers may, in the opinion of Valin, repair the ship notwithstanding notice of abandonment, and compel the assured to receive her back, provided they have not voluntarily settled as for a total loss and have acted, in repairing the ship, under protest against the validity of the abandonment (*c*). Emerigon denies this position (*d*), and the Code de Commerce sanctions his doctrine (*e*).

According to Phillips it appears that the prevailing doctrine in the United States is against any such right of the insurer (*f*), but that in this respect Massachusetts is an exception to the other States (*g*). It is to be noted that both in France and the United States an abandonment validly made is indefeasible by subsequent events (*h*). In this country it has been held by the House of Lords, in an appeal from the Scottish Courts (*i*), that the insurer has no right, by any such voluntary intervention on his part, to reduce what was originally a total loss to a partial one, on the ground that neither party to a contract can by his own act or default defeat the obligations which he has undertaken to fulfil.

Effect of abandonment as entitling the underwriters to the salvage.

1205. "Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto" (*k*). Where there are several

(*c*) 2 Valin, Com. liv. iii. tit. vi. des Assurances, art. 60, p. 144.
(*d*) Emerigon, c. xvii. s. 6, p. 231.
(*e*) Art. 385.
(*f*) 2 Phillips, Ins. s. 1706.
(*g*) *Ibid.* s. 1559.
(*h*) Code de Com. 385; 2 Phillips, Ins. s. 1705.
(*i*) Sailing Ship "Blairmore" Co. *v.* Macredie, [1898] A. C. 593.
(*k*) Mar. Ins. Act, 1906, s. 63, sub-s. 1. In order to perfect their legal title the abandonees of ship must have regard to the provisions of the Merchant Shipping Acts: per Lord Truro in Scottish Mar. Ins. Co. *v.* Turner (1853), 1 Macq. H. L. Cas. 342.

The earlier editions of this work stated this rule in rather a different way. For example, it was said that "abandonment transfers the remains of the abandoned property" and "clothes the underwriter with all the rights and responsibilities of ownership." It was pointed out, however, by the present editors in the seventh edition that statements such as these should be received with caution, and that it might well be that

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insurers, each takes, of course, in proportion to the amount of his subscription.

Retrospective operation.

This right of the underwriters is retrospective, operating from the moment of the casualty that gave the right to abandon, from which time they become, or are entitled to be, complete owners of the abandoned property so far as it is covered by the insurance (*l*).

"Salvage losses."

The thing insured when thus transferred by abandonment to the underwriter is called the salvage; and the losses, which give the right of abandonment, salvage losses, or total losses with benefit of salvage. The effect of abandonment is not only to entitle the underwriter to the remains of the abandoned property, but also to clothe him from the moment of the loss with all the rights and all the responsibility of ownership, entitling him to prosecute all claims which belonged to the assured as owner of the thing insured, and rendering him liable for all just demands that might have been made against the assured in the same capacity (*m*).

abandonment *per se* merely divests the owner of his property, without necessarily vesting it in the underwriters, if they are unwilling to accept it. And, since the passing of the Mar. Ins. Act, this seems now to be the true rule. The point is dealt with in § 1213, *infra*. See 2 Phillips, s. 1726.

(*l*) Stewart *v.* Greenock Mar. Ins. Co. (1848), 2 H. L. Cas. 159; Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. at p. 711; The Red Sea, [1896] P. at p. 24, per Lord Esher, M. R. This rule has not been applied under prize law to insurances of enemy property. Thus, where neutral insurers of enemy goods had, after their seizure, settled for a constructive total loss by a peril encountered before the seizure, the Prize Court held that the insurers could not maintain a claim for the release to them of the goods as being neutral-owned: The Gothland, [1916] P. 239, note.

(*m*) As to his responsibilities, however, see § 1213, *infra*. As to the position when an enemy underwriter of neutral property has accepted an abandonment and paid for a total loss, see The Palm Branch, [1916] P. 230; [1919] A. C. 272. In The Zaanland, [1918] P. 303, Sir Samuel Evans, P., held that where the claimants had, after the seizure and before making a claim, abandoned to their underwriters and been paid for a total loss, they could not maintain a claim for the release of the property. As to joining neutral underwriters as claimants in a proper case, see per Lord Sterndale, P., in The Dirigo, [1919] P. 204, at p. 216.

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Right of underwriters on ship to freight earned by completion of voyage after abandonment.

1206. Upon this principle it was decided in Case *v.* Davidson (*n*), and has ever since been the undoubted law in this country, that if, after abandonment of ship during a voyage, the ship nevertheless succeed in completing her voyage, so as to earn freight (*o*), such freight belongs wholly to the underwriter on ship, and to no extent either to the shipowner, or to the underwriter on freight (*p*). This principle was confirmed by the House of Lords in Stewart *v.* Greenock Marine Insurance Company (*q*), and was enunciated very clearly by Lord Esher, M. R., in the Court of Appeal, as follows:—"Now, what is the effect of that" (*i.e.*, abandonment) "as between the underwriters and the shipowners, according to the case of Case *v.* Davidson and all the others? It seems to me that Lord Ellenborough pointed out distinctly in that case first of all that the ship is to be considered as having passed to the underwriters after the abandonment has been accepted, as from the time when the damage occurred to her which entitled the shipowners to abandon her (*r*). From that time the underwriter is entitled to everything which that ship, then being his, can earn; that is to say, that he can earn by her as being her owner. That is what he is entitled to, and that is what Lord Ellenborough has said. He is not entitled to anything that has been earned by the use of that ship before she was his ship. Now take the simple case of a ship, before the loss or damage, having been chartered or filled with cargo on bills of lading, the freight

(*n*) (1816), 5 M. & S. 79, affd. by the Exchequer Chamber, Davidson *v.* Case (1820), 2 Brod. & B. 379. See *ante*, § 1175.

(*o*) This principle, of course, does not apply to a case where the freight is earned not by the original but by a substituted ship. Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273.

(*p*) See Mar. Ins. Act, 1906, s. 63, sub-s. 2, *infra*, § 1208. *Aliter*, where the policy provides that in the event of a constructive total loss the underwriter shall not claim the freight. In this case the freight is salvage to the underwriter on freight, if he pays for a total loss: Coker *v.* Bolton, [1912] 3 K. B. 315.

(*q*) (1848), 2 H. L. Cas. 159.

(*r*) These last words are not to be found in Lord Ellenborough's judgment, though the position which they involve may perhaps be implied from the tenor thereof.

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to be payable on the arrival of the ship and delivery of the goods. In such a case, at the time of the loss the ship has earned nothing. He who was her owner up to the time of the loss has earned nothing by the use of the ship. But he who is owner when she arrives is entitled, as owner, to receive the freight; that is to say, he is entitled as owner by the delivery of the cargo at the port of destination to the freight for the use of the ship during the whole voyage. He obtains that freight by the use of the ship, and he obtains it in virtue of what the ship does when she arrives at her destination, and when she is his ship. That is the whole of the law of abandonment" (*s*).

Limitation of rights passing by abandonment.

1207. In the passage that follows it is made clear, however, that these principles apply only to freight which the shipowner would have been entitled to receive, if the ship had completed the voyage without being abandoned. The abandonees therefore have no right to receive freight paid or partially paid in advance by a charterer, because this is earned by the shipowner whether the voyage be subsequently completed or not (*t*). So, too, where the ship is under charter-party and the charterer is entitled by virtue of bills of lading to receive from consignees a larger sum than the charter-party freight payable by him to the shipowner, the abandonees receive only the charter-party freight, for the difference between that and the amount due by the bills of lading belongs to the charterers (*u*). And from the charter-party freight receivable by the abandonees, there must, moreover, be deducted the freight's proportion of general average and particular charges, but not expenses incurred on the voyage prior to the abandonment, where those expenses were not incurred in respect of freight alone (*x*).

Advance freight does not pass.

Nor bill of lading freight in excess of that due under charter-party.

(*s*) The Red Sea, [1896] P. 20.

(*t*) But they are entitled to *pro ratâ* freight actually earned and received by the ship. London Ass. Corp. *v.* Williams (1892), 9 Times L. R. 96, 257 (C. A.).

(*u*) The Red Sea, [1896] P. at pp. 25, 26.

(*x*) The Red Sea, [1895] P. 293, per Bruce, J.

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Nor any freight not being earned at the time of the casualty.

1208. It is also to be observed that the freight which passes to the abandonees of ship is only freight which is being earned at or after the time when the loss occasioning the abandonment occurs. For instance, the cargo on board may belong to the shipowner, in which case the abandonee can only recover in respect of the actual use of the ship subsequent to the time of loss (*y*).

Nor damages for loss of freight recovered from tort feasor.

And so, where a ship was under charter to load a cargo at a subsequent port, which she was disabled by collision from reaching, and her owners recovered damages from the ship in fault in respect not only of the loss of their ship itself, but also in respect of the loss of the freight which they expected to earn on the subsequent voyage, it was held that the damages awarded under the latter head were receivable by the shipowner, or by the underwriters on freight, and not by the abandonees of ship (*z*).

The law established by the preceding paragraphs is thus stated by the statute (*a*): "Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss."

Other rights incidental to the ownership of the property pass as salvage to underwriters.

1209. Similarly, it was decided that where underwriters had paid a total loss on British ships captured by the Spaniards, they were entitled, as salvage, to the proceeds of Spanish ships captured by way of reprisals, which had been distributed by the British Government amongst the assured (*b*): so the underwriters on freight are entitled, after

(*y*) Miller *v.* Woodfall (1857), 8 E. & B. 493.

(*z*) See Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. 706 (C. A.). The Circuit Court of Appeals held the contrary in Mason *v.* Mar. Ins. Co. (1901), 110 Fed. R. 452.

(*a*) Mar. Ins. Act, 1906, s. 63, sub-s. 2.

(*b*) Randall *v.* Cochrane (1748), 1 Ves. 98; Blaauwpot *v.* Da Costa (1758), 1 Eden, 130. But these cases were explained and distinguished in Burnand *v.* Rodocanachi (1882), 7 App. Cas. 333, and are discussed in the chapter on subrogation.

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a total loss of the freight insured, to the benefit of other freight earned, instead of that insured (*c*). So in the United States, where the assured, before abandonment, had a right to claim a general average contribution, such claim was held to have been transferred by the abandonment to the underwriters (*d*).

Underwriter's right to salvage may be lost by settling for less than a total loss.

1210. Of course the underwriter, by not accepting the abandonment, or by other acts of the like kind, may lose all title to the ultimate benefit of salvage. A British ship and cargo were captured by the Brazilian Government, and condemned as prize for breach of blockade. The underwriters who had insured the cargo would not accept an abandonment, but compromised the claim for 35 per cent. Some time afterwards restitution and compensation were made by the Brazilian Government, and in an action by the insurers to obtain the benefit of this, the Court held that they were not entitled to anything (*e*).

Liabilities of ownership thrown upon underwriter by abandonment.

1211. As the abandonment thus vests in the underwriter all the privileges, so it throws upon him all the liabilities of ownership (*f*); for instance, the liability to pay salvage reward to third parties for saving the property and restoring it to the underwriters; all liens to which the property is subject, such as for seamen's wages, and all other expenses of earning the pending freight (*g*): but as between the assured and the underwriter, the latter cannot be called upon to discharge incumbrances or liens with which the property was

(*c*) Green *v.* Royal Exch. Co. (1815), 6 Taunt. 68; Everth *v.* Smith (1814), 2 M. & S. 278; Brockelbank *v.* Sugrue (1831), 1 Mood. & Rob. 102. Cf. Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273.

(*d*) Walker *v.* United States Ins. Co. (1824), 11 Serg. & Rawle, 61; 2 Phillips, s. 1709.

(*e*) Brooks *v.* M'Donnell (1835), 1 Y. & C. 500.

(*f*) But see *ante*, § 1205, n. (*k*); *infra*, § 1213.

(*g*) Sharp *v.* Gladstone (1805), 7 East, 24; Barclay *v.* Stirling (1816), 5 M. & S. 6; *ante*, § 1181. See Gilchrist *v.* Chicago Ins. Co. (1899), 104 Fed. R. 566.

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burdened before the casualty took place, and not arising out of the peril insured against (*h*).

Does abandonee of goods take subject to shipowner's claim for freight?

It is a question whether, upon an abandonment to the underwriter on goods, the abandonee takes the salvage subject to the shipowner's claim for freight; whether it be the full freight earned by their subsequent arrival in the original or a substituted ship, or the *pro ratâ* freight which becomes due on their acceptance by the merchant at the port of distress. In this country it was considered by Arnould to have been expressly decided (*i*), and as undoubtedly established as the general rule, that the assured cannot in such cases throw the loss on freight upon the underwriters on goods, and this on the plain principle that they have not, by the terms of their contract, engaged to indemnify him against it, and that the abandonment, although its effect is to subrogate the underwriters in the place of the assured, yet only does this to the extent of the insurance, which in a general policy on goods does not cover the freight. In the Supreme Court of the United States it was decided that a claim for freight against the abandonee could not be supported, and that, if the underwriters on goods had been obliged to pay freight in such case to the shipowner, in order to obtain possession of the salvage, they might either deduct the amount so paid from the loss, or, if a total loss had been previously settled, recover it from the assured as money paid to his use (*k*). Johnson, J., indeed, dissented from the opinion of the majority of the Court, on the ground that as the abandonee of ship is entitled to the freight earned subsequent to the loss, the abandonee of goods ought, by parity of reason, to be liable thereto. Phillips, notwithstanding this decision, inclines to the opinion

Law in United States.

(*h*) So held in the United States in a case where the ship had been bottomried before she became the property of the assured. Williams *v.* Smith (1804), 2 Caines, 20, cited 2 Phillips, Ins. s. 1716; and cf. Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. 706.

(*i*) Baillie *v.* Moudigliani (1785), 1 Park, Ins. 116. Arnould, 2nd ed. p. 1182.

(*k*) Columbian Ins. Co. *v.* Catlett (1827), 12 Wheaton, 383, cited 2 Phillips, Ins. s. 1718.

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that this charge ought to fall on the abandonee of the goods, on the ground that he is the party who, as owner of the salvage, alone derives benefit from their transportation (*l*).

Abandonment releases owners from liabilities. Barraclough *v.* Brown.

1212. When once a valid notice of abandonment is given, the owners, as they lose all privileges, so are, by English law, released from all liabilities attaching to their ownership. An excellent instance of this position is afforded by the case of Barraclough *v.* Brown (*m*). A vessel belonging to the defendants sank within the jurisdiction of the plaintiffs, who were the undertakers of the navigation of the rivers Aire and Calder. The defendants gave their underwriters notice of abandonment, and the latter in their turn, after in vain attempting to raise the vessel, themselves gave notice to the plaintiffs that they abandoned her. The latter eventually succeeded in destroying and removing the wreck at a large cost, which they claimed from the defendants by virtue of statutory enactments providing for the recovery of such expenses from "the owner."

It was held, however, that inasmuch as "owner" meant the owner at the time the expenses were incurred, the defendants were not liable, inasmuch as by giving notice of abandonment they had divested themselves of ownership.

Does abandonment necessarily vest the property in underwriters?

1213. This case suggests another important point for our consideration. Is it correct to say that the mere fact of abandonment necessarily vests the property in the underwriter, so as to throw upon him the liabilities of ownership even though he be unwilling to accept either the privileges or the liabilities attaching thereto? It is submitted that

(*l*) 2 Phillips, s. 1718:—"The goods become his" (the underwriter's) "by abandonment; they are transported as his, and arrive at the port of destination as his, and the freight is not due upon the assured's goods, but upon the underwriter's, and he is the only party who derives the benefit of a higher market at the port of destination if the goods arrive there. Who then has so properly something to do with freight, to the effect of being liable for it?" These reasonings have undoubtedly great weight, and on principle it can hardly be doubted that Phillips is right.

(*m*) 1 Com. Cas. 262, 329; 2 Com. Cas. 249; [1897] App. Cas. 615. See also The Crystal, [1894] App. Cas. 508.

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abandonment *per se* does not necessarily vest the property in anyone (*n*); all it does is to divest the owner of his property, and to give the underwriter an option either of accepting it or not, as he pleases (*o*). In the former event the property becomes the underwriter's property, and brings with it all the privileges and liabilities of ownership (*p*). But in the latter event the property becomes *res nullius;* no one, therefore, can be made liable *qua* owner of such property, though there might be claims in respect of the prior ownership thereof, if such prior owner had by his negligence put his property into such a position as to cause damage to others (*q*).

This question is discussed by Phillips (*r*), who points out that the statement that a valid abandonment invests the underwriters with all the rights, and subjects them to all the liabilities, of ownership, though in general true, yet must be taken with this qualification, that the assured cannot vest the underwriters with the ownership of the salvage, and subject them to all the subsequent liabilities of ownership, against their immediate disclaimer of such transfer. As an instance,

(*n*) Notwithstanding various *dicta* to the contrary; *e.g.*, by Lord Cottenham in Stewart *v.* Greenock Marine Ins. Co. (1848), 2 H. L. Cas. at p. 183. The language of sect. 63, sub-sect. 1 of the Mar. Ins. Act, 1906 (*ante*, § 1182), which appears to give the insurer an option to take over the abandoned property if he wishes to do so, and has no express reference to any liabilities imposed upon him by the mere fact of abandonment, supports the view here advanced. Similar language is used in sect. 79, sub-sect. 1, *infra*, § 1214.

(*o*) See per Farwell, L. J., in Foundling Hospital *v.* Crane, [1911] 2 K. B. at p. 377: "No one can be compelled to accept an assignment of any property, onerous or otherwise, without his consent." See also per Bramwell, L. J., in Eglington *v.* Norman (1877), 47 L. J. Ex. 557, at p. 559.

(*p*) Where a notice of abandonment was not accepted, but the parties agreed without prejudice to their rights to take joint action for salving the property, and it turned out afterwards that the notice was valid, Bigham, J., held that the underwriters were liable for the whole of the damage done to another vessel through the negligence of those in charge of the wreck, and not merely under the collision clause for three-fourths of the damage: Suart *v.* Merchants' Mar. Ins. Co. (1898), 3 Com. Cas. 312.

(*q*) This point is mooted in some of the cases referred to in our text, but no opinion is expressed.

(*r*) Vol. ii. ss. 1726, 1727.

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he raises the question whether, supposing the freight to exceed the value of the salvage, the insurer of goods is bound to take to the salvage, and states his opinion that under such circumstances the underwriter might pay a total loss and decline taking to the salvage, provided he gave speedy notice of his intention so to do (*s*).

Underwriters always entitled to salvage, whether actual or constructive total loss.

1214. Hitherto we have spoken solely of the effects of an abandonment in relation to cases of constructive total loss. It must, however, be clearly understood, that even where no notice of abandonment has been given, but a total loss has taken place, *i.e.*, an actual total loss, the same rule applies, and the underwriter, who has adjusted and paid a total loss, is, by virtue thereof, entitled to the benefit of any salvage that may ultimately come to hand, or the proceeds of any sale of the property that may have been made by the assured, or the master as his agent. The rule is thus stated in sect. 79, sub-sect. 1, of the Marine Insurance Act, 1906:—

> Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

Thus, in the case of a missing ship, where there had been no formal abandonment, Gibbs, C. J., said, that "the underwriters, on payment of a total loss, would of course be entitled to the ship, if she afterwards turned up, as salvage" (*t*). So, in the case of sea-damaged goods sold in specie at an intermediate port, Lord Abinger said, that "the net amount of the sale becomes money had and received to the use of the

(*s*) Arnould, however, seems to have thought otherwise. 2nd ed. pp. 1183, 1184. The owner of cargo cannot excuse himself from payment of freight by abandoning the cargo to the shipowner. Dakin *v.* Oxley (1864), 33 L. J. C. P. 115.

(*t*) Houstman *v.* Thornton (1816), Holt, N. Pr. 242; Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. at p. 471; *ante*, § 1182.

Sect. 1214. underwriter, upon the payment by him of the total loss" (*u*). And in a case where the underwriter had not paid, but was resisting payment, it was held that inasmuch as the sale was a "right sale," so as to constitute an actual total loss, the proceeds *ipso facto* vested in the underwriter without any notice of abandonment. In this case the proceeds were in the hands of the shipowner, who claimed a lien for *pro ratâ* freight; it was held that this was a matter which must be determined between the underwriters on the cargo and the shipowner, and could not affect the right of the cargo owners to recover for a total loss (*x*).

If, however, after adjustment and payment for a total loss, or after action brought, the whole of the thing insured be recovered (as where a box of bullion was fished up and restored after its full insured value had been paid), the underwriter will not, on that account, be entitled to reclaim from the assured the whole amount of his subscription, but merely the thing saved, or its value after deducting the expenses of saving it (*y*).

So, too, where the underwriter pays only for a partial loss, if a part of the proceeds of the thing insured is subsequently restored to the assured, the underwriter is not entitled to recover back any part of the percentage he has paid, even though the part so restored to the assured, together with the percentage paid by the underwriter exceed the whole amount of the insurance, for as Gibbs, C. J., expresses it, "all that is restored, is restored for the benefit of the assured, not of the underwriter. The plaintiff could not recover from the underwriters more than 100 per cent., but he may receive *undequâque* more than 100*l*." (*z*).

(*u*) Roux *v.* Salvador (1836), 3 Bing. N. C. 288; see also Randal *v.* Cockran (1748), 1 Ves. 98; and per Blackburn, J., in Rankin *v.* Potter (1873), L. R. 6 H. L. 130; Burnand *v.* Rodocanachi (1882), 7 App. Cas. 333.

(*x*) Saunders *v.* Baring (1876), 34 L. T. 419.

(*y*) Da Costa *v.* Firth (1766), 4 Burr. 1966; Ruys *v.* Royal Exch. Ass. Co., [1897] 2 Q. B. 135.

(*z*) Tunno *v.* Edwards (1810), 12 East, 488; Goldsmid *v.* Gillies (1813), 4 Taunt. 803.

Sect. 1215. Distribution of the salvage amongst the underwriters.

1215. Upon abandonment each of the underwriters is entitled to share in the proceeds of the salvage, according to the proportion which the amount of his subscription bears to the whole value of the thing insured; and this without regard to the date of the different subscriptions, or the priority of the policies, if more than one.

In cases of double or over-insurance.

In France, if there be more than one policy, and the sum insured in the first policy itself amounts to the value of the thing insured, an abandonment to the underwriters on the first policy carries the whole property in the thing insured, and there will be nothing to abandon to the underwriters on the subsequent policies; in such case, accordingly, the policy first effected is alone considered binding, and the underwriters on the rest are discharged from all claim; and are, of course, entitled to no share in the salvage (*a*).

In our own country a different rule prevails, and the assured in such case may sue both sets of underwriters, but can only recover up to the amount of his loss, to which all the underwriters on both policies shall contribute according to the amount of their several subscriptions, and are, of course, entitled to a proportionate share of the proceeds of the salvage (*b*).

Where the whole interest is not covered.

On the other hand, where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance (*c*). He is consequently entitled to that extent to his proportionate share in the proceeds of the salvage (*d*). Thus,

(*a*) Code de Com. art. 359.

(*b*) Mar. Ins. Act, 1906, ss. 32, 80, *ante*, § 330. The law is the same in the United States (3 Kent, Com. 280), but may be altered by express clauses in the policy.

(*c*) Mar. Ins. Act, 1906, s. 81.

(*d*) The Commonwealth, [1907] P. 216 (division of sum recovered from tortfeasor). In Duus, Brown & Co. *v.* Binning (1906), 11 Com. Cas. 190, the costs of an unsuccessful action by the assured suing partly on their own account and partly on account of their underwriters were divided between the assured and underwriters in proportion to their interests. In Mason *v.* Marine Ins. Co. (1901), 110 Fed. R. 452, the

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suppose A. to have insured goods, the real value of which is 1,000*l.*, for 800*l.*, of which sum B. subscribes 500*l.*, and C. 300*l.*; A., it is plain, stands his own insurer for 200*l.* A constructive total loss takes place, and A. abandons. If the proceeds of the salvage amount to 100*l.*, *i.e.*, a tenth part of the whole insurable value of the goods, this must be distributed among the parties to the insurance in the proportion of a tenth of their respective interests, *i.e.*, to A. 20*l.*, to B. 50*l.*, and to C. 30*l.*

Mode of apportioning the salvage among policies on different subjects.

1216. If there be three insurances, one on the ship and cargo, one on the ship only, and one on the cargo only, a question has been raised as to the mode in which the salvage should be shared amongst the different sets of underwriters. Emerigon adopts a mode of adjustment whereby the underwriters on ship and cargo, though they may have insured only the same amount that has been subscribed for by the underwriters on the two separate interests respectively, shall yet be entitled to a double share of the effects abandoned: Marshall recommended the following more equitable method, by which all would take an equal share in the salvage. Take the following data: let a ship, valued at 5,000*l.*, and a cargo at 5,000*l.* (making a total of 10,000*l.*) be insured by three policies, thus:—

	£
On ship and cargo - - - - -	3,000
On the ship only - - - - -	3,000
On the cargo only - - - - -	3,000
Uninsured - - - - - -	1,000
	£10,000

A shipwreck happens, and the net proceeds of the wreck of the ship are 500*l.*, and of the sea-damaged cargo 500*l.*, total 1,000*l.* The adjustment should be as follows:—

Circuit Court of Appeals held, contrary to the English rule, that the abandonment of a ship, not fully insured, to the underwriters for a constructive total loss vests the entire ownership in them.

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	£
To the owners, for their part of ship and cargo uninsured - - - - - - - - - -	100
To the insurers on ship and cargo, a moiety of three-fifths of the produce of the wreck - - -	150
And a moiety of three-fifths of the produce of the cargo	150
To the insurers on ship, three-fifths of the produce of the wreck - - - - - - - - -	300
To the insurers on goods, three-fifths of the produce of the cargo - - - - - - - -	300
	£1,000

As between insurers and bottomry bondholders.

1217. The Ordonnance de la Marine decreed that where money had been lent on bottomry, and also insured on the same subject, the lender on bottomry, in case of abandonment, should be paid the full amount out of the proceeds of the salvage, to the entire exclusion of the underwriters, supposing the salvage not sufficient for both (*e*). Emerigon (*f*) and Pothier (*g*) rested this law on the principle, that the underwriter, by virtue of the abandonment, was put exactly in the place of the assured, and therefore could not dispute the claim of the bottomry lender, who had become his creditor by the effect of this entire subrogation. Valin (*h*) opposed this view on the ground that abandonment is not an absolute substitution of the underwriter for the assured, but only to the extent of the insurance; that, consequently, the underwriter becomes upon abandonment a debtor to the bottomry lender only in the proportion which the sum insured bears to the whole of the subject; and that, on principle, the bottomry lender and underwriter ought both to share in the benefit of the abandonment, in proportion to their respective interests.

These reasonings of Valin were adopted in the French Legislative Council (*i*); and the 331st Article of the Code de

(*e*) Tit. Contrats à la Grosse, art. 18.
(*f*) Chap. xiii. s. 12, vol. ii. p. 269.
(*g*) Traité des Contrats à la Grosse, No. 49.
(*h*) Comment. on Ord. tit. à la Grosse, art. 18, vol. ii. p. 20.
(*i*) See 3 Boulay-Paty, Droit Mar. 227—232.

Sect. 1217. Commerce accordingly provides that, upon abandonment, the proceeds of the property saved shall be divided between the lender on bottomry for his principal solely, and the insurer, for the amount insured, rateably according to their respective interests.

Arnould advocated the adoption of the same rule in this country (*k*). But it has since his time been clearly established, both in this country by the Privy Council (*l*), and in America by the Supreme Court (*m*), that the bondholders' claim to the salvage prevails over that of all other claimants.

Duties of the master in cases of abandonment.

1218. By the general law maritime, as recognized alike in this country and foreign states, the assured is bound, on the occurrence of any casualty which authorises an abandonment, to do his utmost to avert a total loss, so as to lighten, as far as possible, the burden which is to fall on the underwriters. In so doing he is considered to be the agent of the underwriters, and the exertions he makes in such capacity do not at all prejudice his right to insist on his abandonment.

This generally-recognized right is expressly conferred on the assured in our English policies by a special clause to the following effect:—"And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail for, in, or about the defence, safeguard, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to the insurance, &c." (*n*).

Duty of master under suing and labouring clause.

Although the language is "it shall be lawful," the law and practice of this, and almost all other countries, imposes it upon him as his bounden duty.

(*k*) 2nd ed. p. 1188. See also 2 Marsh. Ins. 768, 769; Benecke, Pr. of Indem. 74—83.

(*l*) Stephens *v.* Broomfield (1869), L. R. 2 P. C. 516.

(*m*) Ins. Co. *v.* Gossler (1877), 96 U. S. 645.

(*n*) See the effect of these words noticed in Stringer *v.* English Mar. Ins. Co. (1869), L. R. 4 Q. B. at p. 686.

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Sect. 78, sub-sect. 4, of the Marine Insurance Act, 1906, declares expressly that—

> It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss (*o*).

So also the Code de Commerce expressly enacts that the assured is bound so to exert himself, "que l'assuré doit travailler," &c. (*p*).

As agent for those ultimately concerned.

Immediately, therefore, that the emergency arises, and before notice of abandonment has been given, the master is bound to take every necessary measure for the defence, safeguard, and recovery of the thing insured; in so doing he acts as the agent for both parties, or, more accurately speaking, as the agent of the party who may eventually turn out to be interested in the salvage, and, as such, derive benefit from his exertions (*q*).

If no abandonment be made, that party is, of course, the assured himself; it is as agent for the assured that the master will turn out to have acted, and it is to the assured himself he must look for making good all expenses *bonâ fide* incurred.

If, however, an abandonment be made which is either accepted or ultimately proves effectual, the underwriter becomes owner of the property from the moment of the casualty (*r*); and therefore the master, by operation of law, is his agent in so acting.

Repurchase of ship by master.

1219. On this principle, if a captured ship be repurchased by the master, in cases where no notice of abandonment is given, he is considered to have effected such repurchase as

(*o*) See the discussion on this provision, *ante*, § 799a.

(*p*) Code de Com. art. 381; see also 4 Boulay-Paty, Droit Mar. 308—310.

(*q*) 3 Kent, 331; Carver on Carriage, s. 294; Suart *v.* Merchants' Mar. Ins. Co., Ltd. (1898), 3 Com. Cas. 312.

(*r*) See, however, § 1213, where it has been suggested that the underwriter may disclaim such ownership.

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agent for the owners; and, if the transaction be legal, and the master have acted *bonâ fide* and within his authority under the circumstances, the assured will be bound by his acts, and thereby precluded from recovering a total loss if the ship is restored before action brought (*s*).

Where, however, under similar circumstances, notice of abandonment has been given and accepted, and the repurchase not effected by the master till after such notice, it has been decided in the United States, that as the master, in consequence of the abandonment, became the agent of the underwriters, so the repurchase was for their benefit, if they chose to take it (*t*).

An American ship and cargo were captured by a French privateer and carried into Malaga, where the cargo was ultimately condemned as lawful prize, and sold for the benefit of the captors. On receiving intelligence of the capture, the assured in New York abandoned to the underwriters on the cargo, who paid a total loss; meanwhile a mercantile house at Malaga, at the request of the master, had purchased the cargo on its being put up for sale, for the benefit and on account of the assured, and whomsoever else it might concern; considering themselves in so doing to have been acting as agents for the assured, to whom they would have had recourse for payment in case any loss had taken place on the purchase. Instead, however, of any loss occurring, the cargo was sold again by the Malaga house for nearly twice the amount they gave for it; and the surplus produced by this sale was held by them as trustees, either for the assured or the underwriters, according to the determination of the Court. The Court held that this surplus belonged to the underwriters. Kent, C. J., said: "The assured abandon and the underwriters accept and pay; they were then substituted for the assured, and succeeded to the benefit of the acts of the agents abroad;

(*s*) M'Masters *v.* Schoolbred (1794), 1 Esp. 238; Wilson *v.* Forster (1815), 6 Taunt. 25; 1 Marshall, R. 425.

(*t*) So held by Chancellor Kent in Jumel *v.* Marine Ins. Co. (1811), 7 Johnson, 423, 424.

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the merchants at Malaga acted, nominally, as agents for the assured, but in reality they were agents for the party having the ultimate claim to the property" (*u*).

The master is agent of the assured until abandonment. On abandonment he becomes the agent of the underwriters.

1220. Several cases, to a similar effect, have been decided in the United States, all tending to establish the position, that the master, although agent of the assured before the abandonment, becomes, by abandonment, supposing it to be effectual or accepted, the agent of the underwriters from the moment of the casualty: the ground of this doctrine being that as the interest in the salvage is thereby transferred to them from that time, the agency is transferred with the subject (*x*).

Underwriters may repudiate the acts of the master.

It has also been decided in the United States that, though the underwriters, after abandonment, are entitled to affirm a repurchase, yet they are not bound by it, unless they elect to take it. "The insurer," says Chancellor Kent, "can accept of the repurchase by the master, as his constructive agent, and affirm the act, or he can leave it to fall upon the master" (*y*).

Of course, if the master after abandonment of ship busies himself about performance of the contract of charter-party, for instance, by taking up another vessel in order to carry on the cargo or passengers, he is at least not the agent of the underwriters on ship in so doing, for their right and relation as owners and principals arise out of the abandoned ship, and extend no further; they have therefore no claim on the freight earned by the substituted ship. The master in hiring

(*u*) United Ins. Co. *v.* Robinson (in error) (1806), 1 Johnson, 591.

(*x*) See these cases collected, 2 Phillips, Ins. s. 1731 *et seq.*, especially Columbian Ins. Co. *v.* Ashby, 4 Peters, S. C. R. 139; see also Gilchrist *v.* Chicago Ins. Co. (1899), 104 Fed. R. 566; Hume *v.* Frenz (1907), 150 Fed. R. 503, in which the insurers were held responsible to the master for his wages after the casualty.

(*y*) 3 Kent, 332. For this position the learned commentator cites the following authorities:—Saidler *v.* Church (1799), 2 Caines, 286; Jumel *v.* Marine Ins. Co. (1811), 7 Johnson, 412; United Ins. Co. *v.* Robinson (1805), 2 Caines, 279; Willard *v.* Dorr (1823), 3 Mason, 161. These cases will be found collected and commented on 2 Phillips, s. 1731.

Sect. 1220. this vessel most probably acted as the agent of his owners (*z*), but not necessarily (*a*).

Recovery of more than the amount of the insurance.

1221. It is quite clear that the assured can recover for a total loss, as such, only the amount of the insurance, or the agreed value in the policy: the question whether he can recover, in addition to this, the amount of any average or partial loss sustained before the happening of the casualty in respect of which the total loss is paid has already been discussed in the Chapter on Particular Average (*b*).

Practice as to adjustment of total losses, actual and constructive.

1224. In cases of abandonment the assured, as we have seen, is entitled to the whole amount of the insurance, and the underwriter, on payment of such amount, is entitled to the net proceeds of whatever may be saved,—in other words, to the salvage, after deducting the expenses of saving and recovering it. We have also seen that, even where no notice of abandonment has been given, he is equally, on payment of a total loss, entitled to the net salvage that may ultimately come to hand (*c*). The only difference between the two cases is, that, in the former, the underwriters generally at once pay the whole amount insured, and the salvage is thereupon transferred to them, and its net proceeds divided amongst them, in proportion to their several interests, in the manner already stated: in the latter case, the underwriters usually agree, in the first instance, to a payment on account, of a sum which is calculated as the probable difference between the amount insured and the net value of the salvage: should this amount prove less than the real difference, they pay the balance of the loss after it is finally settled; if more, the assured repays the excess (*d*).

(*z*) Hickie *v.* Rodocanachi (1859), 28 L. J. Ex. 273; 4 H. & N. 455.

(*a*) See the discussion in Matthews *v.* Gibbs (1860), 30 L. J. Q. B. 55.

(*b*) *Ante*, §§ 1032—1032b.

(*c*) In the former case the loss used frequently to be called a salvage loss with, and in the latter, a salvage loss without, abandonment.

(*d*) For examples, see Gammon *v.* Beverley (1817), 8 Taunt. 119; Russell *v.* Dunskey, 6 Moore, 283.

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Loss on goods sold sea-damaged at any port except that of their destination, is generally adjusted as a salvage loss.

This mode of adjustment is, generally speaking, only adapted to cases of total loss, either constructive or absolute: there is, however, one case of partial or average loss to which, in practice, it is frequently and properly applied—and that is, where, by the perils of the sea, the ship is disabled and prevented from proceeding on her voyage at some place short of her port of destination, and the cargo, or that part of it which is saved, in order to prevent further deterioration, is obliged to be sold at the place of the disaster: in such cases the loss is, in practice, almost always adjusted as a salvage loss, *i.e.*, each underwriter either at once pays the whole amount of his subscription, and takes his proportionate share of the net proceeds of the sale, after deducting all necessary expenses; or he pays the difference between such share and the amount by him subscribed (*e*). In one case, where a ship, with a cargo of indigo just loaded on board, was upset and sunk in her port of loading, and the indigoes, having been got out of her, were sold by auction there, at a loss of 71 per cent. on their cost price on board, the Court held, that the true principle of adjustment was to settle this as a total loss, with benefit of salvage, *i.e.*, to calculate the loss according to the difference between the invoice price of the indigo at the port of loading and the sum it fetched as sold there in its damaged state: and the loss having been adjusted by an arbitrator on this principle, the Court refused to set aside his award, although it appeared that the indigo, after the sale, had been dried and sent on by other ships to London (its port of destination), where it realized nearly as much as though it had received no injury whatever (*f*).

(*e*) Stevens, Average, 79—81; Benecke, Pr. of Indem. 442—447.

(*f*) Hardy *v.* Innes (1822), 6 Moore, 574.

CHAPTER IX.

SUBROGATION.

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Provisions of Mar. Ins. Act relating to subrogation.

1225. THE seventy-ninth section of the Marine Insurance Act, 1906, is the section which professes to deal with subrogation. It is thereby provided as follows:—

> (1) Where the insurer pays for a total loss either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over (*a*) the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter (*b*) as from the time of the casualty causing the loss (*c*).

(*a*) See *ante*, § 1205.

(*b*) It is to be noticed that the words "in so far as the assured has been indemnified," which occur in sub-sect. 2 (where partial loss is dealt with), do not occur here. If the omission of these words implies that by subrogation (as distinct from abandonment) an insurer may obtain more than an indemnity for the payment he has actually made, the editors submit that a change of the law has been effected by the Act, which infringes the whole principle of subrogation. The question, independently of the Act, is discussed *infra*, §§ 1228—1230.

(*c*) For the relation between this sub-section and sub-sect. 1 of sect. 63, see *ante*, § 1182, n. (*b*). The sidenote to this sub-section suggests that its subject is only subrogation, but the earlier part of it deals with abandonment, in the sense in which this word is used by high authorities (see *ante*, § 1182, n. (*a*)), and to this extent seems to cover the same ground as sub-sect. 1 of sect. 63. It is not clear what

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> (2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in (*d*) and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

Subrogation explained. Its relation to abandonment.

The doctrine of subrogation is closely related to that of abandonment. Abandonment, as we have seen, applies only to cases of total loss, and probably only to contracts of insurance. Subrogation is an equitable arrangement incident to all contracts of indemnity and to all payments on account thereof. "The general rule of law (and it is obvious justice)," said Lord Blackburn (*e*), "is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it (*f*), then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." And the doctrine was stated in even more comprehensive terms in the following year by Brett, L. J.,

rights "*in* the subject-matter" are given to the insurer by the second half of the sub-section which have not been given by the earlier words entitling him to take over the interest of the assured in whatever may remain of the subject-matter paid for.

(*d*) It is difficult to see how an insurer who acquires no title to the subject-matter insured can be subrogated to any rights of the assured *in* the subject-matter insured.

(*e*) In Burnand *v.* Rodocanachi (1882), 7 App. Cas. at p. 339.

(*f*) In King *v.* Victoria Ins. Co., [1896] A. C. 250, it was declared by the Privy Council that a payment *bonâ fide* made by insurers in satisfaction of a claim made under the policy was enough to give the insurers a right of subrogation, and that it was not open to a third party to object to the insurer's right to sue that the payment was not actually due under the policy. Accord. Nord Deutscher Lloyd *v.* Ins. Co. of North America (1901), 110 Fed. R. 420.

Sect. 1225. in the Court of Appeal (*g*): "As between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort (*h*) capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

Indemnity is the guiding principle.

1226. And similarly: "What," said Bowen, L. J. (*i*), "is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters." In Simpson *v.* Thomson (*j*), it is said by Lord Cairns, L. C.: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

(*g*) In Castellain *v.* Preston (1883), 11 Q. B. D. at p. 388.

(*h*) For an instance, see Assicurazioni Generali de Trieste *v.* Empress Ass. Corp., [1907] 2 K. B. 814, where a re-insurer, having paid the re-assured, recovered from him the amount of damages which the latter had recovered from the original assured in an action for deceit, in respect of representations by which the re-assured had been induced to pay losses. It was, however, held that the re-assured was entitled to deduct the costs properly incurred by him in order to recover these damages from the original assured.

(*i*) 11 Q. B. D. at p. 401.

(*j*) (1877), 3 App. Cas. at p. 284.

Sect. 1226. The principle insisted upon both throughout the judgments in the cases cited, and elsewhere (*k*), is, that it is entirely foreign to the spirit of contracts of indemnity that a person damnified should recover his loss more than once; it is, therefore, clear that if he has already recovered from a third party, there can be no liability under the contract of indemnity. On the other hand, if he has not previously recovered from such third party, but has the right to do so, there is no reason why such third party should be allowed to allege that his liability has been satisfied or reduced (*l*) by a payment made by a stranger to him, under a contract with which he has nothing to do (*m*). The third party remains liable to the person indemnified just as if there had been no contract of indemnity (*n*). But the person indemnified can only take the sum recovered from the third party as trustee for the indemnifier, and similarly, if he has not himself received any sum to which he is entitled, he is bound to afford the latter all facilities for doing so. In practice, the commonest way in which the principle of subrogation is applied to insurance, is for the insurer to pay the claim of the assured, and then to institute proceedings in the name of the latter, but for his own benefit, against the party ultimately liable.

Distinctions between principles of subrogation and of abandonment.

1227. The difference between the principle of abandonment and that of subrogation is that whereas the former has effect only in cases of total loss, the latter applies, as we have seen,

(*k*) See, for example, Darrell *v.* Tibbitts (1880), 5 Q. B. D. 560. Cf. In re Driscoll, [1918] 1 Ir. R. 152.

(*l*) See Dufourcet *v.* Bishop (1886), 18 Q. B. D. 373, where a shipper of cargo, who had paid freight in advance and insured it, was held to be entitled in an action against the shipowners, by whose negligence the cargo had been lost, to recover on behalf of the insurers the amount of freight paid in advance, as part of the value of the cargo.

(*m*) See The Charlotte, [1908] P. 206. In this case the Court of Appeal held that the insurers of a cargo could recover in the name of the sellers from a wrongdoing vessel for the damage done to the cargo at a time when the property had not passed to the buyers, they having paid the buyers for a total loss and the buyers having paid the sellers the sound value of the goods.

(*n*) Randal *v.* Cockran (1748), 1 Ves. Sen. 97; Mason *v.* Sainsbury (1782), 3 Doug. 61; Yates *v.* White (1838), 4 Bing. N. C. 272.

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to all contracts of indemnity and to all cases in which any loss is reimbursed by the party indemnifying, whether it be partial or total.

In cases of total loss, the insurer by abandonment becomes the owner of the thing that is lost; by subrogation he becomes entitled to the benefit of claims and other remedies which may be independent of the ownership of the thing itself. This distinction between abandonment and subrogation was pointed out by Lord Blackburn (*o*) in the following terms:—"Where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property (*p*), are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid. The right to receive payment of freight accruing due, but not earned, at the time of the disaster, is one of those rights so incident to the property in the ship, and it therefore passes to the underwriters because the ship has become their property, just as it would have passed to a mortgagee of the ship who before the freight was completely earned had taken possession of the ship. (See Keith *v.* Burrows (*q*).) . . . . But the right of the assured to recover damages from a third person is not one of those rights which are incidental to the property in the ship: it does pass to the underwriters in case of payment for a total loss, but on a different principle. And on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes. . . . Mason *v.* Sainsbury (*r*) and Yates *v.* White (*s*) were both cases of partial loss only. The right of the underwriters could not arise in those cases by

(*o*) In Simpson *v.* Thomson (1877), 3 App. Cas. at p. 292. See also the very lucid judgment of Brown, D. J., in the St. Johns (1900), 101 Fed. R. 469 (District Court).

(*p*) But none beyond: see Sea Ins. Co. *v.* Hadden, C. A. (1884), 13 Q. B. D. 706. *Ante*, § 1178; *post*, § 1232.

(*q*) 2 App. Cas. 636.

(*r*) (1782), 3 Douglas, R. 61.

(*s*) (1838), 4 Bing. N. C. 272. Cf. also Tunno *v.* Edwards (1810), 12 East, at p. 492.

relation back to the passing of the property at the time of the loss, for there was no such passing of the property. It could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and were so subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity."

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1228. Abandonment must always be of the whole thing insured, or of an apportionable part thereof; there is no such thing as abandonment of part, except where there is a right to recover for a total loss of such part (*t*). Even though the thing abandoned prove eventually to be of more value than the amount paid to the assured, yet the underwriter may undoubtedly retain possession of the whole proceeds. It is not, however, clear that the same is true of subrogation. Unless the contrary is established by the case of North of England Insurance Co. *v.* Armstrong (*u*), it is submitted that subrogation, apart from abandonment, can never entitle the insurer to enforce, for his own benefit, the claims of the assured, except in so far as it may be necessary to reimburse him for his payment under his contract of insurance. If he recovers more by the exercise of his right of subrogation than he has paid to the assured, it seems just that the surplus ought to be payable by him to the latter.

Can subrogation give underwriters more than an indemnity?

The facts of the case above referred to were as follows: The "Hetton" was sunk and totally lost, owing to a collision with the "Uhlenhorst." The plaintiffs, who were underwriters on the "Hetton," paid the defendants, her owners, 6,000*l.* for a total loss, that being the policy valuation of the "Hetton." The plaintiffs then, using the defendant's name, brought an action against the "Uhlenhorst," which was held solely to blame for the collision. It appeared that the real

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(*t*) A seeming exception to this rule is where the thing totally lost has only been partially insured. In such a case the owner is considered to be his own underwriter to the extent of the uninsured portion. Abandonment then vests the whole thing in the underwriters jointly with the assured. See *ante*, §§ 1187, 1215.

(*u*) (1870), L. R. 5 Q. B. 244.

Sect. 1228. value of the "Hetton" was 9,000*l.*, and this sum the owners of the "Uhlenhorst" would have been liable to pay, had they not succeeded in limiting their liability under the Merchant Shipping Act then in force; as it was, judgment was given against them for about 5,700*l.* The plaintiffs claimed that, by subrogation, they were entitled to the whole of this sum: the defendants contended that inasmuch as the real value of the "Hetton" was not 6,000*l.* but 9,000*l.*, they were entitled to participate in the 5,700*l.* The Court of Queen's Bench (*x*) decided that the sum belonged entirely to the underwriters.

1229. This decision is, no doubt, quite correct. The underwriters did not, in fact, recover from the "Uhlenhorst" a sum exceeding what they had paid under their contract of insurance. Nor was the sum so recovered to any degree enhanced by the fact that the "Hetton" was, in reality, worth more than she was valued at in the policy. Further, on the well-established principle that the policy valuation is binding in all questions as to the amount recoverable thereon from underwriters, it is clear that if the owners of the "Hetton" had in the first instance sued the "Uhlenhorst" and recovered 5,700*l.*, and afterwards sued their own underwriters for 6,000*l.*, they would have been obliged to give credit for the 5,700*l.* obtained from the "Uhlenhorst." But the judgments in the case go further, and suggest that even if the whole 9,000*l.* had been recovered from the "Uhlenhorst," the underwriters on the "Hetton," on the ground of their having paid for a total loss, would have been entitled to retain the whole of this sum, although they would thus be making a profit of 3,000*l.* Thus Cockburn, C. J., says (*y*):—"I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he

(*x*) Cockburn, C. J., Mellor and Lush, JJ. (*y*) At p. 248.

does satisfy it. . . . I think it is clear also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be called upon to contribute for the loss, that what is recovered must be taken to represent the lost ship; and then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to that which is the representative of the ship, in the shape of damages to be paid by the owners of the vessel which caused the collision." Similarly Lush, J., says (*z*): "If the underwriters had got the wreck up, and if they had procured the wrongdoer to repair the vessel, the vessel so repaired would still belong to the underwriters. What difference can it make whether the wrongdoer repairs the thing in specie, or pays in money the amount it would take to repair?" Sect. 1229.

1230. It is submitted that in so far as these judgments imply that the rights of the assured pass to the underwriters except so far as is necessary to reimburse them for the amount they have paid to the assured, they are contrary to the whole principle of the law of subrogation, the sole object of w'ich is to prevent the assured from recovering more than a full indemnity (*a*). It is clear that if the assured had sued the "Uhlenhorst" and recovered 9,000*l.* from her owners, without making any claim upon the underwriters, they would have been entitled to retain the whole of such sum. And it would also be strange if the underwriters should be allowed to make a profit, and the assured to sustain a loss, merely Error in North of England Ins. Co. *v.* Armstrong.

(*z*) At p. 251.

(*a*) See the judgments of Brett and Bowen, L. JJ., in Castelain *v.* Preston; and of Lord Blackburn in Burnand *v.* Rodocanachi, cited *ante*, §§ 1225, 1226. In King *v.* Victoria Ins. Co., [1896] A. C. at p. 255, Lord Hobhouse said: "Their Lordships have no doubt that if, after receiving payment from the plaintiffs, the bank had got damages from the government, a Court of equity would have treated them as trustees for the plaintiffs to the extent of the payment." See also the dictum of Brown, D. J., in the St. Johns (1900), 101 Fed. R. at p. 474. There are dicta of the Supreme Court of the United States to the contrary, cited in The Livingstone (1903), 122 Fed. R. 278. See, however, that case on appeal, *infra*, note (*b*).

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owing to the mistake of the latter in following, in a particular case, the usual business course of claiming upon their policy, instead of first proceeding against the party in default.

Confusion between abandonment and subrogation.

It is apprehended that the mistake in the judgments arose from the failure to grasp the distinction to which we have already referred, and which appears to have been for the first time expressly pointed out by Lord Blackburn seven years later, between the principles and results of abandonment and subrogation. By the former, underwriters are entitled to the thing abandoned, and to all rights of ownership accruing after they become owners: by the latter they become entitled to all the collateral remedies and advantages of the assured, but only for the purpose of reducing the loss which they have themselves sustained by payment under their contract (*b*).

Sect. 79, sub-sect. 1, of the Marine Insurance Act, 1906, declares, as we have seen, in general terms that the insurer is on payment for a total loss subrogated to all the rights and remedies of the assured in respect of the subject-matter insured. It is, however, submitted that this sub-section admits of the construction that the insurer is subrogated to such rights for the purpose for which subrogation is allowed by the principles of English law, and no further—*i.e.*, if the view maintained by the editors be correct, for the purpose of diminishing the insurer's loss.

(*b*) So decided by the Circuit Court of Appeals in The Livingstone (1904), 130 Fed. R. 746. The facts were that a vessel valued at less than her real value in the policy was sunk by collision, and the underwriters paid for a total loss. Afterwards the assured recovered the amount of her real value as damages from the vessel in fault, and the Court held, reversing the decision of the District Court, *supra*, note (*a*), that the insurers were only entitled to receive the amount which they had actually paid, with interest. "The title of the insurers," said the Court, "by virtue of the valued policies, abandonment and conveyance, to the physical property and to salvage, may well be conceded, as may also their right to share in the recovery to the extent of full and complete reimbursement for all losses made by them incident to the insurance. We are fully convinced that equity and good sense do not require the Court to go further and permit them to realize an enormous profit from the transaction. No controlling authority compels such a decision; no principle of equity requires it."

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Thames & Mersey Mar. Ins. Co. *v.* British & Chilian S.S. Co.

The decision in North of England Insurance Association *v.* Armstrong (*c*) was recently followed in Thames and Mersey Marine Insurance Co. *v.* British and Chilian S.S. *Co.* (*d*). In that case a ship worth 65,000*l.*, but insured for 45,000*l.* on an agreed value of 45,000*l.*, was sunk in collision, and the insurers paid the full amount of the insurance. In a collision suit in the Admiralty Division both vessels were held to blame, and the assured were held to be entitled to recover from the owners of the other vessel five-twelfths of their loss, and were paid 26,900*l.*, being five-twelfths of 65,000*l.*, less certain charges and costs. After giving the assured credit for 19,660*l.* which was due to them from the insurers under the collision clause in the policy, there remained a balance of 7,240*l.*, and the insurers claimed that under the principle of subrogation they were entitled to receive that sum from the shipowners. The latter contended that the insurers were not entitled by subrogation to more than five-twelfths of the amount of the valuation, *i.e.*, of 45,000*l.*, on which basis, after debiting the insurers with 19,660*l.* in respect of their liability under the collision clause, nothing remained due to them. Scrutton, J., held, however, that as the amount recovered by the shipowners from the other vessel was less than the amount paid by the insurers, the latter were entitled to recover from the shipowners the sum of 7,240*l.*, though it was based on a larger value than the insured value. The learned judge guarded himself from using any language from which it could be inferred that where the sum recovered exceeds that paid by the insurer, the latter can by subrogation recover more than the amount paid by him. On appeal, this judgment was affirmed.

"In my opinion," said Swinfen Eady, L. J., "the Act" (*i.e.*, the Marine Insurance Act, s. 79) "embodies the law as laid down in North of England Iron Steamship

(*c*) (1870), L. R. 5 Q. B. 244.

(*d*) [1915] 2 K. B. 214; on appeal, [1916] 1 K. B. 30; 21 Com. Cas. 150.

Sect. 1230. Insurance Association *v.* Armstrong, and the judgment below was right on this point, and the plaintiffs are entitled to recover from the shipowners all the sums which the shipowners received in respect of the ship up to the 45,000*l.*, the amount of the insurance" (*dd*).

Limitations of subrogation.

1231. It is convenient, at this point, to consider some further instances in which the underwriter's rights of subrogation have been limited in our jurisprudence.

Underwriter can only stand in the shoes of assured.

First, it is clear that the underwriter is only entitled to the benefit of such remedies, rights, or other advantages, as the assured would himself be able to enjoy. The underwriter has no independent rights of his own and cannot even sue in his own name (*e*). Thus, where two ships, A. and B., were the property of the same owner, and ship A. was sunk by the negligence of those in charge of ship B., it was held by the House of Lords that the underwriters on A., having paid for a total loss, had no claim upon a fund lodged in Court by the owner to satisfy all claims for the damage caused by the negligent navigation of B. Inasmuch as the owner could not be answerable in damages to himself, no claim could be allowed against the fund in respect of any right derived from him and enforceable only in his name (*f*). The point was considered to have been in effect decided by a series of earlier cases (*g*). Yet, though it be true to say that the underwriter can only "stand in the shoes" of his assured, we must at the same time remember that he may be entitled to advantages in respect of which there may be no right of action against any third party (*h*).

(*dd*) 22 Com. Cas. at p. 153.

(*e*) Nor is he, as distinct from the assured, liable to give discovery in an action brought in his interest in the name of the assured: James Nelson & Sons, Ltd. *v.* Nelson Line, Ltd., [1906] 2 K. B. 217.

(*f*) Simpson *v.* Thomson (1877), 3 App. Cas. 279. See also Midland Insurance Co. *v.* Smith (1881), 6 Q. B. D. 561; cf. Phœnix Ins. Co. *v.* Erie Transport Co. (1886), 117 U. S. 312.

(*g*) Yates *v.* White (1838), 4 Bing. N. C. 272; Randal *v.* Cockran (1748), 1 Ves. Sen. 97; Mason *v.* Sainsbury (1782), 3 Doug. 61.

(*h*) See per Brett, L. J., in Castellain *v.* Preston (1883), 11 Q. B. D. at p. 389.

Sect. 1232. Underwriter only subrogated to rights in respect of subject-matter insured.

1232. Secondly, the insurer is only subrogated to the rights of the assured in respect of the subject-matter insured. Thus, where a vessel is damaged by collision, and her owners recover from those by whose negligence the collision was caused damages in respect of matters which are not covered by a policy on ship, the underwriters cannot, by paying for a total loss, recover from their assured sums paid to them by the wrongdoer, but not paid as part of the value of the ship insured. The defendants' ship, "Queen of the East," was insured with the plaintiffs, and came into collision with the "Cassandra," for which collision the latter vessel was solely to blame. Subsequently the plaintiffs settled with the defendants on the basis of a constructive total loss. The defendants then received from the owners of the "Cassandra" a sum of money as compensation, not only for the loss of their vessel itself, but also for the freight which was being earned by her—and would have eventually been earned by her but for the collision—under a charterparty. The plaintiffs claimed the whole of this sum. The defendants contended that the portion of the damages attributable to freight had been properly paid over by them to their underwriters on freight, and was not payable to the plaintiffs. It was held by the Court of Appeal (*i*) that the defendants' contention was correct. Brett, M. R., said:—"In the present case what are the damages recovered? Some of them are daamages recovered in respect of the value of the ship; that is a salvage in respect of the loss of the ship: that goes to the underwriters on ship. But what are the other damages? The others are a salvage in respect of the loss of freight. To whom ought that to go? To the underwriters on freight. Why? Because the freight and the ship are not so joined together that a salvage on the loss of freight is a salvage on the loss of the ship. . . . This recovery of damages in respect of the loss of freight—a separate recovery in respect of a separate and different loss from the loss of the ship—is not a

(*i*) Sea Ins. Co. *v.* Hadden (1884), 13 Q. B. D. 706.

Sect. 1232. salvage in respect of the loss of the ship; therefore it ought not to go to the underwriters on ship." The Master of the Rolls then proceeds to point out the distinction between the case put forward on the part of the plaintiffs and the case where, after abandonment, freight is earned. In the latter case the freight earned is payable to the underwriters because, at the time when it was earned, they were the owners of the ship (*j*).

Answer to difficulties suggested by Lowndes.

1233. The reasoning in this case seems to give the answer to a difficulty suggested by Lowndes (*k*). Where a vessel is partially damaged by a collision, an underwriter is in theory liable to indemnify the owner for the damage. In practice, however, owing mainly to the operation of the rule as to deduction of one-third new for old, the amount paid by the underwriter is less than an indemnity. But if the assured, or the underwriter in his name, brings an action against the party responsible for the collision, it may well be that he recovers more in that action than the amount already paid under the policy. The rule as to thirds does not apply in an action against the tort-feasor; and other items, such as demurrage, are recoverable in such an action, which are not covered by the policy on hull. The practice in this case, as Lowndes admits, is to divide the amount recovered from the wrongdoer rateably between the owner and the insurers, in the proportion which the amount paid by the insurers bears to the amount paid by the wrongdoer. Thus the owner

(*j*) Cf. Mason *v.* Marine Ins. Co. (1901), 110 Fed. R. 452, in which the Circuit Court of Appeals held that the insurers on ship, in a case of constructive total loss, happening through the fault of another vessel, were entitled to the damages recovered from the vessel in fault for the prospective earnings of the insured ship, which was under charter at the time of the loss. They distinguished Sea Ins. Co. *v.* Hadden on the ground that there the claim was founded on a subject which was held not to be an incident of the ownership of the vessel, and which in fact had been separated therefrom by the owner. Here, they said, the damages were for the loss of the prospective earnings of the ship, the charter-party being used merely as evidence upon the question as to how much they would probably have been worth. The distinction seems to the editors to be untenable.

(*k*) Mar. Ins. 2nd ed. s. 217.

retains all damages awarded in respect of demurrage, and also the moneys paid in respect of the thirds; the underwriter retains such portion of the damages as are attributable to the two-thirds which he has paid (*l*). Lowndes, however, suggests that, on principle, the underwriter ought to be allowed to retain the whole of the damages paid by the tort-feasor, apparently on the ground that the assured, having recovered what in law is deemed to be an indemnity from his insurer, cannot be allowed to hold against the latter anything beyond such indemnity. It is submitted, however, that both authority and principle are in favour of the practice above described. Sect. 1233.

Can subrogation give insurer any advantages beyond those to which assured is as of right entitled? Burnand *v.* Rodocanachi.

1234. Thirdly, it has been stated that the advantages to which the insurer by subrogation succeeds are only advantages to which the assured is, or was, of right entitled. This was the ground of Brett, L. J.'s, decision in Castellain *v.* Preston (*m*), and was considered by him to have been also the ground of the decision of the House of Lords, in Burnand *v.* Rodocanachi (*n*). The plaintiffs in that case were underwriters who had granted valued policies of insurance, including war risks, upon a cargo which was afterwards destroyed by the "Alabama," a Confederate cruiser. The underwriters paid the defendants as for an actual total loss, but the real value of the cargo exceeded the valued amounts so paid. Subsequently the United States, out of a compensation fund created after the loss and distributed under an Act of Congress passed for the purpose, paid to the defendants the difference between their real total loss and the sum received from the underwriters. The Act provided that no claim should be allowed for which the party injured had received compensation from any insurer, but that if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference, and that no

(*l*) For a somewhat similar point see The Bode, 156 Fed. R. 981.

(*m*) See *infra*.

(*n*) (1881), 6 Q. B. D. 633; (1882), 7 App. Cas. 333.

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claim should be allowed by or on behalf of any insurer, either in his own right or in that of the party insured. The underwriters claimed that the sum paid to the defendants under the Act of Congress was, by subrogation, payable to them as salvage. Lord Coleridge, C. J., in the Common Pleas Division, and Baggallay, L. J., in the Court of Appeal, considered that the underwriters were entitled to succeed, relying mainly on the authority of two earlier cases (*o*). But the majority of the Court of Appeal, Bramwell and Brett, L. JJ., and the House of Lords unanimously, thought otherwise. A perusal of the judgments of Bramwell, L. J., and of the members of the House of Lords, shows that their judgments were based on the purpose for which, under the Act of Congress, the payment was made, *i.e.*, for the purpose not of reducing the loss of the underwriters, but of compensating the owners of the cargo. But Brett, L. J., in the Court of Appeal, decided against the claim of the underwriters, upon the ground that the award of compensation by Congress was a pure act of grace, and was not to be distinguished from the case of a voluntary gift of money by one individual to another, which clearly would not be within the doctrine of subrogation. Again in Castellain *v.* Preston (*p*), Brett, L. J., after insisting that the application of the doctrine of subrogation must be limited to such advantages as the assured was of right entitled to, proceeds, "I think that the rule does require that limit. In Burnand *v.* Rodocanachi (*q*) the foundation of the judgment, to my mind, was that what was paid by the United States Government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel

Opinion of Brett, L. J.

(*o*) Randal *v.* Cockran (1748), 1 Ves. Sen. 98; Blaauwpot *v.* Da Costa (1758), 1 Eden, 130. See also Gracie *v.* New York Ins. Co. (1811), 8 John. N. Y. R. 237.

(*p*) (1883), 11 Q. B. D. at p. 388.

(*q*) *Ubi supra.*

had been captured got from the English Government by way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own Government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English Government invariably made the 'gift': so invariably, that as a matter of business it had come to be considered as a matter of right."

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This opinion not sound.

1235. It is now clear, however, that this opinion of Brett, L. J., cannot be sustained (*r*). The learned Judge's view as to the "foundation of the judgment" in Burnand *v.* Rodocanachi does not appear to be borne out by the judgments themselves. And his explanation of the reprisal cases is a different explanation from that given by the House of Lords. In those cases (*s*) British shipowners had sustained losses by Spanish depredations, and, general reprisals against Spanish property having been ordered by His Majesty's Privy Council, as a result of which a large sum of money came into the hands of the British Government, "the King was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures" (*t*). It was determined that the benefit of such payments enured to the persons who were bound to indemnify. The House of Lords justified these decisions, not on the ground suggested by Brett, L. J., but because the payments, though voluntary, were by the very terms of the declaration under which they were made intended to compensate those who had actually been the losers by the Spanish depredations.

Conclusion.

Effect of subrogation on gifts received by assured.

1236. The view that it is not correct to say that underwriters can under no circumstances be entitled to advantages received by their assured otherwise than as of right was also

(*r*) See Stearns *v.* Village Main Reef Gold Mining Co., *infra.*

(*s*) Randal *v.* Cockran (1748), 1 Ves. Sen. 98; Blaauwpot *v.* Da Costa (1758), 1 Eden, 130.

(*t*) Per Lord Blackburn, 7 App. Cas. at p. 339.

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that of Bowen, L. J. (*u*):—"With regard to gifts," he said, "all that is to be considered is, Has there been a loss, and what is the loss, and has that loss been in substance reduced by anything that has happened? Now, I admit that, in the vast majority of cases, it is difficult to conceive a voluntary gift which does reduce the loss. I do not think that the question of gift was the root of the decision in Burnand *v.* Rodocanachi, although it seems to me that it was a very essential matter in considering the case. I think the root of the decision in Burnand *v.* Rodocanachi was that the payment which had been made did not reduce the loss, not having been intended to do so. The truth was that the English Government and the American Government agreed that the sums which were to be paid were to be paid not in respect of the loss, but in respect of something else, and therefore the payment could not be a reduction of the loss. Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist him. The effect on the position of the underwriters will depend on the real character of the transaction. Did the brother mean to give the money for the benefit of the insurers as well as for the benefit of the assured? If he did, the insurers, it seems to me, are entitled to the benefit; but if he did not, but only gave it for the benefit of the assured, and not for the benefit of the underwriters, then the gift was not given to reduce the loss, and it falls within Burnand *v.* Rodocanachi. If it was given to reduce the loss, and for the benefit of the insurers as well as the assured, the case would fall on the other side of the line and be within Randal *v.* Cockran" (*x*).

What gifts

In Stearns *v.* Village Main Reef Gold Mining Co. (*y*) the

(*u*) In Castellain *v.* Preston (1883), 11 Q. B. D. at p. 404.

(*x*) See also per Cotton, L. J., 11 Q. B. D. at p. 395. "When a gift is made afterwards in order to diminish the loss, it is bestowed in such terms as to show an intention to benefit the assured, and to give the insurer the benefit of that would be to divert the gift from its intended object to a different person."

(*y*) (1905), 10 Com. Cas. 89. The Court of Appeal also held that

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can be claimed by underwriter?

facts were that the Government of the South African Republic had immediately before the commencement of the late war seized a quantity of gold belonging to the defendants, who recovered for the loss from their insurers. The Government after the seizure had at the request of the defendants, and as a matter of grace, returned a large portion of the gold to the defendants, and the Court of Appeal held that the underwriters were entitled to the value of the restored gold. The decision is a clear authority for the rule that the insurers are entitled to the benefit of gifts made to the assured for the purpose of reducing the loss, provided that they were not intended exclusively for the benefit of the assured. It is not necessary, according to the decision, that the donor should actually have had the insurers in his mind as persons to be benefited.

Application of subrogation to insurances by different persons to an amount exceeding the whole value of thing insured.

1237. The utility of the doctrine of subrogation is well illustrated by its application to certain cases, where the same property is independently insured by different persons having separate and independent interests therein. A distinction has been clearly drawn between two classes of cases where this may occur. "Where different persons," said Mellish, L. J. (*z*), "insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and of course these values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the

the relation of the parties with regard to the sum refunded, was that of debtor and creditor, not of trustee and *cestui que trust*.

(*z*) North British & Merc. Ins. Co. *v.* London Liverpool & Globe Ins. Co. (1877), 5 Ch. D. at p. 583.

Sect. 1237. respective persons assured had in the property. But there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events—for instance, if the other person become insolvent—it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think, whenever that is the case, the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation."

Bailor and bailee.

1238. The case from which these observations are taken was where a bailor and a bailee had both insured a large quantity of grain—apparently to its full value—against fire. By the custom of the trade the bailees—a firm of wharfingers—were responsible to their customers, the merchants to whom the grain belonged, for the safe custody of all goods in their granaries, and were liable to make good loss by fire, however occasioned. A fire took place; both sets of insurers admitted their liability to compensate their respective assured: the question in the case was whether the loss must ultimately fall upon the wharfingers' or the merchants' policies. It was held that, inasmuch as, apart from insurance, the wharfingers were liable to the merchants, the grantors of the wharfingers' policies were solely liable. In this way, the principle of subrogation, although it may not affect the initial liability of several sets of insurers to pay their respective assured amounts which in the aggregate may far exceed the whole value of the thing insured, does prevent them from being ultimately liable for more than a single total loss.

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Insurance by carrier of full value.

In the same way, a common carrier may insure goods as well as the merchant to whom they belong. Here, again, the ultimate liability, as between the two sets of underwriters, will fall on the underwriter on whose assured the loss would, apart from insurance, have fallen. In order to determine this point, the contract between the parties will necessarily be considered by the Court (*a*). If, however, such contract contains unusual terms affecting the insurer's rights of subrogation—for example, where a merchant contracted for the carriage of his goods by a lighterman, but with a stipulation that the carrier was only to be liable for losses by negligence, a policy of insurance effected by the merchant upon such goods may perhaps be avoided, if the unusual terms, by which the insurer may be deprived of his remedy over against the carrier, are not disclosed to the insurer (*b*).

Mortgagor and mortgagee.

1239. *Primâ facie,* no doubt, a person with a limited interest who insures, only protects his own interest. Thus a mortgagee only protects himself to the extent of his mortgage debt, a carrier or other bailee only covers his liability to his bailor, a lessor only covers his reversionary interest. It is clear, however, that insurances may be legitimately effected for the benefit of others than the party insuring. For instance, an insurance by a mortgagee may be made at the expense of, and may be intended for the benefit of, the mortgagor. It is not uncommon to find a stipulation in a contract of carriage that the carrier shall have the benefit of the owner's insurance, and the insurance may legitimately be made in accordance with such contract (*c*). In such cases the purpose for which the insurance was effected may control the underwriter's rights of subrogation.

Assured must not prejudice insurer's rights of subrogation.

1240. An assured who has sustained a loss in respect of which he has a claim against some third party, if he intends

(*a*) As it was in North British, &c. Co. *v.* London Liverpool & Globe Co., *ubi supra*.

(*b*) See Tate *v.* Hyslop (1885), 15 Q. B. D. 368; *ante*, § 608.

(*c*) A number of cases of a similar nature are considered in Joyce, Ins. vol. iv. s. 3549 *et seq.* See also 1 Parsons, Ins. 229, n. (i).

Sect. 1240. to make a claim upon his policy, must take care not to come to any arrangement with such third party which may prejudice the insurer's rights of subrogation. If he effectually renounce any rights or remedies which he may have, he will be bound to give credit to his insurers for the value of such rights or remedies. The insurers will be entitled to say to him: "If you had not made that settlement, we should have been subrogated to your rights, which you would have handed over to us intact; and we should have got, and have been entitled to get, the whole of the benefit under them, or claim from you the whole of the benefit you received. If you have not received the benefit, but have given it up, that does not alter the quantum of your claim, which was really our claim; and therefore you are under an obligation, however it is to be expressed in point of law, to make that good to us" (*d*). Effect was given to this contention on the part of the insurer in the case from which the above passage is cited; and insurers who had paid a loss were allowed to recover from the assured for the value of the rights which the latter had surrendered.

Assured may give a conditional release.

There seems no reason, however, why an assured should not give the third party a release subject to the insurer's rights of subrogation (*e*). A release to a third party by an assured who has already, to the knowledge of the third party, received payment from his insurers, will be deemed to be in fraud of the insurer's rights, and consequently void (*f*).

(*d*) Per Collins, J., in West of England Fire Ins. Co. *v.* Isaacs, [1896] 2 Q. B. 377; affirmed in C. A., [1897] 1 Q. B. 226. See also Phœnix Ass. Co. *v.* Spooner, [1905] 2 K. B. 753. In America cf. The St. Johns (1900), 101 Fed. R. at p. 472, and cases there cited.

(*e*) Joyce, Ins. vol. iv. s. 3542.

(*f*) Joyce, vol. iv. s. 3544, citing Monmouth County Fire Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

CHAPTER X.

SETTLEMENT OF LOSSES.

SECT.
Former Practice as to Settlement of Losses 1241
Effect of Adjustment ..... 1242—1244
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Settlement of losses.

Meaning of an adjustment of the policy, and former practice relating thereto.

1241. WHEN the amount of indemnity which the assured is entitled to receive, and the proportion of such amount which each underwriter is liable to pay on the sum by him subscribed, has been settled and ascertained, an indorsement is made on the policy, generally in the following, or some similar form:—"Adjusted the loss on this policy at ——*l.* per cent." (*a*). The policy thus indorsed is then taken round by the broker to the different underwriters, who respectively affix their initials to the memorandum, and very frequently, at the same time, strike a pen through their subscription at the foot of the policy. The policy thus indorsed is said to be adjusted: the loss, however, is not then paid; but, by the general usage of the trade, is understood to be payable at a month or six weeks from that date. At the end of that period the amount is entered to the debit of the underwriter in the broker's books, a pen is drawn through his initials

(*a*) The practice described here and in the passage which follows is now obsolete. The modern practice has been already described and considered in its proper place (see Part I. Chap. VI.). A loss is now usually said to be "settled"; a policy is not said to be "adjusted"; there is no such thing as "striking-off"; and the arrangements as to credit are quite different. Inasmuch, however, as all the cases to be presently referred to were decided when the practice here described was in vogue, it has been found necessary to retain this passage, so as to explain to the reader what the old practice was, and to enable him to understand the language used in the older reports. The change in practice does not appear to entail any change in the principles supported in our text.

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affixed to the memorandum of adjustment, and the loss is then said to be struck off, or settled in account. As between the broker and underwriter, it is frequently the case that no money even then passes, but the amount is merely carried to the creditor and debtor side of their mutual accounts, the general balance of which is made up at the end of every current year; and the excess of all the losses over the sums due for premiums, or *vice versâ*, is either then paid or is suffered to run on as an item in the next year's account.

Effect of an adjustment under the old practice.

As between broker and underwriter, directly the amount of the loss is entered to the debit of the latter in the broker's books, and his initials struck off the memorandum of adjustment, the account is finally settled, as far as regards the particular policy so adjusted. As between underwriter and assured, however, such adjustment, even where both the subscription of the underwriter to the policy, and also his initials affixed to the memorandum of adjustment, have been struck out, is no bar to an action by the assured on the policy, unless there be satisfactory evidence of express or implied consent on his part to be bound by the adjustment, as conclusive of his claims under the policy. Even then the mere erasure of the defendant's subscription (as distinct from his initials affixed to the memorandum of adjustment) is no proof of payment, but only of settlement on account; the general practice being, as we have just seen, to strike out the signature to the policy, without any money passing at the time, on the faith of a future settlement at the month's end (*b*).

Effect of adjustment as an admission of underwriter's liability.

1242. It was formerly a litigated question to what extent an adjustment thus indorsed on the policy operated as an admission of the underwriter's liability: it may now, however, be taken, as the fair result of the authorities, that an adjustment is nothing more than a promise to pay, which is only binding when founded on the consideration of previous liability, and, that although *primâ facie* it imports consideration,

(*b*) Adams *v.* Saunders (1829), 4 C. & P. 25; M. & Malk. 373.

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yet an underwriter who has merely put his initials to it, but not paid the loss, may avail himself, at the trial, of any defence tending to show that he was never liable under the policy, and this, although he may have been aware of all the facts constituting such defence at the time of signing the adjustment.

Adjustment with a promise to pay.

In the earliest reported case on the subject, the indorsement on the policy being, "Adjusted the loss on this policy at 98*l.* per cent., which I agree to pay one month after date," Lee, C. J., was of opinion that an adjustment in this form was to be considered as a note of hand, and that plaintiff need not enter into proof of loss (*c*).

Effect of adjustment as an admission.

Lord Kenyon, in all the cases of the kind that came before him at Nisi Prius, uniformly ruled that an adjustment was not conclusive where it could be shown to have been made under any misconception of the law or the fact (*d*).

Lord Ellenborough carried out to the full, if, indeed, he did not extend, the same doctrine. Thus, in the first case of the kind which came before him, he allowed the defendants, notwithstanding the adjustment, to go into proof of a deviation in the course of the voyage, which being established, he nonsuited the plaintiff (*e*). In the next case, his Lordship allowed proof to be gone into of concealment at the time of effecting the policy, although it appeared that just before putting his initials to the adjustment, the defendant had read letters from the captain giving a full account of all the circumstances of the loss (*f*); in charging the jury on this occasion, the Chief Justice drew a broad distinction between cases where, upon a dispute, the money is paid and those in which there is only a promise to pay; "if the money has been paid, it cannot be recovered

(*c*) Hogg *v.* Gouldney (1745), Beawes, 460, 6th ed.; 1 Park, Ins. 266; 2 Marshall, Ins. 642; Hewit *v.* Flexney (1746), Beawes, 458, 6th ed.

(*d*) Rogers *v.* Maylor (1790), 1 Park, Ins. 267; 2 Marshall, Ins. 644; De Garron *v.* Galbraith (1795), 1 Park, Ins. 267; and also Peake, Add. Cas. 37; Christian *v.* Coombe (1794), 2 Esp. 489.

(*e*) Sheriff *v.* Potts (1803), 5 Esp. 95.

(*f*) Herbert *v.* Champion (1807), 1 Camp. 133.

Sect. 1242. back without proof of fraud; but a promise to pay will not in general be binding unless founded on a previous liability. What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. An underwriter must make a strong case after admitting his liability; but, until he has paid the money, he is at liberty to avail himself of any defence which the facts or the law of the case will furnish" (*g*).

Where underwriter ignorant of the facts.

1243. In the next case Lord Ellenborough established the position that an adjustment is not binding on the underwriter, although at the time of signing it he had full means of rendering himself acquainted with the history of the voyage, and the manner of the loss, if his attention was not then peculiarly drawn to circumstances he afterwards learns, by which the underwriters are discharged. The facts of the case (*h*) were shortly as follows: Before signing the adjustment, the defendant had read a statement, which was posted up at Lloyd's, to the effect that the ship had chased everything she saw, and been subsequently captured, owing to the cowardice of the captain. In reference to this statement, the defendant remarked, on signing the adjustment, that, as the captain was killed, it was not likely the ship was lost by his cowardice. Lord Ellenborough, notwithstanding the adjustment, allowed the defendant at the trial to go into evidence of deviation by cruising, which, being proved, he had a verdict. He told the jury that the adjustment could not be binding on the defendant, unless the whole circumstances of the case "were all blazoned to him as they really were," and he desired them to consider whether or not at the time of the adjustment his attention was drawn only to the manner in which the ship was captured, and was not roused to the previous deviation, with which he afterwards became acquainted.

Burden of proof.

Lord Campbell, in a very able note to this case, intimates that, even had the previous deviation been brought fully

(*g*) 1 Camp. 136.
(*h*) Shepherd *v.* Chewter (1808), 1 Camp. 274.

Sect. 1243. before the defendant's notice, or, in the emphatic language of Lord Ellenborough, "blazoned to him as it really was," the adjustment would still not have precluded him from availing himself of the deviation as a defence to the action: the ground of his opinion being the principle laid down by Lord Ellenborough in Herbert *v.* Champion, that the underwriter, at any time before paying the loss, may take advantage of whatever grounds of defence his case offers, although he was actually aware of them when he signed the adjustment. Reasoning also from general principles of law, he remarks that, although an adjustment may *primâ facie* import consideration, yet it is not easy to imagine how the defendant should in any case be debarred from showing that in fact it was entirely without consideration, or how greater efficacy can be given to it than merely to transfer the burthen of proof from the assured to the underwriter (*i*).

In a more recent case on the subject the following is the view expressed as to the effect of an adjustment:—"An adjustment has not the effect of determining absolutely the amount due, so as to dispense with the intervention of a jury: it is an instrument, or means, by which a jury may be led to the conclusion that the amount adjusted is the real amount of unliquidated damages, for which they are to give their verdict. It is only a means for enabling the jury to fix the amount for which the plaintiff sues in the shape of unliquidated damages, and not an amount binding upon the parties in all events" (*k*).

Effect of adjustment followed by payment.

1244. If, indeed, the underwriter, besides signing the adjustment, has actually paid the loss with full knowledge of all the circumstances, though in ignorance of the law, he is precluded from afterwards contesting his liability. Thus, where an underwriter who had paid a total loss claimed to

(*i*) 1 Camp. 275, n. See also 2 Selw. N. P. 922, 13th ed. Such seems to have been admitted to be the law in the two subsequent cases of Steel *v.* Lacy (1810), 3 Taunt. 285; Reyner *v.* Hall (1813), 4 Taunt. 725.
(*k*) Luckie *v.* Bushby (1853), 13 C. B. 864; 22 L. J. C. P. 220.

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recover it back on the ground that a material letter had not been disclosed to him before effecting the policy, but it appeared at the trial that, before signing the adjustment and paying the loss, all the papers had been laid before him, and, amongst the rest, the letter in question: the Court held that the money paid could not be recovered back, because it had been paid with full knowledge of all the circumstances (*l*). So, where a policy had been adjusted for a return of premium, and the sum due in respect of such return had been actually paid, under full knowledge of all the circumstances, it was held that the assured could not again resort to the underwriter on the policy (*m*). But where such return has been paid under a mistake of fact the case is different; thus, where a policy on a ship "warranted free of capture in port," was adjusted for a return of premium, and the premium was actually paid back on receipt of a letter stating the capture to have taken place in the port of discharge, but it afterwards turned out that this was a mistake, and that the capture had not taken place in the port of discharge within the meaning of the warranty: the Court held that the assured was not precluded by the adjustment or repayment of the premium from recovering on the policy, though the underwriter's initials had been struck off from the indorsement, and his subscription from the face of the policy, for this must be regarded as the case of an instrument destroyed by mistake (*n*).

Mistake of fact.

Effect of subsequent

1245. As we have seen, if a total loss have been adjusted

(*l*) Bilbie *v.* Lumley (1802), 2 East, 469. Arnould cited this case as deciding that money could not be recovered back if paid with "full means of knowledge" of the circumstances. So wide a proposition, even if the Court intended to lay it down, cannot now be maintained: see Kelly *v.* Solari (1841), 9 M. & W. 54; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; per Lord Blackburn in Brownlie *v.* Campbell (1880), 5 App. Cas. 925, 952; and other authorities cited in the notes to Marriot *v.* Hampton, 2 Sm. L. C. 12th ed. pp. 421—425.

(*m*) May *v.* Christie (1815), Holt, N. P. 67.

(*n*) Reyner *v.* Hall (1813), 4 Taunt. 725. *A fortiori* this would be so where only the initials were struck off the adjustment, and the subscription left on the face of the policy. See *S. C.*

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and actually paid, the subsequent recovery of the thing insured undamaged, and only charged with a trifling sum as the expenses of its recovery, will not entitle the underwriter to recover back the money so paid; for the loss was total at the time of the adjustment, and the money was paid under no misapprehension of the state of the facts as they then existed (*o*). In such case, however, the underwriter, even without abandonment, will be entitled to the salvage, after deducting the expenses of its recovery (*p*); unless, indeed, he have waived his right thereto, as by declining an offer to abandon and inducing the assured to take less than a total loss, on condition of his (the underwriter) renouncing all benefit of future salvage (*q*).

Recovery of thing insured.

If the underwriter have adjusted and paid a certain percentage on his subscription, on account, at a time when the circumstances of the case, being one of capture and confiscation of goods, were such as to amount to a constructive total loss, had notice of abandonment been given, but in the absence of such notice were held to amount to a partial loss only, he will not be allowed to recover back any part of the money so paid, because, ultimately, part of the proceeds of the property are restored to the assured, under such circumstances of increased value, that the amount so received, added to the money paid by the underwriter on the adjustment, together exceeds the whole amount of the insurance (*r*).

1246. If, after a loss has been paid, the underwriter discovers that there was fraud, or misrepresentation, or concealment, in the original contract, or that there were other circumstances attending the loss, which, if known at the time the loss was claimed, would have justified his resisting the demand, he may maintain an action for money had and

Recovery back of losses improperly paid.

(*o*) Da Costa *v.* Firth (1766), 4 Burr. 1966. See *ante*, § 1214.

(*p*) *Ante*, § 1214.

(*q*) Blaauwpot *v.* Da Costa (1758), 1 Eden, 130; Brooks *v.* M'Donnell (1835), 1 Younge & Coll. 500.

(*r*) Tunno *v.* Edwards (1810), 12 East, 488; Goldsmid *v.* Gillies (1813), 4 Taunt. 803.

Sect. 1246. received against the assured, or the broker who has effected the policy, to recover back the sum so paid. The action in such case cannot be sustained against the broker if the latter have actually paid over the loss to the assured, on the principle that one man is not to be a loser by the mistake of another. In such case the action should be brought against the assured himself. If, however, the broker has merely passed the loss in account with his principal, but not actually paid it over to him, this will be no answer to the action brought by the underwriter for its recovery (*s*), unless meanwhile these parties have been led by the insurer to alter their legal position, as, *e.g.*, if there have been subsequently such settlements in account as are tantamount to payment (*t*).

Payments made with full knowledge of all the facts cannot, as we have seen, be recovered back (*u*), nor can they if mistakenly made under compulsion of legal process (*x*); unless, indeed, there have been such fraud as, when afterwards discovered, enables the insurer to vacate the judgment or set aside the process of the Court (*y*).

Recovery of salvage withheld.

If, after payment of a total loss, the salvage or the proceeds of its sale be withheld from the underwriter, he may bring an action for money had and received against the assured (*z*); and will recover in such action unless he have done any act at the time of settling the loss (as by paying less than the whole amount of insurance in full of all demands), whereby he waives his claim to salvage (*a*).

(*s*) Buller *v.* Harrison (1777), 2 Cowp. 565; and see the principle of law well developed in the case of Cox *v.* Prentice (1815), 3 M. & S. 344.

(*t*) Holland *v.* Russell (1861), 1 B. & S. 424; 4 *ibid.* 14.

(*u*) *Ante*, § 1244.

(*x*) Marriot *v.* Hampton (1797), 7 T. R. 269; 2 Sm. L. C. 12th ed. 403; overruling Moses *v.* Macfarlane (1760), 2 Burr. 1005, and Livesay *v.* Rider (1797), cited 7 T. R. 269.

(*y*) See 2 Marshall, Ins. 741.

(*z*) Roux *v.* Salvador (1836), 3 Bing. N. C. 288.

(*a*) Brooks *v.* M'Donnell (1835), 1 Y. & Coll. 520.

CHAPTER XI.

RETURN OF PREMIUM.

Return of Premium—	SECT.
Where Risk never commenced	1247—1252
Where Contract avoided by Illegality or Fraud	1253—1256
For want of Interest, Short Interest, Over-Insurance	1257—1262
Under Express Stipulation	1263—1267
Paying Premium into Court	1268

1247. MONEY received upon a consideration which, from any cause, except the fraud of the party paying it, happens wholly to fail, is, thereupon, money held to the use of him that paid it. The premium in marine insurance is a sum of money paid by the assured to the underwriter in consideration of his taking upon himself the risk of a sea venture. **Return of premium.**

Risk, therefore, assumed by the underwriter on the one side, and the premium paid by the assured as the price of that risk on the other, are "correlatives, whose mutual operation constitutes the essence of the contract of insurance" (*a*).

Hence, as Lord Mansfield expresses it, "There are two general rules established applicable to this question: the first is that where the risk has not been begun, whether this be owing to the fault, pleasure, or will, of the assured, or any other cause, the premium shall be returned, because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the assured, and, to whatever cause it may be owing, if he do not in fact run the risk, the consideration for which the premium **Where the risk has not been begun, the premium is returned.**

(*a*) 2 Marshall, Ins. 648.

Sect. 1247. was put into his hands, fails, and therefore he ought to return it" (*b*).

But where an entire risk has once commenced, no proportionable return of premium is to be made.

Another rule is, that if an entire risk has once commenced, there shall be no apportionment or return of premium afterwards; for though the premium is estimated and the risk depends on the nature and length of the voyage, yet, if it was commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the entire risk, and no part of the consideration shall be returned (*c*).

In the application, however, of these principles, much nicety of discrimination has been shown by the English Courts, especially in determining whether, in the particular case, there has been an inception of an entire risk under the policy, or whether the risk insured, and consequently the premium, is apportionable.

Provisions of the Mar. Ins. Act as to return of premium.

1247a. The provisions of the Marine Insurance Act, 1906, with regard to return of premium are contained in sects. 82, 83 and 84, of which the following is the text:—

Enforcement of return.

Sect. 82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable,—

(a) If already paid, it may be recovered by the assured from the insurer (*d*); and

(b) If unpaid, it may be retained by the assured or his agent.

Return by agreement.

Sect. 83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured (*e*).

(*b*) Per Lord Mansfield in Tyrie *v.* Fletcher (1777), Cowp. 666.

(*c*) Per Lord Mansfield, *ibid.*

(*d*) In general it is the broker, not the assured, who is responsible to the underwriter for the premium; see Mar. Ins. Act, 1906, s. 53 (1), *ante*, Vol. I., § 101. Nevertheless, as is also stated in that section, the insurer is directly responsible to the assured for sums payable in respect of returnable premium. Return premiums are in practice included in the assured's claims for losses.

(*e*) See *infra*, §§ 1263—1267.

Sect. 1247a. Return for failure of consideration.

Sect. 84.—(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable:

(b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival:

(c) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering (*f*):

(d) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable:

(e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable:

(f) Subject to the foregoing provisions, where the assured has over-insured by double insurance,

(*f*) For what are gaming and wagering contracts of insurance, see Mar. Ins. Act, 1906, s. 4, *ante*, § 313 *et seq.*

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a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

Return of premium where risk has never commenced.

1248. As is implied in sect. 84 of the Marine Insurance Act, 1906, where the risk has never had an inception, whatever may have been the cause, even the neglect or fault of the assured himself, provided there has been no fraud or illegality on his part or that of his agents, the premium shall be returned (*g*). The general law maritime agrees with our own on this point, and is based on the same principles (*h*).

Termination of risk before making of policy is no ground for return.

The mere fact, however, that the risk has terminated before the making of the policy, is no ground for return of premium, as the proviso to sect. 84, sub-s. (3) (b) shows, even though, according to the state of facts subsequently proved to have been in existence, there have been since the making of the policy no actual exposure of the interest assured to the perils insured against. An underwriter who had insured a cargo by the "Alata," lost or not lost, from Philadelphia to Rochfort, thinking the vessel was overdue, reinsured on the 23rd December with the plaintiff, neither of them knowing at the time of this policy being effected that the ship had safely arrived on 14th November previous, and without damage to her cargo. Assuming that the policy had never attached, the defendant refused to pay the premium. The Court, however, held that it had attached, because the risk properly described in the policy had commenced, and although it had also terminated, that was not a fact at all relevant to the question. For, as Bramwell, L. J., pointed out, the fallacy of the argument for the defendant lay in this, that risk was assumed to mean chance of loss during the voyage, whereas in relation to the question argued, that term was used in the sense of voyage commenced with necessary conditions to make the underwriters liable (*i*).

(*g*) For an exception to this principle resulting from the rules of a mutual insurance association, see North Eastern 100A SS. Ins. Assn. *v.* Red "S" Steamship Co. (1905-6), 10 Com. Cas. 245; 12 Com. Cas. 26, C. A.

(*h*) See 2 Emerigon, c. xvi. s. 1, p. 186; 4 Boulay-Paty, 6; 1 Parsons, 505—517; and, for the French law, Code de Com. art. 349.

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Apportionable return of premium.

1249. In the following cases, the inquiry has been whether the policy did or did not comprise several distinct risks, and the object has been to apportion the return of premium, with reference to such of those risks as may not have been commenced, in accordance with the principle stated in sect. 84 (2) of the Marine Insurance Act, 1906.

Stevenson *v.* Snow.

In the first reported case of the kind, a ship was insured, "lost or not lost, at and from London to Halifax, warranted to depart with convoy from Portsmouth, for the voyage." Before the ship reached Portsmouth, the convoy was gone. Notice of this was immediately given to the underwriters, who were requested either to make the long insurance, or to return part of the premium. On their refusal the action was brought, to recover back a proportionable part of the premium for the voyage from Portsmouth to Halifax. The jury at the trial having found that it was usual for the underwriters in such cases to return part of the premium (*k*), though the quantum was uncertain, Lord Mansfield and the Court of King's Bench held that the assured was entitled to a rateable return of premium as claimed (*l*).

Lord Mansfield's explanation of this case.

Lord Mansfield, in referring to this case on two subsequent occasions, said the decision depended on this, "that there was a contingency specified in the policy, upon the not happening of which the insurance would cease" (*m*);

(*i*) Bradford *v.* Symondson (1881), 7 Q. B. D. 459; Natusch *v.* Hendewerk (1871), *ibid.* 460, *in notis*. So 2 Phillips, Ins. s. 1826.

(*k*) Lord Mansfield, however, expressly said, "I do not go upon the usage" (p. 1240). But in the later cases, which are here referred to, he appears to have attached more importance to this point.

(*l*) Stevenson *v.* Snow (1761), 3 Burr. 1237; 1 W. Bl. 318.

(*m*) In Bermon *v.* Woodbridge (1781), 2 Dougl. 789.

Sect. 1249. "the intention of the parties," he said, "the nature of the contract, and the consequences of it, spoke manifestly two insurances, and a division between them. The first object of the insurance was from London to Halifax; but if the ship did not depart from Portsmouth with the convoy specified, then there was to be no contract from Portsmouth to Halifax. The parties then have said, 'We make a contract from London to Halifax; but on a certain contingency it shall only be a contract from London to Portsmouth.' That contingency not happening, reduced it, in fact, to a contract from London to Portsmouth only. The whole argument turned on that distinction, and all the Judges, in delivering their opinions, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being, in fact, two voyages" (*n*). His Lordship also said, that, although the alleged usage was rejected by the Court, owing to the uncertainty as to the amount, yet it was considered to show the general sense of merchants, as to the propriety of some return being made (*o*).

Meyer v. Gregson. In the next case of the same kind a ship insured "at and from Jamaica to Liverpool, warranted to sail on or before the first of August," did not sail till the 1st of September, so that, by this breach of warranty, the policy became invalid. The assured, however, contended that the risk was divisible, and had attached upon the ship while she lay in port at Jamaica before the 1st of August; he, however, gave no proof of an usage of trade to consider such risks divisible, or to make a rateable return of premium for the risk at the island. Under these circumstances the Court held there could be no apportionment, and Buller, J., said, "In all insurances from Jamaica, the policy runs 'at and from,' and though in many instances the voyage has not been commenced, yet there never was an idea of any part of the premium being returned; and no usage to do so has been found by the jury" (*p*).

(*n*) In Tyrie *v.* Fletcher (1777), 2 Cowp. 669.
(*o*) *Ibid.*
(*p*) Meyer *v.* Gregson (1784), 3 Dougl. 402; 2 Park, Ins. 796; 2 Marshall, Ins. 666.

Sect. 1250. **1250.** In a subsequent case Buller, J., rests this decision solely on the ground that no usage was found (*q*), and it is plain that on no other basis can it be reconciled with the two following cases:—

Gale v. Machell. A ship, insured "at and from any port or ports in Jamaica to London, following and commencing from her first arrival there, warranted to sail with convoy for the voyage from the place of rendezvous," did not sail with convoy from the rendezvous, so that the warranty was broken, and the underwriters were off the risk, at all events from the time of sailing. But some evidence being given of an usage in such cases to apportion the premium, the jury thought that one half per cent. for the risk in port at Jamaica should be retained, and the residue for the risk from Jamaica to London returned. Lord Mansfield was of the same opinion, remarking, that wherever there is a contingency in the voyage, the risk may be divided, and that the reason why, in such cases, there are not two policies, is that the risk "at" is incapable of exact computation (*r*).

Long v. Allen. In the next case, goods were insured "at and from Jamaica to London, warranted to depart with convoy for the voyage, and to sail on or before the 1st of August, &c."; the ship sailed before the 1st, but without convoy; the assured brought his action for a proportionable return of premium in respect of the voyage from Jamaica to London. The jury found for the plaintiff, and also found specially "that it was the constant and invariable usage in insurances at and from Jamaica to London, warranted to depart with convoy, or to sail on or before a certain day, to return the premium, deducting half per cent., if the ship sailed without convoy or after the day prescribed."

The Court determined that the assured was entitled to recover according to the usage proved; and with reference to distinct risks insured by one policy, Lord Mansfield said,

(*q*) In Long *v.* Allen (1785), 4 Dougl. 278; 2 Marshall, Ins. 669. "In Meyer *v.* Gregson no usage was found."
(*r*) Gale *v.* Machell (1785), 2 Marshall, Ins. 667; 2 Park, Ins. 797.

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"My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and, therefore, the Court has always leaned against them. But where an express usage is found by the jury, the difficulty is cured" (*s*).

Where, however, the risk is entire under the policy, and has once commenced, no return of premium can take place, no matter how short a time the risk may have lasted.

1251. If, however, upon the true construction of the policy the risk be entire and indivisible; then, if it has once commenced—if, for instance, the ship once get under weigh and sail on the voyage insured—the premium is acquired, though she may return the next instant and wholly abandon the voyage (*t*).

As in policies "at and from."

So where the insurance is "at and from," and the risk under the policy entire, there can be no return of premium, though the ship may be lost while at the port waiting to take in a cargo (*u*).

Moses *v.* Pratt.

Or though ship may sail unseaworthy.

A ship insured "at and from" a port sailed on her voyage and was lost; and though not seaworthy for the voyage when she sailed, she was yet sufficiently seaworthy for lying "at" the port. The Court held, that as the insurance was "at and from," the risk had commenced, and being entire, there could be no return of premium (*x*).

Annen *v.* Woodman.

No return of premium in cases of deviation.

Upon the same principle it is a familiar rule that, as deviation does not avoid the policy *ab initio*, but only discharges the underwriter from the time the ship leaves the course of the voyage, the assured is not entitled to a return of premium in cases of deviation (*y*).

When the risk is to be regarded as entire.

The only difficulty, then, is in ascertaining when the risk shall be regarded as entire and indivisible; and with regard

(*s*) Long *v.* Allen (1785), 4 Dougl. 276; 2 Park, Ins. 797; 2 Marshall, Ins. 668. Buller, J., also entirely rests the case on the ground of usage. See also *S. P.*, Rothwell *v.* Cooke (1797), 1 B. & P. 172; and 2 Marshall, Ins. 666, n. (*a*).

(*t*) 2 Marshall, Ins. 669, and the authorities there cited; and see 2 Phillips, Ins. s. 1820.

(*u*) Moses *v.* Pratt (1814), 4 Camp. 296.

(*x*) Annen *v.* Woodman (1810), 3 Taunt. 299.

(*y*) Hogg *v.* Horner (1797), 2 Park, Ins. 782; Tait *v.* Levi (1811), 14 East, 481.

to this an important test is its being insured for one entire premium. Sect. 1251.

One entire premium.

Where the policy is on time, and the insurance for a specified term at one entire premium, there can be no doubt: in such cases, if the risk have once commenced, though an event may happen immediately afterwards which determines the contract, there shall be no return of premium (*z*). And if a gross sum be given as premium it makes no difference that it is expressed in the policy to be at so much per cent. per month; for this shall be deemed only a mode of computing the gross sum, and does not make the contract a monthly insurance (*a*).

Or a gross sum.

Round voyage at an entire premium. Bermon *v.* Woodbridge.

A ship was insured "at and from Honfleur to the Coast of Angola: during her stay and trade there, and at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back again in Honfleur," at a premium of eleven per cent. The ship in sailing from Angola to St. Domingo was guilty of a deviation, which discharged the underwriters from that time, and was lost on her passage home from St. Domingo to Honfleur. Lord Mansfield and the Court of King's Bench, considering that in this case the premium was estimated at one entire sum for the whole; and also (which his Lordship thought extremely material as distinguishing the case from Stevenson *v.* Snow, &c.) that there was nowhere any contingency at any period, out or home, mentioned in the policy, which, happening or not, was to put an end to the insurance—held that the whole was one entire risk, and, therefore, that, as it had once begun, the whole premium was due (*b*).

Law in the United States.

1252. The general result of all the above cases seems to be, that where no usage is proved to the contrary, an entire premium cannot be divided and apportioned unless the risks are divided in the policy in such a manner as to show that the

(*z*) Tyrie *v.* Fletcher (1777), 2 Cowp. 666.

(*a*) Lorraine *v.* Thomlinson (1781), 2 Dougl. 585; 2 Marshall, Ins. 675.

(*b*) Bermon *v.* Woodbridge (1781), 2 Dougl. 781.

Sect. 1252. parties had distinct risks in contemplation; and the law as to this point seems to be the same in the United States (*c*).

In France.

In France the law, as fixed by the 356th Article of the Code de Commerce, is that on an insurance on goods for the round voyage, out and home, if no homeward cargo is in fact loaded on board, the underwriter shall only retain two-thirds of the premium, unless there be a stipulation to the contrary. Boulay-Paty, admitting the law to be as thus fixed by the Code, yet contends, and apparently with very good reason, that such a provision in cases where the outward and homeward passages together make one entire risk insured at one entire premium, is opposed to sound principle, and must be regarded as an anomalous exception to the general rules of Maritime Law on this subject (*d*).

Return of premium in cases of illegality or fraud, and wager policies.

1253. It is implied in sect. 84, sub-sects. 1 and 3 (a), of the Marine Insurance Act, 1906, that even though there be a total failure of consideration for the payment of the premium, there is no return of premium when there has been illegality or fraud on the part of the assured or his agents. So also, as is stated in sub-sect. 3 (c), the premium is not returnable where the assured has had no insurable interest throughout the currency of the risk and the policy was effected by way of gaming and wagering (*e*); and it appears that the position would be the same in a case where the assured

(*c*) Donath *v.* Ins. Co. of North America, 4 Dall. 463, cited 2 Phillips, Ins. s. 1834, and see the other cases cited there.

(*d*) 4 Boulay-Paty, Droit Mar. 97—100.

(*e*) *Ante*, § 1247a. For what is a policy effected by way of gaming and wagering, see Mar. Ins. Act, 1906, s. 4, *ante*, § 313. If the assured who has effected a policy void under sect. 4, sub-s. (2) (b) only has some interest, so as to exclude the introductory words of sect. 84, sub-s. 3 (c), *quære* whether the provisions of this sub-section will not nevertheless apply, so as to defeat a claim for return of an apportionable part of the premium under sect. 84, sub-s. 2, by reason of the words "under the like conditions" in the latter sub-section, and in spite of there being a total failure of an apportionable part of the consideration. In the case of policies which are invalid under the Gaming Act, 1845, the Gaming Act, 1892, will prevent the assured from claiming a return of premium.

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had an insurable interest, but the policy is illegal under sect. 1 (1) (b) of the Marine Insurance (Gambling Policies) Act, 1909.

Where the risk is illegal, the assured shall not recover back the premium.

Before the Act of 1906 came into force, where the risk had never commenced, the premium could be recovered back as money advanced without any consideration; but if it had been advanced on a consideration which failed because the contract was illegal—for example, a wager policy (*f*), or a policy to cover illicit or prohibited trading—and if the contract had been executed, then another principle came into play, and the case fell within the rule *in pari delicto potior est conditio possidentis*. The assured, therefore, unless he was ignorant of the fact of the illegality (for ignorance of the law is no excuse), was not entitled to any return of premium, unless indeed he preferred his claim while the contract was still executory.

Wager policies. Lowry *v.* Bourdieu.

In one of the first cases in which the question arose, the policy was effected on the amount of a bond given by an East India captain to secure his private adventure, valued at 26,000*l*. "without further proof of interest than the bond, free of average and without benefit of salvage"; after the captain had arrived safe with his adventure, the assured claimed a return of the premium, on the ground that, this being a wager policy, the contract was void. Lord Mansfield, at the trial, being of this opinion, held that as both parties were *in pari delicto* the rule of *potior est conditio possidentis* applied, and that the plaintiffs could not recover the premium, and on motion for a new trial the Court took the same view (*g*).

Distinction between contracts executed and executory.

1254. The distinction above referred to between contracts executed and contracts executory appears to have been

(*f*) Wager policies were expressly prohibited by 19 Geo. 2, c. 37, and were held to be illegal under that statute: Allkins *v.* Jupe (1877), 2 C. P. D. 375. This statute is, however, repealed by sect. 92 of the Mar. Ins. Act, 1906, sect. 4 of which declares that insurances "by way of gaming and wagering" are void, but does not make them illegal. As to the non-return of the premium on such policies, see *supra*.

(*g*) Lowry *v.* Bourdieu (1780), 2 Dougl. 468. Accord. Allkins *v.* Jupe (1877), 2 C. P. D. 375.

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suggested for the first time in this case by Buller, J., who said: "There is a sound distinction between contracts executed and executory; and if an action is brought to rescind a contract, you must do it while the contract still remains executory, and then it can only be done on the terms of restoring the other party to his original situation. If the plaintiffs in the present case had brought their action before the risk was over and the voyage finished (*h*), they might have had a ground for their demand; but they waited till the risk (such as it was, not indeed founded in law, but resting in the honour of the defendant) had been completely run" (*i*).

This distinction is not, however, peculiar to contracts of marine insurance, but is part of the general law of contracts, and it is now well established, after much expression of regret by learned judges, that, so long as a contract remains executory, any money paid under it may be recovered back (*k*).

Proviso.

But as regards contracts of marine insurance, it seems to have been a condition to the right of action for this end that before writ issued the assured should by formal notice to the underwriter have renounced his contract. When, therefore, a policy was effected on goods by the "Audaz" (a Spanish ship), or any other ship or ships, with the intention of covering an illegal shipment of cotton for Liverpool from New Orleans, a port of the United States, then at war with this country—but no shipment was ever made, or other thing happened

(*h*) It is doubtful whether the contract would not be considered to be executed within the meaning of the rule as soon as the risk commences. Maclachlan appears to have been of this view (Arnould, Mar. Ins. 6th ed. p. 1105); and cf. Herman *v.* Jeuchner (1885), 15 Q. B. D. 561, and Kearley *v.* Thomson (1890), 24 Q. B. D. 742.

(*i*) Lowry *v.* Bourdieu (1780), 2 Dougl. 468.

(*k*) See Tappenden *v.* Randall (1801), 2 B. & P. 467; Aubert *v.* Walsh (1810), 3 Taunt. 277; Bone *v.* Ekless (1860), 5 H. & N. 925; 29 L. J. Ex. 438; Taylor *v.* Bowers (1876), 1 Q. B. D. 291; Herman *v.* Jeuchner (1885), 15 Q. B. D. 561; Barclay *v.* Pearson, [1893] 2 Ch. 154; Hermann *v.* Charlesworth, [1905] 2 K. B. 123, C. A. It was doubted by Fry, L. J., in delivering the judgment of the Court of Appeal in Kearley *v.* Thomson (1890), 24 Q. B. D. at p. 746, but the learned judge appears to have been in error in stating that the principle is not to be found in any case earlier than Taylor *v.* Bowers.

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within the scope of the policy, to make the risk attach, and the assured brought an action to recover back the premium on the ground of the illegality of the contract—the Court held that he could not recover, because he had not renounced the contract by notice to the underwriter before action brought (*l*).

If the risk has commenced, no return of premium in respect of illegal contract.

1255. Where the risk has commenced and the event taken place, the application of the general principle that the illegality is a bar to a claim for return of premium has never been doubted.

Thus, where the risk had commenced and a loss by capture taken place under a policy void as being a re-insurance within the 19 Geo. 2, c. 37, s. 4, the Court of King's Bench decided that there could be no return of premium (*m*). So, where the policy had been effected in this country to cover a trading with Holland, then in a state of war with Great Britain, and a return of premium was claimed after the risk had been run and a loss by capture taken place, the same Court held on the same principle that no return could be made (*n*). On the same ground it was held that no return could be claimed in respect of a policy intended to cover a trade carried on in contravention of our navigation laws, when they existed; and this, though the assured be a foreigner, for that fact will not excuse his ignorance of the trade laws of the country with which he effects insurances and engages in commerce (*o*). It is otherwise where the policy is effected in ignorance of the facts. Thus, where the agent of a foreigner effected an insurance in this country after hostilities had been actually declared against Great Britain by the foreign government of which the assured was a subject, but without any knowledge of that circumstance

Except where there has been ignorance of fact.

(*l*) Palyart *v.* Leckie (1817), 6 M. & S. 290.

(*m*) Andree *v.* Fletcher (1789), 3 T. R. 266; Howard *v.* Refuge Friendly Society (1886), 54 L. T. 644.

(*n*) Vandyck *v.* Hewitt (1800), 1 East, 96.

(*o*) Morck *v.* Abel (1803), 3 B. & P. 35; *S. P.* Lubbock *v.* Potts (1806), 7 East, 449.

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on the part of the agent, or any possibility of knowing it at the time of effecting the policy, the Court held that under these circumstances the premium should be recovered back, for the plaintiffs had paid for an insurance from which, without any fault imputable to themselves, they could never derive any benefit (*p*).

So where a licence necessary to legalize the voyage was—without the fault or knowledge of the assured, and contrary to the opinion and expectation which they might reasonably entertain—not procured till after the ship had sailed; this was held to fall within the same principle as the case last cited, and the plaintiff was allowed a return of premium (*q*).

Where, however, the want of the licence at the time of sailing was a fact within the knowledge of the assured, it was held that he could claim no return of premium, though the licence was procured as soon as possible after the ship sailed (*r*).

Illegality no defence for an agent against his principal.

Yet illegality of contract is no defence, except for a principal; a mere agent cannot stop the money and set up this as a bar to the action. When, therefore, a loss, notwithstanding the illegality of the transaction, was paid by the underwriter to the broker of the assured, this defence failed the broker in an action by his principal to recover the money (*s*). The position appears to be the same with respect to policies which are void as being gaming or wagering contracts within the Gaming Act, 1845. The provisions of the Gaming Act, 1892, do not seem to prevent the principal from recovering from his agent moneys which the latter has received on his account (*t*).

(*p*) Oom *v.* Bruce (1810, 12 East, 225.

(*q*) Henry *v.* Staniforth (1816), 4 Camp. 270; *S. C.* as Hentig *v.* Staniforth (1816), 5 M. & S. 122. See also Siffken *v.* Allnutt (1813), 1 M. & S. 39.

(*r*) Cowie *v.* Barber (1815), 4 M. & S. 16.

(*s*) Tenant *v.* Elliot (1797), 1 B. & P. 3; Farmer *v.* Russell (1798), *ibid.* 296; Bousfield *v.* Wilson (1846), 16 L. J. Ex. 44.

(*t*) De Mattos *v.* Benjamin (1894), 63 L. J. Q. B. 248; Burge *v.* Ashley, [1900] 1 Q. B. 744, approving O'Sullivan *v.* Thomas, [1895] 1 Q. B. 698.

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Does the Mar. Ins. Act distinguish between executed and executory contracts?

As regards the non-return of the premium when the policy is void on the ground of the illegality of the adventure, no distinction is made in terms in sect. 84 of the Marine Insurance Act, 1906 (*u*), between executed contracts and contracts which are wholly executory. Whether the distinction which, as we have said, is part of the general law of contracts, has been abolished by the Act, so far as contracts of marine insurance are concerned, or whether the words "there has been no illegality" mean "there has been no inception of the illegal adventure," seems to be uncertain.

Premium must be returned wherever the policy is rendered void by the fraud of the underwriter.

1256. It never has been doubted, and indeed on principle is abundantly clear, that the premium must be returned whenever the policy is rendered void by the fraud of the underwriter. As, if an insurance be made on a certain voyage "lost or not lost," when the underwriter, at the time he subscribes the policy, privately knows that the ship has arrived safe, he will be bound to restore the premium (*x*). So, if the contract be void by the positive misrepresentation of the underwriter, the assured may recover back the premium (*y*); though a mere statement of the underwriter's belief or expectation would not entitle him to do so (*z*).

There is no specific statement in the Marine Insurance Act, 1906, that if the assured avoids the contract on account of the underwriter's fraud the premium is recoverable, though the case of a policy effected at a time when the underwriter knows that the ship has arrived safely is specially provided for in sect. 84 (3) (b) (*a*). It seems clear, however, that when the assured has avoided the policy there is a total failure of consideration, and that both under sect. 84 (1) of the Act and by the common law the assured can claim a return of the premium, apart from any question of fraud.

(*u*) *Ante*, § 1247a.

(*x*) Lord Mansfield in Carter *v.* Boehm (1766), 3 Burr. 1909.

(*y*) Duffell *v.* Wilson (1808), 1 Camp. 401; Kettlewell *v.* Refuge Ass. Co., [1907] 2 K. B. 242; [1908] 1 K. B. 545, C. A.

(*z*) Pawson *v.* Watson (1778), 2 Cowp. 787; Barber *v.* Fletcher, 1 Dougl. 292.

(*a*) *Ante*, § 1247a.

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No return where the fraud is on the part of the assured.

For some time it was a subject of very fluctuating decision in our English Courts, whether the assured was or was not entitled to a return of premium where the contract was rendered void *ab initio* by his own fraud (*b*). The point, however, agreeably to truer notions of justice and good policy, was at last clearly established in our English jurisprudence that wherever the contract is avoided by actual fraud on the part of the assured, whether committed by himself or his agent, there shall be no return of premium (*c*); and the principle, as we have seen, is impliedly recognized in sect. 84 of the Marine Insurance Act, 1906 (*d*).

Aliter, in case of mere misrepresentation without fraud.

There must, however, be actual fraud on the part of the assured or his agents thus to preclude him from recovering back the premium; a mere misrepresentation made without actual fraud (*i.e.*, wilful intention to deceive) does not disentitle the assured to a return of premium. "Where there is fraud," says Gibbs, C. J., "there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium" (*e*).

Premium returnable where policy

In the same way, where the contract is avoided, *ab initio*, by the fault of the assured (under such circumstances as not

(*b*) See the cases of Whittingham *v.* Thornburgh (1690), 2 Vernon, 206; Da Costa *v.* Scanderet (1723), 2 P. Will. 170; Wilson *v.* Ducket (1762), 3 Burr. 1361. The two first at Chancery, and the last at Common Law before Lord Mansfield, are in favour of allowing the return even in cases of gross fraud.

(*c*) Tyler *v.* Horne (1785), 2 Marshall, Ins. 661; Chapman *v.* Fraser (1793), *ibid.* In Tyler *v.* Horne the fraud was very gross, for the assured had instructed his broker to effect the policy after receiving private information of the loss of the ship. The fraud must, however, probably be in the procuring of the contract. In Waters *v.* Allen (1843), 5 Hill, N. Y. 421, the voyage was divided by the policy into two distinct risks, to each of which a separate premium was affixed. Soon after the commencement of the earlier risk the vessel was fraudulently scuttled by the assured, so that the later risks were never incurred. It was held that, notwithstanding such fraud, the premium for the latter might be recovered back.

(*d*) *Ante*, § 1247a.

(*e*) Feise *v.* Parkinson (1812), 4 Taunt. 639; acc. Anderson *v.* Thornton (1853), 8 Exch. 425; Rivaz *v.* Gerussi (1880), 4 Asp. M. L. C. 377; 6 Q. B. D. 222.

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to imply actual fraud) in failing to comply with any warranty, either express or implied, the assured will be entitled to a return of premium. Thus, if the ship do not sail on the day prescribed, or do not depart with convoy, or be not seaworthy, and there be no fraud on the part of the assured, he may recover back the premium (*f*).

rendered void *ab initio* by the fault of the assured in not complying with warranties, &c.

Or by making a material alteration.

It has been held that if the policy be rendered void by the act of the assured in making a material alteration in it after subscription, and without consent of the underwriters, the assured will not be entitled to a return of premium (*g*), but the Marine Insurance Act, 1906, does not recognize this exception to the right of the assured to a return of the premium, when the policy is void.

Return of premium for want of interest, &c.

1257. We have seen that, if the risk have once commenced, there can be no return of premium in respect to its greater or less duration; and the reason is very plain, because the degree of risk cannot be calculated by duration—*i.e.*, it may be as great in a day as in a month. It is otherwise with the amount of the insurable interest or the value at risk, it being abundantly obvious that upon two lots of property of different values exposed to the same perils the degree of risk is very different. The risk, in fact, varies with the value.

Where no interest at risk.

Hence, where throughout the currency of the policy the assured has no interest covered by the policy, either because

(*f*) 2 Marshall, Ins. 663. Numerous cases decide this point incidentally. Henckel *v.* Royal Exchange Ass. Co. (1749), 1 Ves. 317 (breach of warranty of neutrality); Allen *v.* Long (1785), 2 Marshall, Ins. 668 (to sail with convoy); and Colby *v.* Hunter (1827), 3 C. & P. 7 (warranted in port). In all these cases return of premium was claimed and allowed. The rule has been explicitly recognized in the jurisprudence of the United States. 2 Phillips, Ins. s. 1844; 1 Parsons, 505. But it is now clear that an insurance "at and from" is not void *ab initio* by reason of the fact that a warranty to be subsequently performed—*e.g.*, that the vessel shall sail by a certain date—is infringed: see *ante*, § 634. Where all warranties have been complied with which could be complied with during the vessel's stay in port, the policy has attached, and under such circumstances there can in general be no return of premium. Cf. Annen *v.* Woodman (1810), 3 Taunt. 299.

(*g*) Langhorn *v.* Cologan (1812), 4 Taunt. 330.

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the interest in respect of which he insures is only a bare contingency or expectation, and not an insurable interest, or because he has no interest whatever in the subject-matter insured, as where he effects an insurance on the wrong ship, in either case he is entitled to a return of premium (*h*).

The rule in fact is, that if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever, the insured is entitled to recover back the whole premium (*i*).

In a case of re-insurance made in ignorance by both parties that the vessel had arrived and delivered her cargo undamaged, it was argued for the defendant, who refused to pay the premium, that under the circumstances there was no insurable interest in the defendant. The Court, however, having first held that the policy had attached notwithstanding the fact of the risk having terminated beforehand, held further that their opinion on the first point necessarily involved their holding that the defendant had an insurable interest (*k*).

No return of premium where interest merely defeasible.

1258. By sect. 84 (3) (d) of the Marine Insurance Act, 1906, "where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable."

Instances under the Prize Acts.

Under the old Prize Acts, where captors from the moment of capture acquired a contingent insurable interest—liable indeed to be divested by subsequent sentence of restoration, but valid till then,—and sent home their prize under an insurance on their own account, after which, upon arrival, she was by sentence of the English Court of Admiralty restored to her owners—it was yet held that, as the risk on the ship had commenced under the policy, the assured could not claim a return of premium (*l*). But where they had not

(*h*) Mar. Ins. Act, 1906, s. 84 (3) (c), *ante*, § 1247a.

(*i*) For almost every position upon the subject which follows, see the great work of Emerigon, c. xvi. Du Ristourne.

(*k*) Bradford *v.* Symondson (1881), 7 Q. B. D. 456. See *S. C.*, *ante*, § 1248.

(*l*) Boehm *v.* Bell (1797), 8 T. R. 154.

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even a contingent insurable interest in her, but merely a bare expectation depending on the bounty of the Crown—if in such case, after a loss, the underwriters availed themselves of the want of interest to defeat the claim on the policy, the assured were entitled to a return of premium (*m*).

In this last cited case, after a loss, the underwriters, who resisted the demand on the ground that there was no insurable interest, were not allowed to retain the premium; but where the ship had arrived safely and earned freight, Lord Ellenborough would not allow the assured afterwards to claim a return of premium, on the ground that he had no insurable interest, on account of a defect in his title to the ship. "The voyage," he said, "has been performed, and the ship has arrived in safety. The freight has been earned and paid. It strikes me as now too late to rip up the matter and to say you had no insurable interest. You might have rescinded the contract before the event; but after that has been determined in favour of the underwriters, it does not lie in your mouth to tell them they were never liable, and that the premium was a payment without consideration" (*n*). If this case was decided on the ground that an assured who has had no insurable interest during the currency of the policy must make his claim for a return of premium before the risk terminates, it is opposed to the rule laid down in sect. 84 (3) (c) of the Marine Insurance Act, 1906, and cannot be considered good law. But the assured seems to have had a real, though defeasible, interest in the ship and freight.

Where insurance is effected by mistake, as on goods by the wrong ship, the assured is entitled to a return.

So much for cases turning on the mere want of insurable interest. Of course, if by mistake an insurance is effected on goods on board the wrong ship, &c., and it turns out that the assured has no scintilla of interest at risk under the policy, he will be entitled to a return of the whole premium (*o*).

(*m*) Routh *v.* Thompson (1809), 11 East, 428.

(*n*) M'Culloch *v.* Royal Exch. Ass. Co. (1813), 3 Camp. 406.

(*o*) Martin *v.* Sitwell (1691), 1 Shower, 156.

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In case of over-insurance, double insurance, &c.

1259. With regard to return of premium for short interest, over-insurance and double insurance, which is dealt with in sect. 84, sub-sect. 3 (b), (c) and (f), of the Marine Insurance Act, 1906 (*p*), the principle established by the cases is simply this: That if the underwriter could at any time, and under any conceivable circumstances, have been called on to pay the whole sum on which he has received premium, in such case the whole premium is earned, and there shall be no return; if, on the other hand, he could never in any event have thus been called on to pay the whole, but only a part of the amount of his subscription—say a half or a fourth—he ought not to retain a larger proportion than one-half or one-fourth of the premium, and must return the residue (*q*).

Short interest.

The cases in which he may be so called on to make return are, 1st, where in either a valued or open policy only part of the property specified in, or declared on, the policy is put on board—as, for instance, if "100 bales of cotton" be insured "valued at 1,000*l*.," or "at 10*l*. per bale"; or if "100 bales of cotton" be specified in the policy as the subject of insurance without any valuation—in such or the like cases, if there be only 50 bales on board, or only half the quantity of interest intended, and declared to be insured, a return of half the premium must be made for short interest (*r*); for as part of the subject-matter insured has never been imperilled, a proportionate part of the premium is returnable (*s*).

Where "freight" is insured generally, in a valued policy, at a gross sum on a general or seeking ship, this must be taken to mean freight on a complete cargo; if, therefore, the freight of a complete cargo has never been at risk during the voyage insured, it should seem that there must be a proportionate return of premium for short interest (*t*). So, in the

(*p*) *Ante*, § 1247a.

(*q*) Stevens, Av. 200, 203; 2 Marshall, Ins. 649. See this test applied in Fisk *v.* Masterman (1841), 8 M. & W. 165; and see also 2 Magens, 137, note to No. 534.

(*r*) Stevens, 204.

(*s*) Mar. Ins. Act, 1906, s. 84 (3) (b), *ante*, § 1247a.

(*t*) Forbes *v.* Aspinall (1811), 13 East, 323. The point was not determined in this case, but appears to follow from the principles regulating return of premium. See also as to goods, Rickman *v.* Carstairs (1833), 5 B. & Ad. 651; Tobin *v.* Harford (1863), 32 L. J. C. P. 134; 34 L. J. C. P. 37.

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case of an insurance "on profits," if the profits on a certain quantity of goods are insured and only part of the goods be put at risk, it has been held that the assured is entitled to a rateable return of premium (*u*).

Return of premium for over-insurance.

1260. The next case is, where in an open policy the sum insured (*i.e.*, the aggregate of the different subscriptions) exceeds the value of the property at risk. The rule is that "when the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable" (*x*). For instance, if in a policy on goods the amount underwritten be 1,000*l*. and the insurable value of the goods on board be only 500*l*., it is evident that the underwriters in case of loss could only have been called upon to pay to the extent of 500*l*., or half the sum insured. Consequently there must be a return of half the amount of the premium. This is called a return for over-insurance.

No return on valued policies for over-insurance.

In valued policies, as we have already seen, the valuation is binding on the underwriter, so that the assured, in case of loss, supposing the whole of the property to which the valuation refers to have been then on board, will be entitled either to the whole or an aliquot part of the whole sum. As, therefore, the underwriters upon such a policy might, in the event of a total loss, have been called upon to pay the whole sum insured, they are entitled to retain the whole premium, and no return can be made for over-insurance, though the sum in the policy may be double the value of the effects insured (*y*).

Return of premiums in cases of double insurance.

Where, after effecting one insurance on his property, the merchant effects further insurances on the same property by other policies with a different set of underwriters, the law is that if the total amount thus insured on the different policies exceeds the insurable value of the property at risk, the

(*u*) Eyre *v.* Glover (1812), 16 East, 218.

(*x*) Mar. Ins. Act, 1906, s. 84 (3) (e).

(*y*) Stevens, 200; 2 Marshall, Ins. 652, citing 2 Magens, 137, n.

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merchant can only recover up to the extent of such value; but may do so from whichever set of underwriters he pleases (*i.e.*, up to the extent of their subscriptions), leaving the different underwriters to contribute rateably amongst themselves to the loss (*z*). The general rule, as stated in the Marine Insurance Act, 1906, is that "where the assured has over-insured by double insurance a proportionate part of the premium is returnable," *i.e.*, the assured is entitled to a rateable return of premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the property at risk. This rule, however, is subject to the proviso that, "if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable" (*a*).

Apportionment of return of premium among the several insurers.

1261. It remains only to consider how the return of premium in such cases is apportioned amongst the underwriters themselves.

On a single policy.

In the first place, it is clear that, where the over-insurance is by a single policy, all the underwriters contribute rateably to the return of premium without regard to the date of their subscriptions; the rule, as laid down by Marshall, being, that "all the underwriters upon a policy in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium in proportion to their respective subscriptions, without regard to the priority of their dates" (*b*).

On several policies of the same date.

It is also stated by Emerigon, as the rule of the law maritime, that several policies effected on the same date are considered to form but one policy, and the rule, therefore, as to the return of premium in this case is the same as in the

(*z*) See Mar. Ins. Act, s. 32, *ante*, § 330.
(*a*) Mar. Ins. Act, s. 84 (3) (f), *ante*, § 1247a; see *infra*, § 1262.
(*b*) 2 Marshall, Ins. 649.

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On several policies of different dates.

last (*c*). But where several policies or sets of policies are effected on the same subject at different dates, the foreign law maritime regards only the policy or policies first in point of date as binding, up to the amount of the value actually at risk, and the return of premium is confined to the underwriters on the other policies (*d*).

The rule of the English law attaches no importance, except in the case where the earlier policy has at some time borne the entire risk, to such difference of date, and is thus correctly expressed by Marshall:—"If, by several policies made without fraud, the sum insured exceed the value of the effects, these several policies will in effect make but one insurance, and will be good to the extent of the interest of the assured, and, in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions; and it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects in proportion to their respective subscriptions" (*e*).

No apportionment where whole risk has once attached on the earlier policies.

1262. The exception above referred to arises in cases where, of the several policies effected on the same subject at different dates, the earlier have actually attached before the later have been underwritten. Under such circumstances, the later only are subject to a claim for return of premium in case of over-insurance, because until their execution the earlier were sustaining a risk equal to the full amount of the sums subscribed.

Fisk *v.* Masterman.

This was determined on the following state of facts:—A merchant in New Orleans, having shipped a large consignment of cottons to a Liverpool house, directed them to effect an insurance, which they immediately did, on the 12th of April, by several policies in London to the amount of 14,150*l.*, and on the 13th of April, by several other policies, both in

(*c*) 2 Emerigon, c. xvi. s. 4, p. 196. See also the case of Fisk *v.* Masterman (1841), 8 M. & W. 165.
(*d*) Emerigon, c. xvi. s. 4, pp. 140, 141.
(*e*) 2 Marshall, Ins. 649. See Stevens, Av. tit. Return of Premium, 205, and also M'Culloch's Com. Dict. tit. Mar. Ins. 750, ed. 1880.

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Liverpool and at London (the agents in the one place being unaware of what was being done at the other), to the amount of 22,300*l.* more. Thus the total amount insured was 36,450*l.*, and the value of the cottons as fixed by the different policies was 30,333*l.*, which left 6,117*l.* as the amount of over-insurance on the aggregate of all the policies. The cottons having arrived safely, the Court, after argument, decided that as, in case a loss had occurred before the policies of the 13th of April were effected, the underwriters upon the policies of the 12th of April would have been liable to the full extent of their subscriptions, so they were entitled to retain the whole amount of their premiums.

The Court directed accordingly, 1. That the assured should have a return of premium to the amount of the over-insurance, such amount to be ascertained by taking into account all the policies; 2. That no return of premium was to be made in respect of the policies effected on the 12th of April; 3. But that all the underwriters who subscribed the policies of the 13th should contribute rateably to the return, in proportion to the sums insured by them respectively on that day (*f*).

No return of premium where over-insurance effected knowingly.

The proviso to sub-sect. 3 (f) of sect. 84 of the Marine Insurance Act, 1906 (*g*), makes two further exceptions to the general rule that in case of over-insurance by double insurance, all the insurers must make a return of premium. One is that when the double insurance is effected knowingly by the assured, there is no return of premium whatever. The other

(*f*) Fisk *v.* Masterman (1841), 8 M. & W. 165. It is impossible to suppose that the Court intended to lay down the rule which a literal construction of their judgment yields—a rule which might have the effect of leaving the underwriters on the later policies without any premium in return for the insurance. For instance, if the value of the goods had been 1,000*l.*, and the amount had been fully underwritten in London on the 12th and in Liverpool on the 13th, the over-insurance would have been 1,000*l.* According to the literal construction of the judgment, the Liverpool underwriters would have been obliged to return the premium on "the amount of the over-insurance," *i.e.*, 1,000*l.* Clearly, as they would have been liable on their policies to the amount of 500*l.*, the return of premium ought only to be made on 500*l.*

(*g*) *Ante*, § 1247a.

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is that if a claim has been paid on a policy in respect of the full sum insured by it, no premium is returnable in respect of that policy. The former exception is an alteration of the law made advisedly for the purpose of discouraging double insurance (*h*). The latter exception seems to have the effect of making the position of an insurer who has paid the full amount insured the same as that of an insurer who has for part of the currency of his policy borne the full risk. If this be the proper construction, it is an alteration of the law, the principle of which may be questioned, as the insurer has a right to enforce contribution from the other insurers. It may, however, be suggested as justifying the alteration, that as he has run some risk of having this right defeated in the event of their insolvency (*i*), he ought in fairness to be allowed to retain the whole premium.

Or by underwriter who has paid in respect of the full amount insured.

Rule and practice in the United States.

In the United States, policies usually contain stipulations whereby, if the assured has made any prior insurance on the property, the insurers are to be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property, and shall return the premium upon so much of the sum insured as they shall be exonerated from by such prior insurance (*k*).

(*h*) See Chalmers & Owen, Mar. Ins. Act, 2nd ed. 134, note (3), 136. Yet there may be cases in which the double insurance is quite legitimate, *e.g.*, where the assured has reason to fear that his underwriters have sustained heavy losses, and will not be able to pay in the event of further claims upon them.

(*i*) It may be argued that the intention of this exception was merely to prevent the assured from claiming a direct return of premium from the underwriter against whom he has enforced his claim in full, but not to prevent another underwriter from claiming a proportionate share of the return of premium which he himself has been compelled to make. According to Mr. McArthur (Ins. p. 44), in case of double insurance, the assured might elect to claim for a loss under one policy or set of policies, and claim for a return of premium under the remaining policies; and the underwriters had then to re-adjust the aggregate of such claims among themselves, so that each of them should in the event bear his proportionate part, both of the loss and of the return premiums. It is, however, difficult to construe the proviso as being merely intended to give effect to such a practice.

(*k*) 2 Phillips, Ins. s. 1839. A similar rule prevails in most other

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Return of premium under express stipulation.

1263. It is frequently agreed between the parties that, upon the happening of a certain event, or the performance of some stipulation, the assured shall return a part of the premium, and clauses to this effect are accordingly in such case inserted in the policy (*l*).

In case the ship sails with convoy, and arrives.

The clause which has given rise to the greatest amount of discussion in our jurisprudence is that which provides for a return of part of the premium in case the ship "sails with convoy and arrives."

The reason for this stipulation, and the meaning of the parties in inserting it, is thus expressed by Lord Mansfield: "Dangers of the sea are the same in time of peace and of war, but war introduces hazards of another sort, depending on a variety of circumstances, some known, others not, for which an additional premium must be paid. These hazards are diminished by the protection of convoy. If the assured will warrant a departure with convoy, there is a diminution of the risk; but if he will not, he pays the full premium, and in that case the underwriter says, 'if it turn out that the ship departs with convoy, I will return part of the premium.'" "But," continues his Lordship, "a ship may sail with convoy, and yet, by storm or other accident, may in a day or two lose its protection; to guard against that risk the underwriter adds in policies of the present sort, 'the ship must not only sail with convoy, but she must arrive in order to entitle you to the return.'"

The words "and arrives" do not mean that the ship shall arrive in company of the convoy; but only that she herself shall arrive. If she does, that shows either that she had convoy for the whole voyage, or did not want it (*m*).

Simond v. Boydell.

So, in the case of Simond *v.* Boydell itself, Lord Mansfield decided that though the policy was on goods, upon which the

countries, causing confusion, as Lowndes observes, when part of an insurance is effected here and part abroad: Lowndes, Mar. Ins. s. 53.

(*l*) Stevens, Av. 194. Sect. 83 of the Mar. Ins. Act, 1906, *ante*, § 1247a, gives effect to stipulations for the return of premium on the happening of a certain event.

(*m*) Simond *v.* Boydell (1779), 1 Dougl. 270, 271.

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underwriters had paid an average loss in respect of sea damage incurred before the ship's arrival, yet, as the ship herself had sailed with convoy, and ultimately arrived safe at her port of destination, the assured, under a stipulation to return 8 per cent. if the ship "sails with convoy and arrives," was entitled to a full return of 8 per cent. on the whole amount of the insurance, including therein the sum which the underwriters had paid as a loss on the damaged goods (*n*).

Aguilar v. Rodgers.

Upon the authority of this case Lord Kenyon decided that, in a policy on freight, with a stipulation to return 10 per cent. "if the ship sailed with convoy and arrived," the assured was entitled to the whole return calculated on the whole amount of the insurance, because the ship, though she had been captured and recaptured on her voyage, was ultimately brought into her port of destination, subject, however, to a charge of 9*l.* 14*s.* per cent. for salvage, which the underwriters paid into Court (*o*).

Arriving captured.

In this case Lord Kenyon said that in order to satisfy the meaning of the clause, the arrival of the ship should "be an arrival at the destined port in the course of the voyage"; and he intimated, that if a ship arrived at her neutral port of destination, in the possession of the enemy, or at her port in this country, as the property of other persons, after a capture, that would not be such an arrival as to entitle the assured, under this clause, to a return of premium (*p*).

Capture after arrival.

If goods are insured with a stipulation to return a certain rate of premium "if ship sails with convoy and arrives," and the ship does sail with convoy and arrives at her port of discharge, though she be there captured before she have completed the unloading of her cargo, so as to be totally lost

(*n*) Simond *v.* Boydell (1779), 1 Dougl. 268. But it is now an established custom of Lloyd's, which has been expressly adopted by the Association of Average Adjusters, that when the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured, in order to arrive at the amount on which the return is calculated. So Stevens, Av. 198.

(*o*) Aguilar *v.* Rodgers (1797), 7 T. R. 421; Stevens, Av. 198.

(*p*) 7 T. R. 422.

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1264. In fact, in all these cases, the arrival of the ship is the sole test of the return of premium, and no regard is had by the parties to the condition of the goods on the ship's arrival. The total or partial loss of the goods is the subject of the indemnity, and must be paid by the underwriters. "But, as to the return of the additional premium, whether the goods arrive safe or not makes no part of the question; the single principle which governs is, that in the events which have happened, the war risk has been rated too high" (*r*).

Arrival to be at the ultimate port of destination.

The words "and arrive" may be so used as to mean arrival at the ship's ultimate port of destination; so that if it be agreed in the policy to return different portions of the premium in case the ship sail with convoy for different portions of the voyage and arrive, no return of any portion of the premium can be claimed if the ship never, in fact, arrives at her port of ultimate destination.

Kellner *v.* Le Mesurier.

A ship was insured "at and from Lisbon to Cadiz, and at and from thence to Flushing, at a premium of twenty guineas per cent., to return 8 per cent. if the ship sail with convoy from Cadiz to England, and 2 per cent. more for convoy from England to Flushing; or 10 per cent. if with convoy for the voyage and arrives." After reaching England from Cadiz with convoy, she was lost by British capture before her arrival at Flushing. Lord Ellenborough held, that no return could be claimed within the meaning of this policy, as the ship had never arrived at Flushing, her ultimate port of destination; the words "and arrives," his Lordship said, annexed a condition which overrode equally all the stipulations in the policy as to returns of premium; and the true meaning of the clause was this: to return 10 per cent. if the ship sail with convoy for the voyage and arrives; if from

(*q*) Horncastle *v.* Haworth (1806), 2 Marshall, Ins. 681.
(*r*) Per Lord Mansfield in Simond *v.* Boydell (1779), 1 Dougl. 271.

Cadiz with convoy for England, 8 per cent.; and 2 per cent. more for convoy from England to Flushing (*s*). Sect. 1264.

Leevin *v.* Cormac.

In this case the arrival at Flushing was held, on the true construction of the policy, to be a condition affecting all the preceding stipulations; where, however, the stipulation was "to return 5 per cent. if the ship sails with convoy for Gottenburg, and arrives, and 5 per cent. more if she sails for her port of delivery and arrives"; the Court of Common Pleas thought it questionable whether a return of premium might not be due for her arrival at Gottenburg, though she never arrived at her ultimate port of delivery (*t*).

Stipulation to return a portion of the premium "for arrival."

1265. During the great French war and Napoleon's continental system, a practice sprang up, which ceased with the state of things that called it forth, of stipulating to return a portion of the premium "for arrival" (*u*). In the only case of this kind which came before the Courts, goods were insured on a Baltic risk, with the usual latitude as to touching and staying, sailing backwards and forwards, &c., "until the captain could find a port," the risk on the goods to continue till the same should there be discharged and safely landed with a warranty to be free from capture or seizure in the ship's port or ports of discharge, at a premium of fourteen guineas, to return 7 per cent. for arrival. The goods being seized on board the ship while moored in Pillau Roads for the purpose of discharging, were held to have been seized in the ship's port of discharge within the warranty. The underwriters consequently were discharged from the loss; but the Court nevertheless held, that there had been such an arrival of the ship as to entitle the assured to the stipulated return of premium (*x*).

It is clear from this case that it is no objection to the claim for a return of premium that the loss was one not insured against, provided the ship have arrived (*y*).

(*s*) Kellner *v.* Le Mesurier (1803), 4 East, 396.
(*t*) Leevin *v.* Cormac (1812), 4 Taunt. 483, n.
(*u*) Stevens, Av. 198.
(*x*) Dalgleish *v.* Brooke (1812), 15 East, 295.
(*y*) Same rule in the United States: 2 Phillips, Ins. s. 1840.

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"If the ship sails with convoy."

1266. Where the words "and arrives" are not inserted, but the stipulation is simply for a return, "if the ship sails with convoy," the construction is different, and the rule of Simond *v.* Boydell will not apply.

Langhorn *v.* Allnutt.

Hence, where, in an insurance on goods, with a stipulation to return so much per cent. "for convoy," the assured claimed to recover the stipulated return (on the ground that the ship had sailed with convoy) in addition to a total loss: the jury refused to give it, saying that the assured had a right, in case of a total loss, to add the whole amount of premium to his invoice, and so could recover it in that shape included in the total loss. Sir James Mansfield, before whom the cause was tried, did not object to this, nor was the Court moved upon it (*z*).

If a return of premium be stipulated, in case the ship sails with convoy, and, before she can do so, the underwriters are discharged by a breach of warranty, the assured will, it seems, be nevertheless entitled to the stipulated return (*a*).

What constitutes a sailing with convoy. Audley *v.* Duff.

What constitutes a sailing with convoy so as to entitle the assured to claim a stipulated return of premium within the meaning of these clauses, may be seen by the following case: A ship, insured "at and from Oporto to Leghorn at twelve guineas per cent., to return 6*l.* if she sailed with convoy from the coast of Portugal and arrive," sailed under convoy from Oporto to Lisbon, the general rendezvous, in order to proceed thence with the whole fleet. The Oporto fleet, however, being dispersed on its way to Lisbon, lost the convoy, on which the ship in question, then judging it for the best, ran for England, and arrived. Lord Eldon held that, upon the true construction of this clause, which only required a sailing with convoy from some part of the coast of Portugal, the assured was entitled to the stipulated return of premium by the ship's having sailed with convoy from Oporto and arrived in England (*b*).

(*z*) Langhorn *v.* Allnutt (1812), 4 Taunt. 511; 2 Marshall, Ins. 676. As to the old practice on this point, see Stevens, Av. 196.

(*a*) Meyer *v.* Gregson, 2 Marshall, Ins. 682.

(*b*) Audley *v.* Duff (1800), 2 B. & P. 111.

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Clauses in time policies.

1267. It is common now, in time policies, to insert a clause providing for the reduction of premium in the event of the vessel not being continuously employed during the whole period covered. The clause takes various forms (*c*): under the Institute Time Clauses it runs as follows:—

To return. { —— per cent. for each uncommenced month if it be mutually agreed to cancel this policy; as follows for each consecutive thirty days the vessel may be laid up in port, viz.:— —— per cent. if in the U. K. not under repair; —— per cent. under repair, or if abroad; Provided always that in no case shall a return be allowed when the within-named vessel is lying in a roadstead or in exposed and unprotected waters; } and arrival.

"Laid up in port." North Shipping Co. *v.* Union Mar. Ins. Co.

The meaning of "laid up in port" in such a clause was in dispute in a recent case where a vessel, though she remained for two months within the limits of a naval port, kept steam up continuously and was from time to time shifted about for the purpose of coaling ships of His Majesty's fleet. Bray, J., held that, apart from any customary meaning of the words, the ship was not during this period "laid up in port." He found on the evidence that the words had acquired a customary meaning, which imposed on the insurers a liability to make a return of premium for the time when a ship was discharging, going into dock for repairs, undergoing repairs and loading, although she might have to go to two or three places to discharge or load. He found, however, that there was no recognized or customary meaning that covered the case of a vessel engaged in coaling ships of war, which was a more hazardous operation than discharging cargo in the ordinary way. He therefore held that the assured were not entitled to a return of premium, and his judgment was affirmed by the Court of Appeal (*d*).

(*c*) See Douglas Owen's Mar. Ins. Notes and Clauses, 3rd ed. pp. 121—123.

(*d*) North Shipping Co. *v.* Union Mar. Ins. Co. (1918—19), 24 Com. Cas. 83, 161.

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"If ship sold or laid up." Hunter v. Wright.

Under a stipulation in a time policy on a ship "for a return of premium if sold or laid up for every uncommenced month," the assured was not entitled to a return by reason of the ship's having been laid up for several months out of the year for which the policy was in force, as it appeared that she was employed again within the year: for the words "laid up," being in connection with the word "sold," must be taken to mean such a permanent laying up as would take place if the ship had been sold, and would put a final end to the policy (*e*).

A time policy contained a clause which provided that if the vessel were "sold or transferred to new management," the policy should become cancelled, and a *pro ratâ* return of premium be made. She was captured by the Japanese during the Russo-Japanese war, and condemned by a Prize Court; but the Court of Appeal held, affirming the decision of Phillimore, J., that there had not been a transfer to new management within the meaning of the policy, and that the assured could not claim a return of premium (*f*).

It is common to provide for the return of a portion of the premium, on condition that the vessel shall not be employed except in certain specified trades, or within a specified area. Where a vessel was insured for twelve months at eight guineas per cent., "returning one guinea per cent. if vessel employed in Eastern trade during the whole currency of this policy," and the vessel was totally lost before the expiration of the twelve months, but having been until her loss only employed in such trade, it was held that the currency of the policy ended when the ship was

(*e*) Hunter *v.* Wright (1830), 10 B. & Cr. 714.

(*f*) Pyman *v.* Marten (1906), 22 Times L. R. 834; (1907), 13 Com. Cas. 64, C. A. The learned judge thought that if a vessel were sold by the Admiralty Court or by a Prize Court, she might perhaps be said to have been sold or transferred to new management within the meaning of the clause, though he inclined to the opinion that the "free of capture and seizure" clause was a bar to a claim arising out of a sale by a Prize Court. In this opinion he was supported by the Court of Appeal.

lost, and that her owners were therefore entitled to the return (*g*).

These are the more ordinary stipulations of this nature, and they fully illustrate the rules applicable to cases of this kind in general. Of course, it is open to the parties to stipulate that the happening of any specified event shall entitle the assured to a return of so much per cent. of the premium (*h*).

Deduction of one-half per cent.

The old custom (*i*), in virtue of which the underwriter used to be allowed to deduct one-half per cent. from the amount of returnable premiums, is now obsolete in this country.

Practice as to paying the premium into Court.

1268. In all cases where there is reason to suppose that the assured may be entitled to claim a return of premium, it will be advisable for the underwriter, in defending an action on the policy, to pay the premium into Court, so as to escape liability for costs (*j*).

Counsel need not open for a return of premium.

Lord Eldon, while Chief Justice of the Common Pleas, was of a different opinion as to the necessity for opening this question to the jury; but it subsequently became the established practice for the plaintiff's counsel not to announce at first any intention to claim a return of premium; so that if the defendant's case proved him to be entitled thereto, he recovered it as money received at any time before verdict; he thus obtained the full advantage which the evidence produced entitled him to, without disparaging his own case at the outset by setting up a demand implying a doubt, at least, of being able to sustain his principal claim (*k*).

(*g*) Gorsedd SS. Co., Ltd. *v.* Forbes (1900), 5 Com. Cas. 413.

(*h*) See, *e.g.*, Ionides *v.* Harford (1859), 29 L. J. Ex. 36.

(*i*) See 2 Emerigon, c. xvi. s. 6, p. 201, citing foreign laws and ancient jurists; Stevens, Av. 206. The Code de Commerce provides for the retention of one-half per cent. in certain cases, see arts. 349, 358—361.

(*j*) See Penson *v.* Lee (1800), 2 B. & P. 330.

(*k*) 2 Marshall, Ins. 663; per Chambre, J., in Penson *v.* Lee (1800), 2 B. & P. 333.

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Effect of taking money out of Court.

But suppose the plaintiff should, without damage to his own case on the record, be able to take this money out of Court, replying at the same time damages *ultra*, and the jury should ultimately find him entitled to his principal demand. a thing inconsistent with any title to a return of the premium, the Court would not allow him to recover more than the amount of such principal demand, less the sum taken out of Court (*l*).

(*l*) Carr *v.* Roy. Exch. Ass. Co. (1864), and Carr-*v.* Montefiore, 34 L. J. Q. B. 21.

PART IV.

PROCEDURE AND EVIDENCE.

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Commercial Court Procedure.

1269. THE early editions of this work terminated with several chapters devoted to the subject of Jurisdiction, Procedure and Evidence. There is comparatively little in those chapters of sufficient importance to justify their retention at the present time. Such questions as who are the proper parties to sue or be sued, and what facts must be proved by a plaintiff or a defendant in order to win his case, have already been dealt with generally in the course of the work; and questions as to the proper form of a declaration or of a plea are no longer of much practical importance (*a*). Cases of marine insurance have, since 1895, been usually tried in what is known as the Commercial Court, where justice is administered without paying a too rigid attention to forms or to technicalities of evidence (*b*).

Consolidation Rule.

1270. Actions on Lloyd's policies are now commonly brought against one individual underwriter selected by the plaintiff. Each underwriter is, of course, only severally

(*a*) Forms of statement of claim and defence will be found in Appendices C. (s. 5, No. 6) and D. (s. 5, Nos. 13—15) to the R. S. C. 1883.
(*b*) For the procedure of this Court, see Mathew's Practice of the Commercial Court; Scrutton on Charter-parties, &c., s. xiv.

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bound for the amount of his own subscription, and a judgment against one underwriter would not, apart from agreement, or some mode of procedure introduced to meet the case, bind other underwriters who had subscribed the same policy. The assured would, therefore, be entitled to bring a separate action against all the separate underwriters on the same policy, however numerous, in respect of the same loss and the same risk.

As, however, in every policy, regarded as a contract of indemnity, there are substantially but two parties—namely, the assured on one side and the whole body of underwriters on the other; and as the claim to a loss on such policy must generally rest on the same grounds, when preferred against one of the underwriters, as when preferred against another, it is obviously desirable that in actions on policies, as in all other cases, a single trial should decide what is, in fact, but a single question.

Accordingly, in order to secure this result, Lord Mansfield introduced the practice of consolidating actions on policies of insurance (*c*).

At the present day the case is adequately provided for by the Rules of the Supreme Court, 1883 (*d*), which give general powers of consolidating all actions, whether of marine insurance or not, pending in the same Division. In one of the appendices (*e*) to the rules, there is a lengthy form of an order to consolidate actions against underwriters in particular, which form appears to embody in substance the earlier practice. Perhaps the most noticeable feature of the old practice was that inasmuch as the order for consolidation was a favour asked for by the defendants, it was only they who were bound by the result. The plaintiff might if he chose, after a verdict for the defendant at the first trial, proceed with one of his other actions.

(*c*) Arnould (2nd ed. p. 1272) here followed with some pages relating to the old practice as to consolidation, which are not considered as of sufficient importance to be retained in this edition.

(*d*) Ord. XLIX. r. 8.

(*e*) App. K. No. 60.

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In modern practice, however, the consolidation order is not very much used. The plaintiff usually issues a single writ against one underwriter, and the result, apart from special circumstances, is treated by all parties as concluding the matter.

Order for ship's papers.

1271. There is one important point of practice, which is peculiar to actions on policies of marine insurance; this is the practice whereby the underwriter is entitled, as a matter of course, to an order against the assured, requiring the latter to discover on oath, and to produce, all the ship's papers. This practice appears to have been introduced more than a century ago, at a time when the Courts of Common Law were unable to grant discovery, in order to relieve the underwriter of the necessity of going to a court of equity (*f*). Further reasons for the practice are that "the underwriters have no means of knowing how a loss was caused: it occurs abroad and when the ship is entirely under the control of the assured. In addition to this the contract of insurance is made, in peculiar terms, on behalf of the assured himself and all persons interested, and who these persons are, especially at the time of the loss, is entirely unknown to the underwriters" (*g*). Nor was the practice of making the order on all parties interested, without an affidavit, altered by the Judicature Acts (*h*).

The order is very comprehensive in form and runs as follows (*i*):—"It is ordered that the plaintiff and all persons interested in these proceedings and in the insurance, the subject of this action, do produce and show to the defendant, his solicitors or agents, upon oath, all insurance slips, policies, letters of instruction, or other orders for effecting such slips or policies, or relating to the insurance or the subject-matter of the insurance on the ship , or the cargo on board

(*f*) See Goldschmidt *v.* Marryat (1809), 1 Camp. at p. 562, per Mansfield, C. J.

(*g*) Per Brett, L. J., in China SS. Co. *v.* Commercial Ass. Co. (1881), 8 Q. B. D. 142, at p. 145.

(*h*) *Ibid.*; and see also West of England Bank *v.* Canton Ins. Co. (1877), 2 Ex. D. 472.

(*i*) App. K. to R. S. C. 1883, No. 19.

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thereof, or the freight thereby, and also all documents relating to the sailing or alleged loss of the said ship, the cargo on board thereof and the freight thereby, and all letters and correspondence with any person or persons in any manner relating to the effecting the insurance on the said ship, the cargo on board thereof, or the freight thereby, or any other insurance whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the voyage insured by, or relating to the policy sued upon in this action, or any other policy whatsoever effected on the said ship, or the cargo on board thereof, or the freight thereby on the same voyage. Also all correspondence between the captain or agent of the vessel and any other person, with the owner or any person or persons previous to the commencement of or during the voyage upon which the alleged loss happened. Also all protests, surveys, log books, charter-parties, tradesmen's bills for repairs, average statements, letters, invoices, bills of parcels, bills of lading, manifests, accounts, accounts-current, accounts-sales, bills of exchange, receipts, vouchers, books, documents, correspondence, papers, and writings (whether originals, duplicates, or copies respectively), which now are in the custody, possession, or power, of the said plaintiff and the said other persons as aforesaid, his, or their, or any or either of their brokers, solicitors, or agents, in any way relating or referring to the matters in question in this action, with liberty for the defendant, his solicitors, or agents to inspect and take copies of or extracts from the same or any, or either of them, [and that in the like manner the plaintiff and the said other persons as aforesaid do account for all such documents as were once, but are not now, in his, their, or any or either of their possession, custody, or power (*j*),] and that in the meantime all further proceedings be stayed, and that the costs of and occasioned by this application be ."

Stringent nature of the order.

1272. It will be observed that this order is much more stringent than the common order for discovery made in an

(*j*) See China SS. Co. *v.* Commercial Ass. Co., *supra;* O. LXI. r. 33.

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ordinary action, which only embraces such documents relating to the matters in question in the action as are or have been in the possession or power of the party. From the observations above cited of Brett, L. J. (*k*), it might have been inferred that the order would only be made against a shipowner, with the object of obtaining from him information of which he alone was possessed. But the terms of the order and the decisions thereon go far beyond such a limitation. Thus, it was held that the order was properly made against mortgagees who had never sailed or been in possession of the vessel, and that it was not a sufficient compliance with the order for them to swear that they had no papers (*l*). The position was thus explained by Cleasby, B.:—"The interest of the plaintiffs is that of bare mortgagees. They have nothing to do with the sailing of the ship; they merely have an interest in the ship itself. The ship is lost; they bring this action. Is the underwriter entitled to call upon them not only to make an affidavit and to produce that which they have—which is nothing, from their interest being such as I have mentioned—but to cause these papers to be produced upon affidavit by the mortgagor, who, by permission of the mortgagee has sailed the ship, and who, I assume, would be the person in possession of all the ship's papers? I do not say that the mortgagees would be *bound* to produce through the mortgagor all those papers—we do not decide that—but at all events, they cannot say: 'We will do no more than make an affidavit that we have no papers ourselves, or none under our actual control.' No; they must go further, and endeavour to comply with the practice in substance, that is to say, they must endeavour to produce the ship's papers; they must satisfy us that they have made application to the mortgagor and have done what they can to place the defendant in the position of knowing what his defence to the action is" (*m*).

Made against mortgagees.

(*k*) See also per Cockburn, C. J., in Rayner *v.* Ritson (1865), 35 L. J. Q. B. at p. 61.

(*l*) West of England Bank *v.* Canton Ins. Co. (1877), L. R. 2 Ex. D. 472.

(*m*) Per Cleasby, B., L. R. 2 Ex. D. at p. 474. The judgments of

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Owner of goods and re-assured.

Similarly, the order is made against a plaintiff claiming on a policy on goods (*n*), and against an underwriter suing upon a policy of re-insurance (*o*). A similar order has also been granted against an assured in an action brought against him by an underwriter to recover back money alleged to have been obtained by fraud (*p*). The order in this case was made after the delivery of pleadings on both sides and after a clear definition of the issues. In a later case, however, where the plaintiffs, an insurance company, were seeking to recover from a bank in this country losses paid to the latter on account of foreign assured, which the bank after collecting had duly paid over to their principals abroad, and an application for the affidavit was made immediately after the issue of the writ, it was considered by the Court of Appeal that some passages in the judgments in Boulton *v.* Houlder went too far, and that the order asked for ought not to be made, at any rate, in the present state of the litigation (*q*).

It is to be observed that the order will only be made where the case is really one of marine insurance. It has been refused not only where the transit covered was entirely inland (*r*), but also in two cases where it was partly by sea and partly by land (*s*); but it was granted by the Court of

the Court of Appeal in China SS. Co. *v.* Commercial Ass. Co., *ubi supra*, are to the same effect. For an instance where the Court was not satisfied that the plaintiffs had done their best to obtain papers, see London & Provincial Co. *v.* Chambers (1900), 5 Com. Cas. 241.

(*n*) See per A. L. Smith and Chitty, L. JJ., in the case next cited.

(*o*) China Traders' Co. *v.* Royal Exch. Ass. Corp., [1898] 2 Q. B. 187; overruling two Divisional Court decisions to a contrary effect.

(*p*) Boulton *v.* Houlder, [1904] 1 K. B. 784, C. A.

(*q*) National Benefit Assurance Co., Ltd. *v.* Hambro, Lloyd's List, 31st July, 1919. Cf. British Isles Mar. & Gen. Ins. Co., Ltd. *v.* Bostandji (1920), 5 Lloyd's List Law Rep. 202, where underwriters who had paid a broker for a loss of goods, brought an action against him to recover back the money on the ground that the goods had not been shipped, and the Court of Appeal made an order for ship's papers.

(*r*) Schloss *v.* Stevens (1905), 10 Com. Cas. 224, C. A. See also Tannenbaum *v.* Heath (1908), 13 Com. Cas. 264, C. A.

(*s*) Henderson *v.* The Underwriting, &c. Assoc., [1891] 1 Q. B. 557; Village Main Reef Co. *v.* Stearns (1900), 5 Com. Cas. 246.

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Appeal where the voyage was mainly by sea, and the last-mentioned decisions were questioned by the Court (*t*).

Discovery where action brought in name of agent.

When the nominal plaintiff has effected the policy as an agent for another, the underwriter is entitled to the same discovery as if the real assured were a party to the action (*u*).

Correspondence passing after notice of abandonment between underwriters and the salvage association employed to protect their interests has been held by the Court of Appeal to be privileged (*v*).

Who can sue?

1273. Questions as to who are competent and proper parties to avail themselves of policies have already been sufficiently discussed (*w*). An action on a policy may be brought in the name of the broker, or other agent, who has effected it in his own name (*x*), and, speaking generally, persons in whose interest a policy has been effected (*y*), or to whom the policy has been properly assigned (*z*), can sue thereon, as well as the nominal assured (*a*).

Province of the jury.

Questions sometimes arise, in cases of marine insurance, as to the respective provinces of judge and jury. It is within the province of the jury to determine questions of fact relating to the existence of mercantile usage, and to the use and meaning of mercantile terms. The customs of merchants,

(*t*) Harding *v.* Bussell, [1905] 2 K. B. 83.

(*u*) Willis *v.* Baddeley, [1892] 2 Q. B. 324. As to discovery where an action brought in the name of an assured is conducted by the underwriter who is subrogated to his rights, see James Nelson & Sons, Ltd. *v.* Nelson Line, Ltd., [1906] 2 K. B. 217.

(*v*) Adam SS. Co., Ltd. *v.* London Assce. Corp., [1914] 3 K. B. 1256.

(*w*) See Part I. Chap. VIII. on Description of Assured in the Policy, &c.

(*x*) Usparicha *v.* Noble (1811), 13 East, 332; Provincial Ins. Co. of Canada *v.* Leduc (1874), L. R. 6 P. C. 224; Phillips, § 1965.

(*y*) Sunderland Marine Ins. Co. *v.* Kearney (1851), 16 Q. B. 925; 20 L. J. Q. B. 417; Browning *v.* Provincial Ins. Co. of Canada (1873), L. R. 5 P. C. 263.

(*z*) Mar. Ins. Act, s. 50 (2), *ante*, § 175.

(*a*) In Swan *v.* Maritime Ins. Co., [1907] 1 K. B. 116; 12 Com. Cas. 73, Channell, J., held that the plaintiff need not be the holder of the policy in order to maintain an action thereon, and thought that a mortgagor, who is interested in the insurance as well as the mortgagee, may sue although the policy has been handed over to the latter.

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Usages.

and the general and known usages of trade, when they have been ascertained and determined by a course of judicial decision, form part of the law merchant, and as such are thenceforward judicially noticed by the Courts (*b*).

The usages, however, of a particular trade (*c*), or of a particular place, as the usages at Lloyd's (*d*), must be proved by parol evidence to the satisfaction of the jury; and whether the parties to the contract must, from their place of residence, habits of business, or other circumstances, be taken to be cognisant of the usage at Lloyd's, is also a question for the jury (*e*), according to whose finding thereon the Courts hold the parties bound or not bound by the usage. It is, however, in all cases for the Court to decide whether evidence of usage be admissible.

Terms of trade.

1274. The construction of the policy, when the meaning of its terms is ascertained, is for the Court; but the interpretation to be put upon technical terms (*f*), the extension given by mercantile usage to descriptions of ports or places named in the policy (*g*), and the construction of peculiar, novel, or unusual clauses by received practice or known usage (*h*), is for the jury. In these cases it is for the jury to say what the meaning of the expression is, but for the Court to decide what the meaning of the contract is (*i*).

Materiality of

The question of the materiality of a representation (*j*) or

(*b*) Brandao *v.* Barnett (1846), 12 Cl. & F. 787.

(*c*) Pelly *v.* Royal Exch. Ass. Co. (1757), 1 Burr. 341; Noble *v.* Kennoway (1780), 2 Dougl. 510; Milward *v.* Hibbert (1842), 3 Q. B. 120.

(*d*) Gabay *v.* Lloyd (1825), 3 B. & Cr. 793; Lawrence *v.* Aberdein (1821), 5 B. & Ald. 107.

(*e*) Stewart *v.* Aberdein (1838), 4 M. & W. 211; Sweeting *v.* Pearce (1861), 7 C. B. N. S. 449; 9 *ibid.* 534.

(*f*) Houghton *v.* Gilbart (1836), 7 C. & P. 701.

(*g*) Constable *v.* Noble (1810), 2 Taunt. 403; Cockey *v.* Atkinson (1819), 2 B. & Ald. 460; Robertson *v.* Clarke (1824), 1 Bing. 445; Moxon *v.* Atkins (1812), 3 Camp. 200.

(*h*) Parr *v.* Anderson (1805), 6 East, 202, 207.

(*i*) Per Parke, B., in Hutchinson *v.* Bowker (1839), 5 M. & W. 542.

(*j*) M'Dowall *v.* Fraser (1779), 1 Dougl. 260; Mackintosh *v.* Marshall (1843), 11 M. & W. 121; Duer, Representations, 78, 196.

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representation and concealment.

concealment (*k*) is for the jury, though the Judge in such cases ought to take care that they are not misled by anything that comes out in the evidence (*l*). The question whether a given ship be out of time on a given voyage seems exclusively a question for the jury (*m*).

Deviation.

In cases of deviation, the question as to what is the usual or prescribed course of the voyage insured is, generally speaking, for the jury, and is to be made out by the evidence of mercantile men. When so ascertained, the question whether, upon the whole construction of the policy and under all the circumstances of the case, there has been what amounts to a deviation, is for the Court (*n*). It is for the jury to say whether a given voyage has been commenced or prosecuted within a reasonable time (*o*).

Delay.

Seaworthiness.

The question whether the ship was seaworthy when she sailed is for the jury; and whether anything has been done to dispense with the obligation of the implied warranty is for the Court (*p*).

Illegality.

In cases of alleged illegality for violating the laws of blockade, the question whether actual notice of a blockade has reached the captain is for the jury (*q*); whether he is to be presumed in law to have had notice in consequence of a certain public notification by the government is for the Court (*r*); but whether the captain was endeavouring to break the blockade when taken is a question for the jury (*s*).

(*k*) Littledale *v.* Dixon (1805), 1 B. & P. N. R. 151; Rawlins *v.* Desborough (1840), 2 Mood. & Rob. 328; Westbury *v.* Aberdein (1837), 2 M. & W. 267.

(*l*) Mackintosh *v.* Marshall (1843), 11 M. & W. 126.

(*m*) Littledale *v.* Dixon (1805), 1 B. & P. N. R. 151.

(*n*) So Arnould, 2nd ed. p. 1307, *sed quære.*

(*o*) Mount *v.* Larkins (1831), 8 Bing. 108. See also Phillips *v.* Irving (1844), 7 M. & Gr. 325. By sect. 88 of the Mar. Ins. Act, 1906, where any reference is made in the Act to reasonable time or reasonable diligence, the question what is reasonable is one of fact.

(*p*) So Arnould, 2nd ed. p. 1307, citing Weir *v.* Aberdein (1819), 2 B. & Ald. 320.

(*q*) Harratt *v.* Wise (1829), Dans. & Ll. 234; Winder *v.* Wise (1829), *ibid.* 238.

(*r*) Naylor *v.* Taylor (1829), Dans. & Ll. 240. (*s*) *Ibid.*

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Extent of interest intended to be insured.

When the question turns upon the extent to which the plaintiff is entitled to recover in respect of his interest, the jury may be asked whether, in procuring the policy to be effected, he intended to protect his own interest only, or that also of other parties not named on the record, but having an interest in the subject of insurance (*t*).

Constructive total loss.

In determining whether the loss on a wreck or stranded ship is constructively total, the question whether the case was one for abandonment rather than repair is for the jury. Whether notice of abandonment has been given in due time was said by Arnould to be a question for the Court. This opinion derives considerable support from the reported cases (*u*). The Marine Insurance Act, however, which provides that notice of abandonment must be given with reasonable diligence after the receipt of reliable information (*x*), also declares that the question what is reasonable diligence is one of fact (*y*). It seems to follow that the question whether notice of abandonment was given in due time is one for the jury (*z*). As, however, the onus of proof that the notice was given in due time is on the assured, the judge has no doubt power to hold on the facts as proved that he has given no evidence which justifies the judge in leaving the question to the jury (*a*).

Reasonable skill and care.

In actions against policy brokers and other agents for negligence, questions as to reasonable skill and care, due

(*t*) Carruthers *v.* Sheddon (1815), 6 Taunt. 14; Irving *v.* Richardson (1831), 2 B. & Ad. 193; Scott *v.* Globe Mar. Ins. Co. (1896), 1 Com. Cas. 370. "I have to ascertain as matter of fact the risk intended to be covered," per Mathew, J.

(*u*) See the cases cited, *ante*, §§ 1192—1194, in particular Mellish *v.* Andrews (1813), 15 East, 13; Aldridge *v.* Bell (1816), 1 Stark. 198; Reid *v.* Bonham (1821), 3 Brod. & B. 147. See also Anderson *v.* Royal Exchange Ass. Co. (1805), 7 East, 38.

(*x*) Sect. 62 (3).

(*y*) Sect. 88.

(*z*) See per Shee, J., in Kemp *v.* Halliday (1866), 34 L. J. Q. B. 233, 241. In Gernon *v.* Royal Exchange Ass. (1815), 6 Taunt. 383, Gibbs, C. J., left the question to the jury, subject to the opinion of the Court.

(*a*) See Kaltenbach *v.* Mackenzie (1878), 3 C. P. D. 467, per Thesiger, L. J., at p. 489.

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diligence, and gross negligence must, generally speaking, be decided by the jury (*b*).

Where a vessel alleged by her owners to be a constructive total loss is lying unrepaired in a distant port, an order may be made for her to be brought to this country (*c*).

Sufficiency of proof.

1275. The rules of evidence applicable to policies of insurance do not differ from those which prevail in other cases. Questions of the burden of proof and the sufficiency of the evidence have to a great extent been considered in the course of this work; but the following remarks, reproduced chiefly from previous editions, may be of some use to the practitioner.

Proof of the making of the policy.

The allegation that the policy was effected by the nominal assured as agent for the party interested must be substantially proved as laid (*d*).

Proof of agency for assured.

In the leading case on this subject, the allegation that the policy was effected by the plaintiffs as agents for one Lund, and for his use and benefit, was held to be sustained by proof that plaintiffs had effected the policy as general agents for Lund and consignees of the bill of lading; and that Lund, after being informed of their having effected the policy on his behalf, had written to approve of their having done so (*e*).

Ratification.

The main principle acted upon in this case, and illustrated more or less by most of the subsequent decisions on the point, is that subsequent ratification of the insurance by the principal on whose behalf it is effected, is equivalent to a prior order on his part to insure—*omnis ratihabitio retrotrahitur, et mandato æquiparatur* (*f*).

(*b*) See *ante*, Part I. Chap. VII.

(*c*) Steamship "New Orleans" Co. *v.* London & Prov. Mar. &c. Ins. Co., [1909] 1 K. B. 943.

(*d*) See Boston Fruit Co. *v.* British and Foreign Mar. Ins. Co., [1906] A. C. 336, and Yangtze Ins. Ass. *v.* Lukmanjee, [1918] A. C. 585.

(*e*) Wolff *v.* Horncastle (1798), 1 B. & P. 316.

(*f*) Lucena *v.* Craufurd (1808), 3 B. & P. N. R. 269; *S. C.* on *venire de novo*, 1 Taunt. 325; Routh *v.* Thompson (1811), 13 East, 274;

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After verdict, it will be intended that sufficient proof has been given that the plaintiffs effected the policy on behalf of the party really interested. Lord Ellenborough, therefore, refused to arrest judgment in an action on a policy, though it appeared on the face of the declaration that the plaintiffs on the record were neither the persons named in the policy nor the parties interested (*g*).

Agency for insurer. Proof of subscription of the policy.

1276. Unless admitted, as is very generally the case, the subscription of the policy must be proved in the usual way. Where the underwriter's signature has actually been written by himself, no difficulty can arise; where, however, as not unfrequently occurs, the policy has been subscribed by an agent on his behalf, a question may arise as to the authority of the agent. The cases relating to this question have been referred to in an earlier part of this work (*h*).

When copy of alleged policy can be put in.

1277. The assured, in order to prove the policy, produced in evidence what purported to be a copy received from the defendant's broker. It was objected on the part of the defendant that this was inadmissible in evidence, because a stamped original never had existed, and interlocutory evidence to that effect was offered on the instant. But the judge refused to determine that question in the way of an interlocutory point, as it went to the whole cause of action; he admitted the copy, received the evidence on the part of the defendant in its own order, and submitted the point as one of the questions in the case to the jury. The Court in Banc approved of this course as right (*i*).

Routh *v.* Thompson (1809), 11 East, 428; Bell *v.* Janson (1813), 1 M. & S. 201; Hagedorn *v.* Oliverson (1814), 2 M. & S. 485; Williams *v.* North China Ins. Co. (1876), 1 C. P. D. 757. See further as to evidence of ratification, and as to what amounts to ratification, *ante*, §§ 140—143.

(*g*) Mellish *v.* Bell (1812), 15 East, 4.

(*h*) See §§ 166—168, *ante*.

(*i*) Stowe *v.* Querner (1870), L. R. 5 Exch. 155. See Stamp Act, 1891, s. 97 (3).

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Proof of compliance with warranties.

Arnould (*k*) stated that compliance by the plaintiff with all express warranties, "being conditions precedent to the policy's attaching," must be proved by him as part of his case. This is probably true, though it is not correct to speak of all warranties as "conditions precedent to the policy's attaching" (*l*). It is clear, however, that the onus of proving unseaworthiness is upon the underwriter (*m*), and it is not clear why in this respect there should be a distinction between warranties express and implied.

Proof of interest in ship.

1278. Under the Merchant Shipping Act, 1894 (*n*), the register and certificate of registry of a ship are evidence of the facts stated therein (*o*), and can, therefore, be used to prove interest in the ship. Upon a policy on ship, the possession of the assured as owner is also *primâ facie* evidence of property, but a traverse of that fact, supported by evidence, may render it necessary for the assured to prove additional facts. When the parties to an action were not allowed to give evidence, the proof of ownership was of course more difficult than it is now. Where it was proved by the captain that the assured were the persons by whom, as owners, he was appointed and employed—this was held to be sufficient *primâ facie* evidence of ownership; and though it afterwards appeared, by his answers on cross-examination, that the ownership was derived to the assured under a bill of sale executed by himself as attorney to the former owner, it was further held that it did not on this account become necessary to produce the bill of sale or the ship's register, or to give any further proof of property beyond the mere fact of ownership, no

(*k*) 2nd ed. p. 1310, citing Arcangelo *v.* Thompson (1811), 2 Camp. 620; D'Israeli *v.* Jowett (1796), 1 Esp. 427; Watson *v.* King (1815), 4 Camp. 272.

(*l*) See Mar. Ins. Act, 1906, s. 33 (3), *ante*, § 634.

(*m*) Pickup *v.* Thames Ins. Co. (1878), 3 Q. B. D. 594.

(*n*) Sects. 64, 695, reproducing in effect sect. 107 of the Merchant Shipping Act, 1854.

(*o*) But not conclusive evidence: see The Princess Charlotte (1863), Br. & L. 75, where the national character of the ship was in dispute.

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contrary proof having been adduced on the other side (*p*). To the same effect it was ruled by Lord Kenyon, that evidence of the assured having exercised acts of ownership in directing the loading, &c. of the ship and paying the people employed, was sufficient proof of interest (*q*); and by Lord Ellenborough, that evidence that the party in whom interest was averred had ordered and paid for stores, &c., was sufficient *primâ facie* proof of his ownership, though it came out on cross-examination that he had derived his title under a bill of sale which was not produced (*r*).

Agent cannot deny his principal.

An agent, after accounting with his principals and receiving money in that capacity, cannot dispute their title, and say that he did not receive the money for them, but for some other person. Hence, where a broker, after having become sole registered owner of a ship which had been previously owned by one of two parties, effected an insurance on the partnership account, and accounted with the partnership for the premiums, it was held that he could not set up his title on the register as a defence to an action for money had and received, brought by the partnership to recover the amount of a loss which had been paid by the underwriter to him, as the agent of both partners (*s*).

Proof of insurable interest in freight.

The question of insurable interest in freight has already been so fully considered (*t*) that it is unnecessary to say anything more as to the facts which must be proved to establish such an interest.

Proof of insurable interest in goods.

1279. Interest in goods is proved either as in the case of ship by evidence of possession or of acts of ownership; or by transfer of title to the assured under bill of lading or other document; or by evidence of payment of the price or of a contract under which the property has passed.

(*p*) Robertson *v.* French (1803), 4 East, 130.
(*q*) Amery *v.* Rodgers (1794), 1 Esp. 208.
(*r*) Thomas *v.* Foyle (1803), 5 Esp. 88.
(*s*) Dixon *v.* Hamond (1819), 2 B. & Ald. 310. See Hickie *v.* Rodocanachi (1859), 4 H. & N. 455.
(*t*) *Ante*, §§ 262—279.

Sect. 1279. Bill of lading.

The bill of lading is the usual evidence of the ownership of property shipped, the consignee or his assignee being presumed to be the owner where it is not otherwise expressed in the bill of lading (*u*). It must be remembered that, even against the shipowner, the bill of lading is not more than *primâ facie* evidence of the shipment of the goods (*x*). In an action on the policy, being merely an acknowledgment by the master, it is no evidence without authentication and some proof that the goods specified in it were actually shipped on board (*y*). If it be subscribed "contents unknown," it has been held that such bill of lading is not evidence either of the quantity of the goods, or of the insurable interest of the consignee (*z*). It is, however, submitted that such bill of lading is *primâ facie* evidence that the property in the packages mentioned therein, and in whatever may be proved to be their contents, is in the holder of the bill.

Payment of price of goods.

Payment of price of the goods is satisfactory evidence of insurable interest; hence a bill of parcels, with the vendor's receipt, for goods sold abroad, was very clearly held to be sufficient proof of interest (*a*); so the fact that consignees have given their acceptance to the consignors for the price, and on account, of the goods, especially if coupled with proof of payment, would, it seems, be satisfactory evidence (*b*).

(*u*) Hibbert *v.* Carter (1787), 1 T. R. 745; Caldwell *v.* Ball (1786), 1 T. R. 205. See *ante*, § 292.
(*x*) All that is done by the Bills of Lading Act is to make this acknowledgment conclusive against "the master or other person signing the same": 18 & 19 Vict. c. 111, s. 3. See Grant *v.* Norway (1851), 10 C. B. 665; Maclean *v.* Fleming (1871), L. R. 2 H. L. (Sc.) 128; and the other cases cited, Carver, s. 69.
(*y*) M'Andrew *v.* Bell (1795), 1 Esp. 373; Dickson *v.* Lodge (1816), 1 Stark. 226.
(*z*) Haddow *v.* Parry (1810), 3 Taunt. 303. The captain who signed the bill of lading was dead, and Sir James Mansfield seems to have thought at the trial that it could not be used at the trial as an admission, on proof of the handwriting of the deceased. On the argument of the rule for a new trial, however, Lawrence, J., seemed to think that the bill of lading, without the limiting words, would have been evidence that the goods had been received on board. It is submitted that the view of Lawrence, J., is the correct one.
(*a*) Russel *v.* Boehm (1740), 2 Str. 1127.
(*b*) See Davies *v.* Reynolds (1815), 1 Stark. 115.

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Documents kept at the custom-house.

To prove that the goods insured were shipped, a clerk in the custom-house produced the copy of an official paper, containing an account of the cargo as examined by the searcher; the official paper goes with the ship, and the copy is kept at the custom-house. Chambre, J., ruled this copy to be admissible without calling the searcher, as being a paper made by the appointed officer under the authority of an Act of Parliament, and lodged as an official document in the custom-house (*c*).

Proof of insurable interest in bottomry.

In an action upon a policy on bottomry and respondentia loans, evidence of the execution of the bond, and of the interest of the borrower in the ship or goods, is sufficient proof of the interest of the assured, and the borrower himself was, even before Lord Denman's Act, and *à fortiori* would be so now, a competent witness to prove his own interest in the ship or goods, by hypothecating which he raised the loan (*d*).

Respondentia bond no proof of interest in goods, except by usage.

But in a policy on goods a respondentia bond is no proof of interest in the goods on which the money was borrowed (*e*); though by the usage of the East India trade, proof of money laid out by the captain in the course of the voyage, and for which he charged respondentia interest, was held to be proof of insurable interest in a policy "on goods, specie, and effects" (*f*).

Amount of interest.

1280. Under a general averment of interest in the entire thing insured, the plaintiff may prove an interest in part, and recover *pro tanto;* thus, where one of four part owners of a ship insured her freight generally in an open policy, and averred his interest generally, without specifying it to be in only an aliquot part of the freight, it was held that he might recover in proportion to the amount of interest he proved (*g*). So, *à fortiori,* if the plaintiff prove a greater interest than he has alleged in his claim, this shall not preclude him from recovering to the extent of the interest he has alleged (*h*).

(*c*) Johnson *v.* Ward (1806), 6 Esp. 47.
(*d*) Glover *v.* Black (1762), 1 W. Bl. 396.
(*e*) Glover *v.* Black (1762), 3 Burr. 1394; 1 W. Bl. 405, 422.
(*f*) Gregory *v.* Christie (1785), 3 Dougl. 419.
(*g*) Rising *v.* Burnett (1798), 2 Marsh. Ins. 738.

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Where a plaintiff, only interested in one-fourth of a ship, declared for a total loss of the entire ship and proved only a partial loss, he was held entitled to recover in proportion to the partial loss on his fourth (*i*).

Inception of risk.

1281. As we have elsewhere seen, before a loss can be recovered from the underwriter, it must be shown to have taken place within the period or local limits of the risk or voyage insured. Hence the fact that the ship was at the port, or had sailed on the voyage, or that the goods were loaded on board, before the loss, must be substantially proved as laid. This may be done by the testimony of the master or other officer acquainted with the circumstances, or by means of written directions transmitted to the master, or by licences, charter-parties, entrances, clearances, convoy bonds, &c., preparatory to the departure of the ship, and indicating her destination (*k*).

On ship.

It must be proved that the ship had sailed on the voyage insured, or if the loss should take place "at" the port where the risk is made to commence, then that the ship was at such port on the voyage insured (*l*). Where the ship has foundered at sea, this proof of her having sailed on the voyage insured has sometimes presented difficulty. The following points have been decided as to the sufficiency of the evidence. To prove that a ship, insured at and from Portsmouth to Quebec, had sailed for the latter place, a witness was called who stated that he had seen the ship in Stokes Bay going out with the other ships from Spithead, and that she had never since been heard of. Lord Ellenborough held this insufficient.

Production of convoy bond.

The convoy bond from the custom-house was then produced, with these words at the bottom of it—"convoy bond for Quebec"; and an officer from the customs said that

(*h*) Page *v.* Rogers (1785), 2 Marsh. Ins. 739.
(*i*) Gardiner *v.* Croasdale (1760), 2 Burr. 904; 1 W. Bl. 198.
(*k*) Stark. Evidence, vol. iii. p. 873, 3rd ed.
(*l*) Cohen *v.* Hinckley (1809), 2 Camp. 51.

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it was in the course of office to write these words on the bond, and that though he did not know of any act of office being done on it, yet he had no doubt that the papers, for a voyage to Quebec, were delivered to the captain before sailing. Lord Ellenborough held this good *primâ facie* evidence that the ship had sailed on the voyage insured (*m*).

Of charter-party, or clearances.

In the same case Lord Ellenborough said that if it could be shown that the ship had a particular destination by charter-party, he should presume that she sailed on the chartered voyage; so, on proof that she had cleared out for a particular port, the presumption would be that she had sailed for it when she dropped from her moorings (*n*).

Of licence.

A licence to carry a cargo to a place named in the policy as the port of destination is *primâ facie* evidence that the ship, when she left her port of outfit, sailed on the voyage insured (*o*).

What is insufficient evidence for this purpose.

In order to prove, under a policy on goods, that the ship had sailed on a voyage from Leghorn to Lisbon, the plaintiff called a packer, resident in Leghorn, who stated that he had packed the goods at the warehouse of the shipper, and by his orders delivered them to a boatman, to go by the ship; the boatman was also called, who stated that he, by the shipper's orders, had delivered them on board the ship and taken a receipt for them from the captain, whom he knew, and that he had heard, both from the shipper and the captain, that the vessel was bound for Lisbon. Abbott, C. J., held that this was not even *primâ facie* evidence that the ship ever sailed for Lisbon (*p*).

Time of sailing.

Where the averment was that the ship sailed after the making of the policy, and the proof was that she sailed before, the variance was held to be immaterial (*q*). A shipping entry at the custom-house has been admitted to show the time of the ship's sailing (*r*).

(*m*) Cohen *v.* Hinckley (1809), 2 Camp. 51.
(*n*) *Ibid.* 52.
(*o*) Marshall *v.* Parker (1809), 2 Camp. 69.
(*p*) Koster *v.* Innes (1825), Ry. & Mood. 333.
(*q*) Peppin *v.* Solomons (1794), 5 T. R. 496.
(*r*) Hughes *v.* Wilson (1816), 1 Stark. 180.

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1282. In case of goods, the loading of them on board must be properly proved, and for this purpose the bill of lading of itself is not evidence. There must be direct testimony of the actual shipment of the goods (*s*).

On goods.

Proof also must be given that the loss took place within the period of the risk, or the limits of the voyage insured. Thus, where it appeared that the ship, after being turned away from her port of destination, sailed on another voyage not protected by the policy, and no proof was given whether the damage sustained by the goods had accrued on the first or the second of these two voyages, Lord Ellenborough directed a nonsuit on the ground that there was no distinct evidence that the goods were injured while protected by the policy (*t*).

Loss on goods accrued upon the risk, or voyage, insured.

On freight.

With regard to freight, the question when there is an inception of the risk has been fully considered (*u*). If the plaintiff relies on a contract to ship the goods on freight, he must be prepared to show that such contract is legally binding (*x*), though it need not be written or under seal (*y*), and also that the perils insured against prevented freight being earned (*z*).

Proof of loss.

1283. Direct proof of the fact of loss may be, and in most cases is, given by the parol testimony of the master, officers, or some of the crew of the ship. It may also be proved by other legal evidence. The condemnation of a foreign Court of Prize is not evidence to prove a capture in fact, though, after such proof has been given, it is evidence of the grounds of condemnation (*a*).

(*s*) *Ante*, § 1279.
(*t*) Parkin *v.* Tunno (1809), 2 Camp. 59.
(*u*) *Ante*, §§ 510—519.
(*x*) Patrick *v.* Eames (1813), 3 Camp. 441.
(*y*) Flint *v.* Flemyng (1830), 1 B. & Ad. 48.
(*z*) For a full discussion of the question of the commencement of the risk on ship, goods, or freight, see *ante*, Part I. Chap. XVII.
(*a*) Marshall *v.* Parker (1809), 2 Camp. 69. In one case Le Blanc, J., is reported to have ruled that the fact of capture might be proved by the production of Lloyd's book, in which it was mentioned: Abel *v.* Potts (1800), 3 Esp. 242, *sed quære*.

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The protest of the captain cannot be put in evidence for the shipowner, but if produced against him by the other side, it thereupon becomes evidence for the ship also.

Proof of confiscation.

In one case Lord Ellenborough ruled that, in order to prove a confiscation, it was enough to show that the goods were forcibly taken possession of by the officers of government (*b*).

Presumptive proof of loss.

We have already sufficiently considered what will amount to presumptive proof of loss by foundering, and need not here repeat what has been said on that head (*c*). It has been held sufficient to establish a presumption of the loss of a ship on the voyage, for the shipowners to prove that they had not heard of her arrival; it is not necessary to call witnesses from the port of destination to prove that the ship never arrived there (*d*).

During the recent European War, it frequently became a question, in the case of ships insured in one policy against perils of the sea, and in another against war risks only, where all that was definitely known about them was that they had started on a voyage and never been heard of again, upon which set of underwriters lay the liability for the loss. In such cases the parties laid before the Court evidence of collateral circumstances, such, for instance, as the fate and experiences of other vessels which sailed at or about the same time, the usual course of such a voyage, the chances that the vessel in question might have succumbed to stormy weather, or to enemy action, and her fitness for resisting tempest or warlike operations. Generally the Court was able to come to a definite conclusion—based, no doubt, on probabilities—as to the cause of the loss, without relying too much on any presumption (*e*).

(*b*) Carruthers *v.* Gray (1811), 3 Camp. 142.
(*c*) *Ante*, §§ 813, 814.
(*d*) Twemlow *v.* Oswin (1809), 2 Camp. 85.
(*e*) See for example Munro, Brice & Co. *v.* War Risks Assn., [1918] 2 K. B. 78; reversed (in effect) by the Court of Appeal in Munro, Brice *v.* Marten, [1920] 3 K. B. 94. See *ante*, § 905a.

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Assured who claims for a total may recover for a partial loss.

1284. Unless the policy otherwise provides, the assured may recover for a partial although he has brought his action for a total loss (*f*); indeed, this is matter of common form. He may, as we have already seen, recover for loss by salvage, although it be not specifically alleged by him as a loss (*g*); but if it be salvage which he has been obliged to pay to recaptors, he cannot recover the amount unless he produces and proves the proceedings in the Admiralty Court; for the extent of his claim depends on the judgment of that Court (*h*). Where the assured on ship, who had claimed a total, but was only entitled to an average, loss, merely proved that his ship had sustained some damage, but gave no evidence as to its extent, Lord Tenterden directed the jury to find a verdict for the plaintiff, with nominal damages only (*i*).

Mercantile interest.

By the Common Law no interest was recoverable on the amount of loss, except in cases where the assured had, before the trial, made application to the underwriter for the amount, and notified to him the ground of his application (*k*). Now, however, by the 3 & 4 Will. 4, c. 42, s. 29, juries may, if they think fit, give damages in the nature of interest, over and above the money recoverable, in all actions of policies of insurance.

Interest on bottomry loans.

In regard to interest on bottomry loans, it has been laid down by Story, J., that the sum lent and the bottomry interest are to be considered as an aggregate debt from the time the bond becomes due by the successful termination of the voyage, and that, consequently, from such time common interest is to be allowed on the aggregate amount (*l*); and

(*f*) Mar. Ins. Act, 1906, s. 56 (4). See Gardiner *v.* Croasdale (1760), 2 Burr. 904; King *v.* Walker (1863), 2 H. & C. 384; 3 *ibid.* 209.
(*g*) Mar. Ins. Act, 1906, s. 65, *ante*, § 863. See also s. 73, sub-s. 2.
(*h*) Thellusson *v.* Shedden (1806), 2 B. & P. N. R. 228.
(*i*) Tanner *v.* Bennett (1825), Ry. & Mood. 182. Failure to prove losses amounting to 3 or 5 per cent. might, by virtue of the memorandum, disentitle the plaintiff to even nominal damages. See 2 Phillips, s. 2144.
(*k*) Bain *v.* Case (1829), 3 C. & P. 496. See Kingston *v.* M'Intosh (1808), 1 Camp. 518; Higgins *v.* Sargent (1823), 2 B. & Cr. 348.
(*l*) The Ship Packet (1823), 3 Mason, 255.

Sect. 1284. such, it seems, would now be the law in this country, as it is not to be supposed that the old maxim *accessio accessionis non est* (*m*) would in the present day have any weight with our Courts.

Burden of proof under plea of misrepresentation.

1285. Proof of misrepresentation will generally comprise the following facts:—1. That the representation was made; 2. That it was material; 3. That it was untrue. In order to prove the first point, recourse may be had to the party to whom the representation was made, or to others who heard it; its materiality is a question for the jury (*n*), and will generally be made out by the nature of the statement itself. The proof of the third point will depend upon, and be readily suggested by, the facts of the case.

Proof of illegality is on defendant.

Illegality is never presumed, but must be proved by the party who relies on it. Thus, whenever the defence turned on non-compliance with the Convoy Acts, Lord Ellenborough held that the burden of proof lay on the underwriters (*o*). So, where an insurance was made to a port or ports within a certain territory, where some of the ports were neutral and others hostile, it was held that the presumption was that the ship was destined to one of the neutral ports (*p*).

Constructive total loss.

It is upon the assured to show, in a case of alleged constructive total loss, that the circumstances attending the insured property were such as justified the notice of abandonment. It is upon the underwriter to show that this state of circumstances has not continued down to the time of action brought, so as to reduce the plaintiff's claim to an average loss (*q*). In a case of wrongful taking at sea and condemnation as a slaver by the Vice-Admiralty Court of St. Helena, Lord Campbell thought that inasmuch as from the wrongful seizure and notice of abandonment the loss was at one time to be regarded as total, the onus was cast upon the underwriter of showing that by subsequent events it ceased to be so (*r*).

(*m*) 2 Marshall, Ins. 759.

(*n*) Mar. Ins. Act, 1906, s. 20, sub-s. 7. The rule is the same as regards non-disclosure: Mar. Ins. Act, s. 18, sub-s. 4.

(*o*) Thornton *v.* Lance (1815), 4 Camp. 231; D'Aguilar *v.* Tobin (1816), Holt, 185; 2 Marsh. R. 265.

(*p*) Anon., 1 Chit. R. 49. See Hobbs *v.* Henning (1865), 34 L. J. C. P. 117.

(*q*) It is arguable that the Mar. Ins. Act of 1906 has changed the law on this point, and that now the state of circumstances justifying the notice need only exist at the time when the notice was given. See *ante*, § 1097a.

(*r*) Lozano *v.* Janson (1859), 28 L. J. Q. B. 337, 342; 2 E. & E. 100.

Sect. 1285.

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APPENDIX A.

XXXIV. Vict. c. XXI.

An Act for incorporating the members of the Establishment or Society formerly held at Lloyd's Coffee House in the Royal Exchange in the City of London, for the effecting of Marine Insurance, and generally known as Lloyd's; and for other purposes. [25*th May*, 1871.]

19. The rules set forth in the schedule to this Act shall be the fundamental rules of the society.

Fundamental rules in schedule.

THE SCHEDULE.

THE FUNDAMENTAL RULES OF THE SOCIETY.

1. There shall be underwriting members and non-underwriting members.

2. A non-underwriting member shall not underwrite in his own name at Lloyd's, or empower another person to underwrite for him at Lloyd's.

3. All underwriting business transacted at Lloyd's shall be conducted in the underwriting rooms, and not elsewhere.

4. An underwriting member shall not, by himself or by any partner or other substitute, directly or indirectly underwrite in the city of London a policy of insurance, as follows:—

(1) In the name of a partnership, or otherwise than in the name of one individual (being an underwriting member of the society) for each separate sum subscribed; or,

(2) For the account, benefit, or advantage of any company or association, unless they are subscribers to the society, nor unless every policy underwritten for their account, benefit, or advantage is underwritten in their ordinary place of business.

5. A member shall not open an insurance account in the name of any person not being a member or subscriber.

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54 & 55 Vict. c. 39 (Stamp Act, 1891).

Charge of Duty upon Instruments.

Charge of duties in schedule.

1. From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the First Schedule to this Act shall be the several duties in the said schedule specified, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by this Act, and shall be subject to the exemptions contained in this Act and in any other Act for the time being in force.

All duties to be paid according to regulations of Act.

2. All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

How instruments are to be written and stamped.

3.—(1.) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

(2.) If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable.

Instruments to be separately charged with duty in certain cases.

4. Except where express provision to the contrary is made by this or any other Act,—

(a) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;

(b) An instrument made for any consideration in respect whereof it is chargeable with ad valorem duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.

Production of Instruments in Evidence.

Terms upon which instruments not duly stamped

14.—(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee,

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notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

may be received in evidence.

(2.) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the Commissioners may appoint the money received by him for the duty and penalty.

(3.) On production to the Commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument.

(4.) Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Policies of Insurance.

Meaning of policy of insurance.

91. For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

Policies of Sea Insurance.

Meaning of policy of sea insurance.

92.—(1.) For the purposes of this Act the expression "policy of sea insurance" means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may

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be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance.

(2.) Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

Contract to be in writing. 25 & 26 Vict. c. 63.

93.—(1.) A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance.

(2.) No policy of sea insurance made for time shall be made for any time exceeding twelve months.*

(3.) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.

Policy for voyage and time chargeable with two duties.

94. Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

No policy valid unless duly stamped.

95.—(1.) A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say,

(a) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover:

(b) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only.

(2.) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of one hundred pounds.

* See Finance Act, 1901, *infra*.

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Legal alterations in policies may be made under certain restrictions.

96. Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

Penalty on assuring unless policy duly stamped.

97.—(1.) If any person—

(a) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(b) makes or effects, or knowingly procures to be made or effected any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium, or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(c) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded,

he shall for every such offence incur a fine of one hundred pounds.

(2.) Every broker, agent, or other person negotiating or

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transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of one hundred pounds, and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer.

(3.) If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence in addition to any other fine or penalty to which he may be liable incur a fine of one hundred pounds.

FIRST SCHEDULE

(as amended by sect. 41 of the Finance Act, 1920 (10 & 11 Geo. 5, c. 18)).

STAMP DUTIES ON INSTRUMENTS.

	£	s.	d.
Policy of Sea Insurance—			
(1) Where the premium or consideration does not exceed the rate of 2*s.* 6*d.* per centum of the sum insured	0	0	1
(2) In any other case—			
(a) For or upon any voyage—			
where the sum insured—			
does not exceed 250*l.*	0	0	3
exceeds 250*l.* but does not exceed 500*l.* ...	0	0	6
„ 500*l.* „ „ 750*l.* ...	0	0	9
„ 750*l.* „ „ 1,000*l.* ...	0	1	0
„ 1,000*l.*, for every 500*l.* and any fractional part of 500*l.*	0	0	6
(b) For time—			
where the insurance is made for any time not exceeding six months, an amount equal to three times the amount which would be payable if the insurance were made upon a voyage;			
where the insurance is made for any time exceeding six months and not exceeding twelve months, six times the amount which would be payable if the insurance were made upon a voyage.			

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1 EDW. 7, c. 7 (FINANCE ACT, 1901).

PART II.

Stamps.

Provision as to continuation clauses in policies of sea insurance. (54 & 55 Vict. c. 39.)

11.—(1.) Notwithstanding anything contained in the Stamp Act, 1891, a policy of sea insurance made for time may contain a continuation clause as defined in this section, and such a policy shall not be invalid on the ground only that by reason of the continuation clause it may become available for a period exceeding twelve months.

(2.) There shall be charged on a policy of sea insurance containing such a continuation clause a stamp duty of sixpence in addition to the stamp duty which is otherwise chargeable on the policy.

(3.) If the risk covered by the continuation clause attaches, and a new policy is not issued covering the risk, the continuation clause shall be deemed to be a new and separate contract of sea insurance expressed in the policy in which it is contained, but not covered by the stamp thereon, and the policy shall be stamped in respect of that contract accordingly, but may be so stamped without penalty at any time not exceeding thirty days after the risk has so attached.

(4.) For the purposes of this section, the expression "continuation clause" means an agreement to the following or the like effect, namely, that in the event of the ship being at sea, or the voyage otherwise not completed on the expiration of the policy, the subject-matter of the insurance shall be held covered until the arrival of the ship, or for a reasonable time thereafter not exceeding thirty days.

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3 EDW. 7, c. 46 (REVENUE ACT, 1903).

Stamping of policies of insurance on ships under construction, &c.

8. A policy of insurance made or purporting to be made upon or to cover any ship or vessel, or the machinery or fittings belonging to the ship or vessel, whilst under construction or repair or on trial, shall be sufficiently stamped for the purposes of the Stamp Act, 1891, and the Acts amending the Act, if stamped as a policy of sea insurance made for a voyage; and though made for a time exceeding twelve months, shall not be deemed to be a policy of sea insurance made for time.

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[**Note.**—*The references at the end of the paragraphs are to the sections of this work which deal with the various provisions of the Act.*]

6 Edw. 7, c. 41.

An Act to codify the Law relating to Marine Insurance.
[21*st December*, 1906.]

Marine Insurance.

Marine insurance defined.

1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure. (§§ 1, 253.)

Mixed sea and land risks.

2.—(1.) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage. (§§ 1, 507.)

(2.) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined. (§ 1.)

Marine adventure and maritime perils defined.

3.—(1.) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance. (§§ 1, 217, 249, 734.)

(2.) In particular there is a marine adventure where—

(a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy. (§§ 1, 236, 240, 250, 257, 309.)

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Insurable Interest.

Avoidance of wagering or gaming contracts.

4.—(1.) Every contract of marine insurance by way of gaming or wagering is void. (§§ 9, 313, 313a, 319, 1253.)

(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer. (§§ 253, 313, 314, 317, 358.)

Insurable interest defined.

5.—(1.) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (§ 254.)

(2.) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof. (§§ 254, 257, 287, 288.)

When interest must attach.

6.—(1.) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not. (§§ 13, 258, 259, 281, 314.)

(2.) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss. (§ 258.)

Defeasible or contingent interest.

7.—(1.) A defeasible interest is insurable, as also is a contingent interest. (§ 255a.)

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(2.) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise. (§ 255a.)

Partial interest.

8. A partial interest of any nature is insurable. (§§ 259a, 284.)

Re-insurance.

9.—(1.) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it. (§ 322.)

(2.) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance. (§§ 322, 324.)

Bottomry.

10. The lender of money on bottomry or respondentia has an insurable interest in respect of the loan. (§§ 242, 289.)

Master's and seamen's wages.

11. The master or any member of the crew of a ship has an insurable interest in respect of his wages. (§§ 244, 245, 308.)

Advance freight.

12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss. (§§ 232, 263.)

Charges of insurance.

13. The assured has an insurable interest in the charges of any insurance which he may effect. (§ 362.)

Quantum of interest.

14.—(1.) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage. (§ 298.)

(2.) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit. (§§ 292, 298.)

(3.) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss. (§ 309.)

Assignment of interest.

15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the confract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law. (§ 174.)

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Insurable Value.

Measure of insurable value.

16. Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade: (§§ 219, 365.)

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance: (§§ 262, 365, 1041.)

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole: (§§ 365, 1010.)

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance. (§ 365.)

Disclosure and Representations.

Insurance is *uberrimæ fidei*.

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party. (§§ 522, 523, 575.)

Disclosure by assured.

18.—(1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. (§§ 523, 575, 578.)

(2.) Every circumstance is material which would influence the

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judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (§§ 575, 589.)

(3.) In the absence of inquiry the following circumstances need not be disclosed (§§ 609, 620), namely:—

(a) Any circumstance which diminishes the risk; (§ 624.)

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know; (§ 598.)

(c) Any circumstance as to which information is waived by the insurer; (§ 618.)

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty. (§ 619.)

(4.) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact. (§§ 591, 626, 1285.)

(5.) The term "circumstance" includes any communication made to, or information received by, the assured. (§§ 590, 600.)

Disclosure by agent effecting insurance.

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent. (§§ 577, 587, 588.)

Representations pending negotiation of contract.

20.—(1.) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract. (§§ 522, 523, 555, 567.)

(2.) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (§§ 531, 544, 554.)

(3.) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief. (§§ 527, 544.)

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(4.) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer. (§§ 530, 544, 558.)

(5.) A representation as to a matter of expectation or belief is true if it be made in good faith. (§§ 545, 558.)

(6.) A representation may be withdrawn or corrected before the contract is concluded. (§ 561.)

(7.) Whether a particular representation be material or not is, in each case, a question of fact. (§§ 557, 1285.)

When contract is deemed to be concluded.

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped. (§§ 34, 37, 41, 567, 576.)

The Policy.

Contract must be embodied in policy.

22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards. (§ 8.)

What policy must specify.

23. A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf:

(2) The subject-matter insured and the risk insured against:

(3) The voyage, or period of time, or both, as the case may be, covered by the insurance:

(4) The sums or sums insured:

(5) The name or names of the insurers. (§§ 8, 11, 18, 20, 26, 38, 81, 170, 171, 291.)

Signature of insurer.

24.—(1.) A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal. (§§ 8, 26, 38, 79, 80.)

(2.) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured. (§ 26.)

Voyage and time policies.

25.—(1.) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy

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is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy." A contract for both voyage and time may be included in the same policy. (§§ 9, 369, 436, 445.)

1 Edw. 7, c. 7.

(2.) Subject to the provisions of section eleven of the Finance Act, 1901, a time policy which is made for any time exceeding twelve months is invalid. (§§ 8, 440.)

Designation of subject-matter.

26.—(1.) The subject-matter insured must be designated in a marine policy with reasonable certainty. (§§ 15, 251.)

(2.) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy. (§§ 243, 251, 252a, 323.)

(3.) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered. (§§ 172, 251, 252b, 355, 365, 1041.)

(4.) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured. (§§ 243, 251, 252a.)

Valued policy.

27.—(1.) A policy may be either valued or unvalued. (§§ 9, 20, 338.)

(2.) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (§§ 9, 20, 338.)

(3.) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial. (§§ 340, 342, 345, 355.)

(4.) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss. (§§ 348, 1133.)

Unvalued policy.

28. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified. (§§ 9, 20, 238.)

Floating policy by ship or ships.

29.—(1.) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration. (§§ 9, 185.)

(2.) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner. (§§ 185, 187.)

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(3.) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith. (§§ 41, 185, 187, 188, 189, 360.)

(4.) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration. (§§ 186, 360.)

Construction of terms in policy.

30.—(1.) A policy may be in the form in the First Schedule to this Act. (§ 10.)

(2.) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

Premium to be arranged.

31.—(1.) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2.) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable. (§ 376.)

Double Insurance.

Double insurance.

32.—(1.) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance. (§ 330.)

(2.) Where the assured is over-insured by double insurance—

(a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act; (§§ 349, 352.)

(b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any

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other policy without regard to the actual value of the subject-matter insured; (§§ 349, 352.)

(c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy; (§ 330.)

(d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves. (§§ 330, 1215.)

Warranties, &c.

Nature of warranty.

33.—(1.) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts. (§ 628.)

(2.) A warranty may be express or implied. (§ 628.)

(3.) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date. (§§ 530, 628, 634.)

When breach of warranty excused.

34.—(1.) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law. (§§ 628, 636.)

(2.) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss. (§§ 633, 688.)

(3.) A breach of warranty may be waived by the insurer. (§§ 633, 690.)

Express warranties.

35.—(1.) An express warranty may be in any form of words from which the intention to warrant is to be inferred. (§§ 630, 631.)

(2.) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy. (§ 629.)

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(3.) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith. (§§ 628, 686.)

Warranty of neutrality.

36.—(1.) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk. (§§ 656, 664.)

(2.) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract. (§§ 656, 661, 662, 666.)

No implied warranty of nationality.

37. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk. (§ 727.)

Warranty of good safety.

38. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day. (§ 640.)

Warranty of seaworthiness of ship.

39.—(1.) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. (§§ 685a, 698, 707.)

(2.) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port. (§ 698.)

(3.) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage. (§§ 699, 707.)

(4.) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured. (§§ 686, 713.)

(5.) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea

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in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. (§§ 697, 799.)

No implied warranty that goods are seaworthy.

40.—(1.) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy. (§ 689.)

(2.) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy. (§ 712.)

Warranty of legality.

41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner. (§§ 685a, 745.)

The Voyage.

Implied condition as to commencement of risk.

42.—(1.) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract. (§§ 376, 480, 618.)

(2.) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition. (§§ 480, 483.)

Alteration of port of departure.

43. Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach. (§§ 14, 380.)

Sailing for different destination.

44. Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach. (§§ 14, 380.)

Change of voyage.

45.—(1.) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage. (§§ 370, 380.)

(2.) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs. (§ 380.)

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Deviation.

46.—(1.) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs. (§§ 376, 424a, 428.)

(2.) There is a deviation from the voyage contemplated by the policy—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from. (§§ 376, 391, 392.)

(3.) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract. (§ 378.)

Several ports of discharge.

47.—(1.) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation. (§§ 388, 394.)

(2.) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation. (§ 393.)

Delay in voyage.

48. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable. (§§ 376, 412, 424a, 428.)

Excuses for deviation or delay.

49.—(1.) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(a) Where authorised by any special term in the policy (§ 424a); or

(b) Where caused by circumstances beyond the control of the master and his employer (§§ 378, 383, 425, 431, 435); or

(c) Where reasonably necessary in order to comply with an express or implied warranty (§ 481); or

(d) Where reasonably necessary for the safety of the ship or subject-matter insured (§§ 419, 425, 428, 430, 431, 435); or

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(e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger (§ 434); or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship (§ 430); or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against. (§ 424a.)

(2.) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch. (§§ 425, 431.)

Assignment of Policy.

When and how policy is assignable.

50.—(1.) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss. (§§ 12, 175.)

(2.) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected. (§§ 12, 175, 176.)

(3.) A marine policy may be assigned by indorsement thereon or in other customary manner. (§§ 175, 177.)

Assured who has no interest cannot assign.

51. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss. (§§ 174, 175.)

The Premium.

When premium payable.

52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium. (§§ 101, 104.)

Policy effected through broker.

53.—(1.) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the

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insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium. (§§ 66, 101, 106, 107.)

(2.) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent. (§ 101.)

Effect of receipt on policy.

54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker. (§§ 24, 101, 106.)

Loss and Abandonment.

Included and excluded losses.

55.—(1.) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. (§§ 775, 783.)

(2.) In particular,—

(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew; (§§ 799, 799a, 801, 821, 828.)

(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against. (§§ 784, 824.)

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils. (§§ 775, 778, 779.)

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Partial and total loss.

56.—(1.) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss. (§§ 863, 1008.)

(2.) A total loss may be either an actual total loss, or a constructive total loss. (§ 1043.)

(3.) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss. (§ 1091.)

(4.) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss. (§ 1284.)

(5.) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total. (§ 780.)

Actual total loss.

57.—(1.) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss. (§ 815, 1043, 1045, 1066, 1074, 1079.)

(2.) In the case of an actual total loss no notice of abandonment need be given. (§§ 1043, 1045, 1184.)

Missing ship.

58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed. (§§ 442, 813, 1048.)

Effect of transhipment, &c.

59. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment. (§§ 192, 468.)

Constructive total loss defined.

60.—(1.) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred. (§§ 815, 1043, 1066, 1091, 1093, 1095, 1111.)

(2.) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered (§§ 1093, 1108, 1138); or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. (§§ 1111, 1117, 1123, 1124.)

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired (§ 1125); or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival. (§§ 1142, 1158.)

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Effect of constructive total loss.

61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss. (§§ 1091, 1092, 1097a.)

Notice of abandonment.

62.—(1.) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss. (§§ 1043, 1091, 1162, 1182, 1184.)

(2.) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer. (§§ 1188, 1189.)

(3.) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry. (§§ 1094, 1192, 1274.)

(4.) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment. (§ 1091.)

(5.) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence

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of the insurer after notice is not an acceptance. (§§ 1199, 1200, 1201.)

(6.) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice. (§§ 1199, 1202.)

(7.) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him. (§§ 1056, 1059, 1062, 1066, 1091, 1113, 1117, 1162, 1163, 1171, 1191.)

(8.) Notice of abandonment may be waived by the insurer. (§§ 1052, 1190.)

(9.) Where an insurer has re-insured his risk, no notice of abandonment need be given by him. (§ 1191.)

Effect of abandonment.

63.—(1.) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto. (§§ 216, 1178, 1182, 1188, 1205, 1213, 1225.)

(2.) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss. (§§ 1175, 1176, 1177, 1178, 1181, 1206, 1208.)

Partial Losses (including Salvage and General Average and Particular Charges).

Particular average loss.

64.—(1.) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss. (§§ 869, 1008.)

(2.) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average. (§§ 214, 869, 1008.)

Salvage charges.

65.—(1.) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils. (§§ 863, 865, 1284.)

(2.) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred. (§§ 863, 865, 874, 964, 965.)

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General average loss.

66.—(1.) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice. (§ 906.)

(2.) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure. (§§ 906, 907, 913, 915.)

(3.) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution. (§ 908.)

(4.) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute. (§§ 908, 1004.)

(5.) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer. (§§ 908, 1005.)

(6.) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against. (§§ 994, 997.)

(7.) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons. (§§ 906, 1005.)

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Measure of Indemnity.

Extent of liability of insurer for loss.

67.—(1.) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity. (§§ 338, 349, 1008.)

(2.) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy. (§§ 338, 1010, 1023, 1041.)

Total loss.

68. Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,—

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured. (§§ 338, 349, 364.)

Partial loss of ship.

69. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above. (§§ 340, 1023.)

Partial loss of freight.

70. Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy. (§ 1041.)

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Partial loss of goods, merchandise, &c.

71. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total loss:

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value:

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers. (§§ 340, 1009a, 1018.)

Apportionment of valuation.

72.—(1.) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act. (§ 361.)

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(2.) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods. (§ 361.)

General average contributions and salvage charges.

73.—(1.) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute. (§ 1005.)

(2.) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle. (§ 1284.)

Liabilities to third parties.

74. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability. (§ 368a.)

General provisions as to measure of indemnity.

75.—(1.) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case. (§ 368a.)

(2.) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy. (§§ 345, 368a, 1041.)

Particular average warranties.

76.—(1.) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part. (§§ 901, 1082.)

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(2.) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against. (§§ 863, 871, 884, 885, 901.)

(3.) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage. (§ 894.)

(4.) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded. (§§ 871, 896, 897.)

Successive losses.

77.—(1.) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured. (§ 1032.)

(2.) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause. (§§ 1032, 1032a.)

Suing and labouring clause.

78.—(1.) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage. (§§ 214, 870, 871, 874.)

(2.) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause. (§§ 863, 866, 870.)

(3.) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause. (§ 870.)

(4.) It is the duty of the assured and his agents, in all cases,

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to take such measures as may be reasonable for the purpose of averting or minimising a loss. (§§ 22, 799a, 1218.)

Rights of Insurer on Payment.

Right of subrogation.

79.—(1.) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss. (§§ 1186, 1213, 1214, 1225, 1230.)

(2.) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss. (§ 1225.)

Right of contribution.

80.—(1.) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract. (§§ 330, 1215.)

(2.) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt. (§§ 330, 1215.)

Effect of under insurance.

81. Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance. (§§ 2, 364, 1187, 1215.)

Return of Premium.

Enforcement of return.

82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable,—

(a) If already paid, it may be recovered by the assured from the insurer; and

(b) If unpaid, it may be retained by the assured or his agent. (§ 1247a.)

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Return by agreement.

83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured. (§ 1263.)

Return for failure of consideration.

84.—(1.) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured. (§§ 537, 1248, 1253, 1256.)

(2.) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured. (§ 1249.)

(3.) In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable: (§§ 1253, 1256.)

(b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable: (§§ 1248, 1259.)

Provided that where the subject-matter has been insured "lost or not lost," and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival: (§§ 13, 1256.)

(c) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering: (§§ 1253, 1257.)

(d) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable: (§ 1258.)

(e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable: (§§ 1259, 1260.)

(f) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a propor-

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tionate part of the several premiums is returnable: (§§ 332, 1259, 1260.)

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable. (§§ 1260, 1262.)

Mutual Insurance.

Modification of Act in case of mutual insurance.

85.—(1.) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance. (§ 80.)

(2.) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium. (§§ 2, 80.)

(3.) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association. (§ 80.)

(4.) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance. (§ 80.)

Supplemental.

Ratification by assured.

86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss. (§§ 140, 142, 143, 171.)

Implied obligations varied by agreement or usage.

87.—(1.) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract. (§ 55.)

(2.) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement. (§ 55.)

Reasonable time, &c. a question of fact.

88. Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact. (§§ 480, 1274.)

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Slip as evidence.

89. Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding. (§§ 41, 572.)

Interpretation of terms.

90. In this Act, unless the context or subject-matter otherwise requires,—

"Action" includes counterclaim and set-off:

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money:

"Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents:

"Policy" means a marine policy.

Savings.

91.—(1.) Nothing in this Act, or in any repeal effected thereby, shall affect—

(a) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue; (§ 8.) 54 & 55 Vict. c. 39.

(b) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same; 25 & 26 Vict. c. 89.

(c) The provisions of any statute not expressly repealed by this Act.

(2.) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance. (§§ 536, 1097a.)

Repeals.

92. The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that schedule.

Commencement.

93. This Act shall come into operation on the first day of January one thousand nine hundred and seven.

Short title.

94. This Act may be cited as the Marine Insurance Act, 1906.

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SCHEDULES.

Section 30.

FIRST SCHEDULE.

Form of Policy.

Lloyd's S.G. policy.

Be it known that as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, upon the said ship, &c.

and so shall continue and endure, during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at .

Touching the adventurers and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes,

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and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defences, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of

[Sue and labour clause.]

[Waiver clause.]

In witness whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

[Memorandum.]

Rules for Construction of Policy.

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—

1. Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not. (§§ 13, 475, 514.)

Lost or not lost.

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From. 2. Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured. (§§ 446, 473, 513.)

At and from. [Ship.] 3.—(a) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. (§ 475.)

(b) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival. (§§ 475, 478, 486, 499.)

[Freight.] (c) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety. (§§ 279a, 514.)

(d) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro ratâ* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo. (§§ 277, 279a, 511, 512.)

From the loading thereof. 4. Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them whilst in transit from the shore to the ship. (§ 447.)

Safely landed. 5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases. (§§ 456, 462.)

Touch and stay. 6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination. (§ 401.)

Perils of the seas. 7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves. (§§ 776, 812.)

Pirates. 8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore. (§ 836.)

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Thieves. 9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers. (§ 837.)

Restraint of princes. 10. The term "arrests, &c. of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process. (§ 832.)

Barratry. 11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer. (§ 839.)

All other perils. 12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy. (§ 860.)

Average unless general. 13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges." (§ 885.)

Stranded. 14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached, and, if the policy be on goods, that the damaged goods are on board. (§ 887.)

Ship. 15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured. (§§ 219, 220, 365.)

Freight. 16. The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money. (§§ 229, 233, 235, 262.)

Goods. 17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board. (§§ 222, 224, 245.)

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods. (§§ 225, 227, 801.)

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Section 92.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 Geo. 2, c. 37....	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.	The whole Act.
28 Geo. 3, c. 56....	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandizes, or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict. c. 86..	The Policies of Marine Insurance Act, 1868.	The whole Act.

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9 EDW. 7, c. 12.

An Act to prohibit Gambling on Loss by Maritime Perils.

[*20th October*, 1909.]

Prohibition of gambling on loss by maritime perils.

1.—(1.) If—

(a) any person effects a contract of marine insurance without having any *bonâ fide* interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bonâ fide* expectation of acquiring such an interest; or

(b) any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term,

the contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction,

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to imprisonment, with or without hard labour, for a term not exceeding six months or to a fine not exceeding one hundred pounds, and in either case to forfeit to the Crown any money he may receive under the contract.

(2.) Any broker or other person through whom, and any insurer with whom, any such contract is effected shall be guilty of an offence and liable on summary conviction to the like penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of this Act.

(3.) Proceedings under this Act shall not be instituted without the consent in England of the Attorney-General, in Scotland of the Lord Advocate, and in Ireland of the Attorney-General for Ireland.

(4.) Proceedings shall not be instituted under this Act against a person (other than a person in the employment of the owner of the ship in relation to which the contract was made) alleged to have effected a contract by way of gambling on loss by maritime perils until an opportunity has been afforded him of showing that the contract was not such a contract as aforesaid, and any information given by that person for that purpose shall not be admissible in evidence against him in any prosecution under this Act.

(5.) If proceedings under this Act are taken against any person (other than a person in the employment of the owner of the ship in relation to which the contract was made) for effecting such a contract, and the contract was made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract shall be deemed to be a contract by way of gambling on loss by maritime perils unless the contrary is proved.

(6.) For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed either in the place in which the same actually was committed or in any place in which the offender may be.

(7.) Any person aggrieved by an order or decision of a court of summary jurisdiction under this Act, may appeal to quarter sessions.

(8.) For the purposes of this Act the expression "owner" includes charterer.

(9.) Sub-section (7) of this section shall not apply to Scotland.

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Short title. 6 Edw. 7, c. 41.

2. This Act may be cited as the Marine Insurance (Gambling Policies) Act, 1909, and the Marine Insurance Act, 1906, and this Act may be cited together as the Marine Insurance Acts, 1906 and 1909.

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2 & 3 GEO. 5, c. 8 (FINANCE ACT, 1912).

Stamping of policies of sea insurance which are subject to a contingent increase of premium. 54 & 55 Vict. c. 39.

8. Where the premium or consideration for a policy of sea insurance is expressed to be a sum not exceeding the rate of half-a-crown per cent. of the sum insured, and is subject to an increase (whether defined or not in the policy) in the event of the occurrence of a specified contingency, the premium or consideration shall, for the purpose of the Stamp Act, 1891, be treated as a premium or consideration not exceeding the rate of half-a-crown per cent. on the sum insured. But if, owing to the occurrence of the contingency which is the occasion for an increase of the premium or consideration, the premium or consideration is increased so as to exceed the rate of half-a-crown per cent. of the sum insured, the policy or a new policy to be thereupon issued shall be stamped with such an additional sum as is required to represent the additional duty payable, and may be so stamped without penalty at any time not exceeding thirty days after the date on which the increased premium or consideration becomes ascertained.

APPENDIX B.

SPECIMEN SLIP.

(SLIP for a Lloyd's Policy, with Institute Time Clauses and Warranties,* on the steamship "Xerxes" for twelve months beginning on the 20th of February, 1921, at a premium of £6 per cent.)

No. ——

X. Y. & Co.

12 months. Noon, 20th Feb. 1921.

Ship	£30,000
Machinery.....	10,000
	£40,000

Institute Warranties and Institute Clauses.*

£6.

£2,000 C.D. 30/1. (*Subscription of C.D.* for 2,000*l.*, *dated the 30th of January. The other subscriptions follow, or are written on the back of the slip.*)

——, 1921.

INSTITUTE VOYAGE CLAUSES. 1921.

HULLS.

(*Some of the clauses are different when the insurance is made F.P.A. absolutely.*)

1. And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned

* For the Institute Time Clauses and Warranties, see *post*, App. B.

Appendix B

will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay: but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

2. *Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.*

3. Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

4. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo or caused through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or

by the manager. Masters, mates, engineers, pilots, or crew, not to be considered as part owners within the meaning of this clause, should they hold shares in the steamer. Appendix B

5. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

6. In the event of expenditure for salvage, salvage charges, or under the sue and labour clause, this policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the insurer is liable bears to the value of the salved property.

Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this policy without any deduction for loss and/or damage shall bear its *pro ratâ* share of such expenses or excess of expenses accordingly.

7. Average payable on each valuation separately or on the whole without deduction of thirds new for old, whether the average be particular or general.

8. Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be part of the hull, and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this policy.

9. Warranted free from particular average under 3 per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.

10. No claims shall in any case be allowed in respect of scraping or painting the vessel's bottom.

Appendix B

11. Grounding in the Panama Canal, Suez Canal, or in the Manchester Ship Canal or its connections, or in the river Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar, shall not be deemed to be a stranding.

12. In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

13. In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

14. In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire; and whenever the extent of the damage is ascertainable, the underwriters may take or may require the assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of underwriters, the underwriters will make an allowance at the rate of 30*l.* per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of this Clause, 15*l.* per cent. shall be deducted from the amount of the ascertained claim.

15. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

16. Warranted that (except as hereinafter mentioned) the amount insured for account of assured and/or their managers on premiums, freight, hire, profit, disbursements, commissions, or other interests policy proof of interest or full interest admitted or on excess or increased value of hull or machinery, however described, shall not exceed 15 per cent. of the values of the hull and machinery as stated herein but this warranty shall not restrict the assured's right to cover.

(1) *Premiums.*—Any amount not in excess of actual premiums for twelve months on all interests of whatsoever nature insured (including estimated premium on any Club Insurances),

but in all cases reducing monthly by a proportionate amount of the whole. Appendix B

(2) *Freight and/or chartered freight and/or anticipated freight on board or not on board, insured for 12 months or other time.*—Any amount not exceeding 25 per cent. of the value of hull and machinery, as stated herein, but if the insurance be for less than 12 months, the 25 per cent. to be proportionately reduced. If at any time the gross freight and/or chartered freight at risk exceeds the amount placed on freight and/or chartered freight for time, the owner to have the liberty to cover the excess amount whilst at risk.

(3) *Freight and/or chartered freight for voyage.*—Any amount not exceeding the actual gross freight and/or chartered freight at risk, all freight covered on time policy under Clause 2 hereof to be taken into account.

(4) *Anticipated freight.*—If the vessel be in ballast and unchartered, an amount reasonably estimated on the basis of current freight at time of insurance for anticipated net freight on the next cargo passage, all freight covered on time policy to be taken into account.

(5) *Time charter, hire or profit on time charter, or charter for series of voyages.*—Any amount not exceeding the reasonably estimated net profit, reducing as earned, on a period not exceeding the length of the charter. Any amount insured under Clause 2 to be taken into account, and only the excess of such amount to be insured, reducing *pro ratâ* as earned.

Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty.

17. Held covered in case of deviation or change of voyage provided notice be given and any additional premium required be agreed immediately after receipt of advices.

18. With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

19. With leave to dock and undock and go into graving dock.

Freight.

1. Including risk of craft and/or lighter to and from the ship. Each craft and/or lighter to be deemed a separate insurance if desired by the assured.

2. General average and salvage to be adjusted according to

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the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

3. Warranted free from particular average under 3 per cent. unless the ship be stranded, sunk, or on fire, underwriters notstanding this warranty to pay for any damage or loss caused by fire or collision with another ship or vessel.

4. In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered.

5. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break up value of the vessel or wreck shall be taken into account.

6. In calculating the amount due under this policy in respect of any claim except under Clauses 2 and 4, all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein.

7. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

8. It is further agreed that should the within-named vessel receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the within-named vessel; but in such cases the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

9. Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt

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thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

10. Held covered in case of deviation or change of voyage, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

11. With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

12. With leave to dock and undock and go into graving dock.

CARGO.

1. Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. — **F. C. & S. clause.**

2. Warranted free of loss or damage caused by strikers, locked-out workmen, or persons taking part in labour disturbances, or riots or civil commotions. — **Strikes, riots and civil commotions clause.**

Should Clause 1 be deleted, Clause 3 is to operate as part of this policy.

3. Warranted free of any claim based upon loss of, or frustration of, the insured voyage, or adventure, caused by arrests, restraints or detainments of kings, princes, or peoples.

4. General average and salvage charges payable according to foreign statement or per York-Antwerp Rules if in accordance with the contract of affreightment. — **G/A clause.**

5. Held covered at a premium to be arranged in case of deviation or change of voyage, or other variation of the risk by reason of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment, or of any omission or error in the description of the interest vessel or voyage. — **Deviation clause.**

6. The insured goods are covered subject to the terms of this policy from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit until on board the vessel, during transhipment if any, and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignees' or other warehouse at destination named in policy. — **Warehouse to warehouse clause.**

7. Including transit by craft, raft and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a — **Craft, &c. clause.**

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separate insurance. The assured are not to be prejudiced by any agreement exempting lightermen from liability.

Bill of lading, &c. clause.

8. The assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the bills of lading and/or charter party. The seaworthiness of the vessel as between the assured and the assurers is hereby admitted.

(The following clause is added when the insurance is "f.p.a.":)

F.P.A. clause.

9. Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty the assurers are to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also for any loss of or damage to the interests insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress, also to pay landing, warehousing, forwarding and special charges if incurred for which underwriters would be liable under a policy covering particular average.

INSTITUTE TIME CLAUSES. 1921.

HULLS.

(*Other forms differing in some of the clauses are used when the insurance is made F.P.A. absolutely, or free of damage absolutely.*)

1. And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay;

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but when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

2. *Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.*

3. Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

4. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

5. Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro ratâ* monthly premium, to her port of destination.

6. Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

7. Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in

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either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro ratâ* daily return of premium shall be made.

8. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery directly caused by accidents in loading, discharging or handling cargo, or caused through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

9. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

10. In the event of expenditure for salvage, salvage charges, or under the sue and labour clause, this policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the insurer is liable bears to the value of the salved property.

Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this policy without any deduction for loss and/or damage shall bear its *pro ratâ* share of such expenses or excess of expenses accordingly.

11. Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the average be particular or general.

12. Donkey boilers, winches, cranes, windlasses, steering gear,

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and electric light apparatus shall be deemed to be part of the hull and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this policy.

13.* Warranted free from particular average under 3 per cent., but nevertheless when the vessel shall have been stranded, sunk, on fire, or in collision with any other ship or vessel, underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.†

14. No claim shall in any case be allowed in respect of scraping or painting the vessel's bottom.

15. Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal, or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar shall not be deemed to be a stranding.

16. The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, viz.: at any time at which the vessel (1) begins to load cargo, or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this policy may be added to particular average

* The following "Excess 3 per cent. P. A. Clause" is sometimes substituted for Clause 13: "In the event of particular average the assurers only to be liable for the excess of 3 per cent. upon the entire value."

† In the Hulls (Internal Combustion Engines) Institute Time Clauses the following additional clause is inserted after Clause 13: "In the event of particular average on the machinery the underwriter only to be liable for the excess of 10 per cent. upon the insured value of the machinery in respect of each accident."

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occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding policy.

17. In no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

18. In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

19. In the event of total or constructive total loss, no claim to be made by the underwriters for freight, whether notice of abandonment has been given or not.

20. In the event of accident whereby loss or damage may result in a claim under this policy, notice shall be given in writing to the underwriters, where practicable, and, if abroad, to the nearest Lloyd's agent also, prior to survey, so that they may appoint their own surveyor if they so desire; and whenever the extent of the damage is ascertainable, the underwriters may take or may require the assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of underwriters, the underwriters will make an allowance at the rate of 30*l.* per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the assured failing to comply with the conditions of this clause, 15*l.* per cent. shall be deducted from the amount of the ascertained claim.

21. Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

22. Warranted that (except as hereinafter mentioned) the amount insured for account of assured and/or their managers on premiums, freight, hire, profit, disbursements, commissions, or other interests policy proof of interest or full interest admitted or on excess or increased value of hull or machinery, however described, shall not exceed 15 per cent. of the values of the hull and machinery as stated herein but this warranty shall not restrict the assured's right to cover.

(1) *Premiums.*—Any amount not in excess of actual pre-

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miums for twelve months on all interests of whatsoever nature insured (including estimated premium on any club insurances), but in all cases reducing monthly by a proportionate amount of the whole.

(2) *Freight and/or chartered freight and/or anticipated freight, on board or not on board, insured for 12 months or other time.*—Any amount not exceeding 25 per cent. of the value of hull and machinery as stated herein, but if the insurance be for less than 12 months, the 25 per cent. to be proportionately reduced. If at any time the gross freight and/or chartered freight at risk exceeds the amount placed on freight and/or chartered freight for time, the owner to have the liberty to cover the excess amount whilst at risk.

(3) *Freight and/or chartered freight for voyage.*—Any amount not exceeding the actual gross freight and/or chartered freight at risk, all freight covered on time policy under Clause 2 hereof to be taken into account.

(4) *Anticipated freight.*—If the vessel be in ballast and unchartered, an amount reasonably estimated on the basis of current freight at time of insurance for anticipated net freight on the next cargo passage, all freight covered on time policy to be taken into account.

(5) *Time charter, hire or profit on time charter, or charter for series of voyages.*—Any amount not exceeding the reasonably estimated net profit, reducing as earned, on a period not exceeding the length of the charter. Any amount insured under Clause 2 to be taken into account, and only the excess of such amount to be insured, reducing *pro ratâ* as earned.

Provided always that a breach of this warranty shall not afford underwriters any defence to a claim by mortgagees or other third parties who may have accepted this policy without notice of such breach of warranty.

23. To return { per cent. for each uncommenced month if it be mutually agreed to cancel this policy. as follows for each consecutive 30 days the vessel may be laid up in port, viz.:— per cent. if in the United Kingdom not under repair, per cent. under repair, or if abroad. Provided always that in no case shall a return be allowed when the within-named vessel is lying in a roadstead or in exposed and unprotected waters. } and arrival.

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In the event of the vessel being laid up in port for a period of 30 consecutive days a part only of which attaches to this policy it is hereby agreed that the laying up period in which either the commencing or ending date of this policy falls shall be deemed to run from the first day on which the vessel is laid up and that on this basis underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching hereto bear to thirty.

Freight.

1. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and go on trial trips.

2. Including risk of craft and/or lighter to and from the ship. Each craft and/or lighter to be deemed a separate insurance if desired by the assured.

3. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

4. Warranted free from particular average under 3 per cent. unless the ship be stranded, sunk or on fire, underwriters notwithstanding this warranty to pay for any damage or loss caused by fire or collision with another ship or vessel.

5. In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

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7. In calculating the amount due under this policy in respect of any claim except under clauses 3 and 5, all insurances on freight (including honour policies on freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this policy, notwithstanding any valuation therein.

8. Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise.

9. Should the vessel be sold or transferred to new management, then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro ratâ* daily return of premium shall be made.

10. It is further agreed that should the vessel hereby insured receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.

11. Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

12. Should the vessel at the expiration of this policy be at sea or in distress or at a port of refuge or of call, the interest hereby insured shall, provided previous notice be given to the underwriters, be held covered at a *pro ratâ* monthly premium to her port of destination.

13. Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

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14. To return { per cent. for each uncommenced month if it be mutually agreed to cancel this policy. / per cent. for each consecutive 30 days the vessel may be laid up in port. } and arrival.

Provided always that in no case shall a return be allowed when the within-named vessel is lying in a roadstead or in exposed and unprotected waters.

INSTITUTE CLAUSES FOR BUILDERS' RISKS. 1921.

Risk to Commence from Laying of Keel.

1. This insurance is also to cover all risks, including fire, while under construction and/or fitting out, except in buildings or workshops, but including materials in yards and docks of the assured, or on quays, pontoons, craft, &c., and all risk while in transit to and from the works and/or the vessel wherever she may be lying, also all risks of loss or damage through collapse of supports or ways from any cause whatever, and all risks of launching and breakage of the ways.

2. This insurance is also to cover all risks of trial trips, loaded or otherwise, as often as required, and all risks whilst proceeding to and returning from the trial course.

3. With leave to proceed to and from any wet or dry docks, harbours, ways, cradles, and pontoons during the currency of this policy.

4. With leave to fire guns and torpedoes, but no claim to attach hereto for loss of or damage to same or to ship or machinery unless the accident results in the total loss of the vessel.

5. In case of failure of launch, underwriters to bear all subsequent expenses incurred in completing launch.

6. Average payable irrespective of percentage, and without deduction of one-third, whether the average be particular or general.

7. General average and salvage charges as per foreign custom, payable as per foreign statement, and/or per York-Antwerp Rules, if required; and in the event of salvage, towage, or other assistance being rendered to the vessel hereby insured by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard

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to the common ownership of the vessels) shall be ascertained by arbitration in the manner hereinafter provided for under "Collision Clause," and the amount so awarded, so far as applicable to the interest hereby insured, shall constitute a charge under this policy.

8. In event of deviation to be held covered at an additional premium to be hereafter arranged.

9. To cover while building all damage to hull, machinery, apparel, or furniture, caused by settling of the stocks, or failure or breakage of shores, blocking or staging, or of hoisting or other gear, either before or after launching and while fitting out.

10. Full contract value to be the basis of the insurance.

11. It is agreed that any changes of interest in the steamer hereby insured shall not affect the validity of this policy.

12. And it is expressly declared and agreed that no acts of the insurer or insured, in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

13. This insurance also specially to cover loss of or damage to the hull or machinery, through negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery, or hull, or from other causes, arising either on shore or otherwise, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them, or by the manager, and to cover all risks incidental to steam navigation, or in graving docks.

Collision Clause.

14. And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the undersigned will pay the assured such proportion of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of the undersigned, they will also pay a like pro-

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portion of the costs which the assured shall thereby incur, or be compelled to pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

15. And it is further agreed that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners, all questions of responsibility and amount of liability as between the two ships being left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator, or failing such agreement, to the decision of arbitrators, one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of underwriters interested in each vessel; the two arbitrators chosen to choose a third arbitrator before entering upon the reference. The terms of the Arbitration Act of 1889 to apply to such reference, and the decision of such single, or of any two of such three arbitrators, appointed as above, to be final and binding.

16. *This clause shall also extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers for injury to harbours, wharves, piers, stages, and similar structures, or for loss of life or personal injury consequent on such collision.*

Protection and Indemnity Clause.

17. It is further agreed that if the assured shall by reason of his interest in the insured ship become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses arising from or occasioned by any of the following matters or things during the currency of this policy, that is to say:—

Loss of or damage to any other ship or boat or goods, merchandise, freight, or other things or interests, whatsoever on board such other ship or boat caused proximately or otherwise by the ship insured in so far as the same is not covered by the running down clause set out above.

Loss of or damage to any goods, merchandise, freight or other things or interest whatsoever other than as aforesaid (not being builders' gear or material or cargo on the insured ship) whether on board the insured ship or not, which may arise from any cause whatever.

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Loss of or damage to any harbour, dock (graving or otherwise), slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or moveable thing whatsoever, or to any goods or property in or on the same, howsoever caused.

Any attempted or actual raising, removal or destruction of the wreck of the insured ship or the cargo thereof, or any neglect or failure to raise, remove, or destroy the same.

Any sum or sums for which the assured may become liable or incur from causes not hereinbefore specified, but which are absolutely or conditionally recoverable from or undertaken by the Liverpool and London Steamship Protection Association, Limited, and/or North of England Protecting and Indemnity Association, but excluding loss of life and personal injury and matters expressly excluded from any of the above clauses.

18. The undersigned will pay the assured such proportion of such sum or sums so paid, or, which may be required to indemnify the assured for such loss, as their respective subscriptions bear to the policy value of the ship hereby insured, and where the liability of the assured has been contested with the consent in writing of a majority (in amount) of the underwriters on the ship hereby insured, the undersigned will also pay a like proportion of the costs which the assured shall thereby incur or be compelled to pay.

Notwithstanding the foregoing, this policy is—

(a) Warranted free from any claim arising directly or indirectly under Workmen's Compensation or Employers' Liability Acts and any other statutory or common law liability in respect of accidents to workmen.

(b) Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

(c) Warranted free of loss or damage caused by strikers, locked out workmen, or persons taking part in labour disturbances or riots or civil commotions.

(d) Warranted free of loss or damage caused by earthquake.

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INSTITUTE WARRANTIES. 1921.

1. Warranted not to enter or sail from any port or ports, place or places, in British North America on the Atlantic coast, except Halifax, Louisburg and Sydney for purpose of coaling, and not north of 50 deg. N. lat. on the Pacific coast.

2. Warranted not to enter the Baltic beyond 13 deg. E. long., or sail from a loading port therein between 1st October and 1st April.

3. Warranted not to sail for or from any port or place on the north coast of Europe between North Cape and Cape Kanin, and not to proceed east of Cape Kanin in the Arctic Ocean.

4. Warranted not to sail with Indian coal as cargo between 1st March and 30th June.

5. Warranted not to sail for or from any port or place in the Behring Sea or Alaska or Siberia (except that vessels may enter or sail from Vladivostock between 1st May and 1st November).

On payment of an additional premium of per cent., it is agreed to cancel No. 1 of the above warranties—except between 1st October and 1st May.

On payment of an additional premium of per cent., it is agreed to cancel No. 2 of the above warranties.

APPENDIX C.

ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS.

LIVERPOOL CONFERENCE, 1890.

YORK-ANTWERP RULES, 1890.

Rule I. Jettison of Deck Cargo.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II. Damage by Jettison and Sacrifice for the Common Safety.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety shall be made good as general average.

Rule III. Extinguishing Fire on Shipboard.*

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

* The construction of this rule was involved in Greenshields *v.* Stephens, [1908] 1 K. B. 51 (C. A.); affirmed in the House of Lords, [1908] A. C. 431.

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Rule IV. Cutting away Wreck.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V. Voluntary Stranding.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI. Carrying Press of Sail. Damage to or Loss of Sails.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII. Damage to Engines in Refloating a Ship.

Damage caused to machinery and boilers of a ship which is ashore and in a position of peril in endeavouring to refloat shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII. Expenses Lightening a Ship when Ashore and Consequent Damage.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

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Rule IX. Cargo, Ship's Materials, and Stores Burnt for Fuel.

Cargo, ship's materials and stores, or any of them necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving shall be charged to the shipowner and credited to the general average.

Rule X. Expenses at Port of Refuge, &c.

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expenses saved) shall be payable by

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the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI. Wages and Maintenance of Crew in Port of Refuge, &c.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII. Damage to Cargo in Discharging, &c.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average when and only when the cost of those measures respectively is admitted as general average.

Rule XIII. Deductions from Cost of Repairs.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.—

In the case of **iron or steel ships** from date of original register to the date of accident,—

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 3 years (B.)	One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full.

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Between 3 and 6 years (C.)	Deductions as above under Clause **B.**, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).
Between 6 and 10 years (D.)	Deductions as above under Clause **C.**, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.
Between 10 & 15 years (E.)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.
Over 15 years (F.)	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (G.)	The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the ship and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

In the case of **wooden or composite ships**:—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

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In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages and graving dock materials, shall be allowed in full.

Rule XIV. Temporary Repairs.

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV. Loss of Freight.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act or when the damage to or loss of cargo is so made good.

Rule XVI. Amount to be Made Good for Cargo Lost or Damaged by Sacrifice.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII. Contributory Values.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average. Appendix C

Rule XVIII. Adjustment.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

APPENDIX D.

The following are the Rules of Practice adopted by the Association of Average Adjusters, May, 1920:—

NOTE.—Some of the undermentioned Rules are, as indicated, "Customs of Lloyd's," now by resolution of the Association incorporated amongst the Rules of Practice.

The preamble to the Customs was—

> "Nothing can be called a 'Custom of Lloyd's' which is determined by a decision of the superior Courts; for whatever is thus sanctioned rests on a ground surer than Custom. A 'Custom of Lloyd's' then must relate to a point on which the law is doubtful, or not yet defined, but as to which, for practical convenience, it is necessary that there should be some uniform rule. By the term is here understood the Customs of English Adjusting, whether as affecting General or Particular Average."

1. *Adjustments "for the Consideration of Underwriters."*

That any adjustment prepared for the consideration of underwriters shall include a statement of the reasons of the average adjuster for making such adjustment, and, when submitted in conjunction with a claim for which underwriters are liable, shall be contained in an entirely separate document. To such adjustments the following note shall be appended, viz.:—

"This adjustment has been prepared by request, to enable the assured to submit the case to underwriters."

2. *Interest and Commission for Advancing Funds.*

That, in practice, interest and commission for advancing funds are only allowable in average when, proper and necessary steps having been taken to make a collection on account, an

out-of-pocket expense for interest and/or commission for advancing funds is reasonably incurred. **Appendix D**

3. *Agency Commission and Agency.*

That, in practice, neither commission (excepting bank commission) nor any charge by way of agency or remuneration for trouble is allowed to the shipowner in average, except in respect of services rendered on behalf of cargo when such services are not involved in the contract of affreightment.

4. *Duty of Adjusters in respect of Cost of Repairs.*

That in adjusting particular average on ship or general average which includes repairs, it is the duty of the adjuster to satisfy himself that such reasonable and usual precautions have been taken to keep down the cost of repairs as a prudent shipowner would have taken if uninsured.

5. *Claims for Damage to Ship's Machinery.*

That no claim for damage to ship's machinery shall be admitted into an adjustment unless a survey has been held upon such machinery by competent and disinterested engineers as soon as practicable after the occurrence of the casualty giving rise to the claim; a certificate of such survey, reporting as to the nature and cause of the damage, to be furnished to the adjuster; or unless clear proof be given to the adjuster that the holding of such survey or the obtaining of such certificate is impracticable, which proof is to be set forth on the face of the adjustment.

6. *Claims on Ship's Machinery.*

That in all claims on ship's machinery for repairs, no claim for a new propeller or new shaft shall be admitted into an adjustment, unless the adjuster shall obtain and insert into his statement evidence showing what has become of the old propeller or shaft.

7. *Water Casks (Custom of Lloyd's*, 1876).

Water casks or tanks carried on a ship's deck are not paid for by underwriters as general or particular average; nor are warps or other articles when improperly carried on deck.

GENERAL AVERAGE.

8. *Basis of Adjustment.*

That in any adjustment of general average not made in accordance with British Law it shall be prefaced on what principle or according to what law the adjustment has been made, and the reason for so adjusting the claim shall be set forth.

In all cases the adjuster shall give particulars in a prominent position in the average statement of the clause or clauses contained in the charter-party and/or bills of lading with reference to the adjustment of general average.

9. *Deckload Jettison (Custom of Lloyd's, Amended,* 1890—91).

The jettison of a deckload carried according to the usage of trade and not in violation of the contracts of affreightment is general average.

There is an exception to this rule in the case of cargoes of cotton, tallow, acids and some other goods.

10. *Damage by Water used to Extinguish Fire.*

That damage done by water poured down a ship's hold to extinguish a fire be treated as general average.

11. *Damage caused by Water thrown upon Burning Goods.*

That goods in a ship which is on fire, or the cargo of which is on fire, affected by water voluntarily used to extinguish such fire, shall not be the subject of general average if the packages so affected be themselves on fire at the time the water was thrown upon them.

12. *Voluntary Stranding (Custom of Lloyd's,* 1876).

The custom of Lloyd's excludes from general average all damage to ship or cargo resulting from a voluntary stranding

This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire.

13. *Expenses Lightening a Ship when Ashore (Custom of Lloyd's, Amended,* 1890—91).

When a ship is ashore, and, in order to float her, cargo is put into lighters, and is then at once reshipped, the whole cost of lightering, including lighter hire and reshipping, is general average.

14. *Sails set to force a Ship off the Ground (Custom of Lloyd's,* 1876).

Sails damaged by being set, or kept set, to force a ship off the ground or to drive her higher up the ground for the common safety, are general average.

15. *Stranded Vessels: Damage to Engines in getting off.*

That damage caused to machinery and boilers of a stranded vessel, in endeavouring to refloat for the common safety, when the interests are in peril, be allowed in general average.

16. *Claims arising out of Deficiency of Fuel.*

That in adjusting general average arising out of deficiency of fuel the facts on which the general average is based shall be set forth in the adjustment, including the material dates and distances, and particulars of fuel supplies and consumption.

17. *Resort to Port of Refuge for General Average Repairs: Treatment of the Charges incurred.*

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of general average, and sails thence with her original cargo, or a part of it, the outward as well as the inward port charges shall be treated as general average; and when cargo is discharged for the purpose of repairing such damage, the warehouse rent and reloading of the same shall, as well as the discharge, be treated as general average. (See *Atwood* v. *Sellar.*)

18. *Resort to Port of Refuge on Account of Particular Average Repairs: Treatment of the Charges incurred.*

That when a ship puts into a port of refuge in consequence of damage which is itself the subject of particular average (or not of general average), and when the cargo has been discharged in consequence of such damage, the inward port charges and the cost of discharging the cargo shall be general average, the warehouse rent of cargo shall be a particular charge on cargo, and the cost of reloading and outward port charges shall be a particular charge on freight. (See *Svendsen* v. *Wallace.*)

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19. *Treatment of Costs of Storage and Reloading at Port of Refuge.*

That when the cargo is discharged for the purpose of repairing, re-conditioning, or diminishing damage to ship or cargo which is itself the subject of general average, the cost of storage on it and of reloading it shall be treated as general average, equally with the cost of discharging it.

20. *Expenses at a Port of Refuge (Custom of Lloyd's, Amended, 1890—91).*

When a ship puts into a port of refuge on account of accident and not in consequence of damage which is itself the subject of general average, then, on the assumption that the ship was seaworthy at the commencement of the voyage, the custom of Lloyd's is as follows:—

(a) All cost of towage, pilotage, harbour dues, and other extraordinary expenses incurred in order to bring the ship and cargo into a place of safety, are general average. Under the term "extraordinary expenses" are not included wages or victuals of crew, coals, or engine stores, or demurrage.

(b) The cost of discharging the cargo, whether for the common safety, or to repair the ship, together with the cost of conveying it to the warehouse, is general average.

The cost of discharging the cargo on account of damage to it resulting from its own *vice propre*, is chargeable to the owners of the cargo.

(c) The warehouse rent, or other expenses which take the place of warehouse rent, of the cargo when so discharged, is, except as under, a special charge on the cargo.

(d) The cost of re-loading the cargo, and the outward port charges incurred through leaving the port of refuge, are, when the discharge of cargo falls in general average, a special charge on freight.

(e) The expenses referred to in clause (d) are charged to the party who runs the risk of freight—that is, wholly to the charterer—if the whole freight has been prepaid; and, if part only, then in the proportion which the part prepaid bears to the whole freight.

(f) When the cargo, instead of being sent ashore, is placed on board hulk or lighters during the ship's stay in port, the hulk-hire is divided between general average, cargo, and freight, in such proportions as may place the several contributing interests in nearly the same relative positions as if the cargo had been landed and stored.

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21. *Treatment of Costs of Extraordinary Discharge.*

That no distinction be drawn in practice between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.

22. *Towage from a Port of Refuge.*

That if a ship be in a port of refuge at which it is practicable to repair her, and if, in order to save expense, she be towed thence to some other port, then the extra cost of such towage shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

23. *Cargo forwarded from a Port of Refuge.*

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, but, in order to save expense, the cargo, or a portion of it, be transhipped by another vessel, or otherwise forwarded, then the cost of such transhipment (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure.

24. *Cargo Sold at a Port of Refuge.*

That if a ship be in a port of refuge at which it is practicable to repair her so as to enable her to carry on the whole cargo, or such portion of it as it fit to be carried on, but, in order to save expense, the cargo, or a portion of it, be, with the consent of the owners of such cargo, sold at the port of refuge, then the loss by sale including loss of freight on cargo so sold (up to the amount of expense saved) shall be divided in proportion to the saving of expense thereby occasioned to the several parties to the adventure; provided always that the amount so divided shall in no case exceed the cost of transhipment and/or forwarding referred to in the preceding rule of the association.

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25. *Interpretation of the Rule respecting Substituted Expenses.*

That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel had been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.

26. *Damage caused to Cargo during Forced Discharge.*

That whenever the cost of discharging cargo is general average, all loss or damage necessarily arising to cargo therefrom shall be allowed in general average.

27. *Treatment of Damage to Cargo caused by Discharge, Storing, and Reloading.*

That damage necessarily done to cargo by discharging, storing, and reloading it, be treated as general average when, and only when, the cost of those measures respectively is so treated.

28. *Deductions from Cost of Repairs to Iron Vessels in adjusting General Average.*

That in adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz.:—

From Date of Original Register.

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 and 3 years (B.)	One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal, and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting. One-sixth to be deducted off wire rigging, ropes, and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes and connexions; other repairs in full.
Between 3 and 6 years (C.)	Deductions as above under Clause **B.**, except that one-sixth be deducted off ironwork of masts and spars, and machinery other than boilers.
Between 6 and 10 years (D.)	Deductions as above under Clause **C.**, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery and all hawsers, ropes, sheets, and rigging; one-sixth to be deducted off chains and cables.
After 10 years (E.)	One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing. Anchors to be allowed in full. One-sixth to be deducted off chain cables.
Generally (F.)	The deductions (except as to provisions and stores, machinery, and boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

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29. *Freight Sacrificed: Amount to be made good in General Average.*

That the loss of freight to be made good in general average shall be ascertained by deducting from the amount of gross freight lost the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

30. *Basis of Contribution to General Average.*

When property saved by a general average act is injured or destroyed by subsequent accident, the contributing value of that property to a general average which is less than the total contributing value, shall, when it does not reach the port of destination, be its actual net proceeds; when it does it shall be its actual net value at the port of destination on its delivery there; and in all cases any values allowed in general average shall be added to and form part of the contributing value as above.

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The above rule shall not apply to adjustments made before the adventure has terminated.

31. *Contributory Value of Ship.*

That in any adjustment of general average there shall be set forth the certificate on which the contributory value of the ship is based, or, if there be no such certificate, the information adopted in lieu thereof, and any amount made good shall be specified.

32. *Contributory Value of Freight.*

That freight at the risk of the shipowner shall contribute to general average upon its gross amount, deducting the whole of, and no more than, such port charges as the shipowner shall incur after the date of the general average act, and such wages of the crew as the shipowner shall become liable for after that date.

That in any adjustment of general average there shall be set forth the amount of the gross freight and the freight advanced, if any; also the port charges and wages deducted, and any amount made good.

33. *Vessel in Ballast and under Charter: Contributing Interests.*

That when a vessel is in ballast and under charter, the interests contributing to expenses or sacrifices incurred for the common safety are, in practice, the ship and the freight she is earning under the charter, computed as usual in the adjustment of general average, unless the expenses are salvage expenses specifically charged by a Court of law or by arbitration to the vessel without any regard to the freight.

34. *Chartered Freight (Ulterior): Contribution to General Average.*

That when at the time of a general average act the vessel has on board cargo shipped under charter-party or bills of lading, and is also under a separate charter to load another cargo after the cargo then in course of carriage has been discharged, the ulterior chartered freight shall not contribute to the general average.

35. *Deductions from Freight at Charterer's Risk.*

That freight at the risk of the charterer shall be subject to no deduction for wages and port charges, except in the case of

charters in which the wages or port charges are payable by the charterer, in which case such freight shall be governed by the same rule as freight at the risk of the shipowner. Appendix D

36. *Forwarding Charges on Advanced Freight.*

That in case of wreck, the cargo being forwarded to its destination, the charterer, who has paid a lump sum on account of freight, which is not to be returned in the event of the vessel being lost, shall not be liable for any portion of the forwarding freight and charges, when the same are less than the balance of freight payable to the shipowner at the port of destination under the original charter-party.

37. *Adjustment: Policies of Insurance and Names of Underwriters.*

That no statement shall be drawn up showing the amount of payments by or to the underwriters, excluding statements of particular average on ship now dealt with by rule of the association, unless the policies, or copies of policies of insurance, or certificates of insurance, for which the statement is required, be produced to the adjusters; and that such statement shall give the names of the underwriting firms and companies interested, and the amounts due on the respective policies produced.

38. *Sacrifice for the Common Safety: Direct Liability of Underwriters.*

That in case of general average sacrifice there is, under ordinary policies of insurance, a direct liability of an underwriter on ship for loss of or damage to ship's materials, and of an underwriter on goods or freight, for loss of or damage to goods or loss of freight so sacrificed as a general average loss; that such loss not being particular average is not taken into account in computing the memorandum percentages, and that the direct liability of an underwriter for such loss is consequently unaffected by the memorandum or any other warranty respecting particular average.

39. *Enforcement of General Average Lien by Shipowners.*

That in all cases where general average damage to ship is claimed direct from the underwriters on that interest, the

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average adjusters shall ascertain whether the shipowners have taken the necessary steps to enforce their lien for general average on the cargo, and shall insert in the average statement a note giving the result of their enquiries.

40. *Underwriter's Liability (Custom of Lloyd's, 1876).*

If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assessed on the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and when there has been a particular average for damage which forms a deduction from the contributory value of the ship that must be deducted from the insured value to find upon what the underwriter contributes.

This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured.

41. *The Duty of Adjusters in Cases involving Refunds of General Average Deposits or Apportionment of Salvage, Collision Recoveries, or other Funds.*

That in cases of general average where deposits have been collected and it is likely that repayments will have to be made, measures be taken by the adjuster to ascertain the names of underwriters who have reimbursed their assured in respect of such deposits; that the names of any such underwriters be set forth in the adjustment as claimants of refund if any, to which they are apparently entitled; and that on completion of the adjustment, notice be sent to all underwriters whose names are so set forth as to any refund of which they appear as claimants and as to the steps to be taken in order to obtain payment of the same.

That in cases where the names of any underwriters are not to be ascertained on completion of the adjustment, notice be sent to the Secretary of Lloyd's, to the Institute of London Underwriters, to the Liverpool Underwriters' Association, and to the Association of Underwriters of Glasgow, notifying such interests as have not been appropriated to underwriters.

And that in cases of apportionment of salvage or other funds for distribution, similar measures be taken by the adjuster to safeguard the interests of any underwriters who may be entitled to benefit under the apportionment.

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42. *"Memorandum" to Statements showing Refunds in respect of General Average Deposits.*

That the following memorandum shall appear at the end of statements which show refunds to be due in respect of General Average Deposits, viz.:—

Memorandum—Refunds of General Average Deposits shown in this statement should only be paid on production of the "original" deposit receipts.

YORK-ANTWERP RULES.

43. *Modification of York-Antwerp Rules in Contracts of Affreightment: Liability of Underwriters.*

That in all cases where the contract of affreightment provides for the application of York-Antwerp Rules in any modified or mutilated form, and when the policies of insurance provide for the application of York-Antwerp Rules, if in accordance with the contract of affreightment, in applying the claim to such policies no effect shall be given to York-Antwerp Rules.

44. *Allowance to be made in General Average under York-Antwerp Rules in respect of the Cost of Maintenance of Officers and Crew.*

That the amount to be allowed in general average under York-Antwerp Rules for the maintenance of officers and crew shall be the actual cost of such maintenance where proved; but where proof of actual cost is not furnished to the adjuster, the allowance shall be determined by the under-mentioned scale; provided that where evidence of cost is produced, but is not conclusive, the allowance shall represent as nearly as possible the actual cost, but shall not exceed the under-mentioned scale, viz.:—

	Officers* Per man per day.	Crew† Per man per day.
Passenger Steamers (Liners)	4/0	1/6
Passenger Sailing Vessels	3/0	1/6
Cargo Steamers and Sailing Vessels	2/6	1/6

except that the allowance for Lascars shall be 9*d.* per man per day, and in the case of other Asiatic (native) crews shall be determined by the circumstances of each case.

* To include the master, deck officers, and engineers (in the case of a steamer), also the doctor and purser (if carried).

† To include the remainder of the ship's company.

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PARTICULAR AVERAGE ON SHIP.

45. *Statement of Particular Average on Ships.*

That claims for particular average on ships shall not be stated unless the policies or copies of policies of insurance, for claiming on which the statement is required, be produced to the adjusters.

That such statements shall give the names of the underwriting firms and companies interested, and the amounts payable on the respective policies produced.

46. *Apportionment of Costs in Collision Cases.*

That when a vessel sustains and does damage by collision, and litigation consequently results for the purpose of testing liability, the technicality of the vessel having been plaintiff or defendant in the litigation shall not necessarily govern the apportionment of the costs of such litigation, which shall be apportioned between claim and counter-claim in proportion to the amount which has been or would have been allowed in respect of each in the event of the claim or counter-claim being established; provided that when a claim or counter-claim is made solely for the purpose of defence, and is not allowed, the costs apportioned thereto shall be treated as costs of defence.

47. *Expenses of Removing a Vessel for Repair.*

Where a vessel is in need of repair at any port, and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently:—

(a) The necessary expenses incurred in moving the vessel to the port of repair shall be allowed as part of the cost of repair, and where the vessel after repairing forthwith returns to the port from which she was removed, the necessary expenses incurred in so returning shall also be allowed.

(b) Where by moving the vessel to the port of repair any new freight is earned, or any expenses are saved in relation to the current voyage of the vessel, such net earnings or savings shall be deducted from the expenses of moving her, and where the vessel loads a new cargo at the port of repair no expenses subsequent to the completion of repair shall be allowed.

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The expenses of removal include the cost of temporary repair, ballasting, wages and provisions of crew and/or runners, pilotage, towage, extra marine insurance, port charges, and, in case of a steamer, coal and engine-room stores.

(c) This rule shall not admit any ordinary expenses incurred in fulfilment of a contract of affreightment, though such expenses are increased by the removal to a port of repair.

48. *Coals and Stores used in Repair of Damage to the Hull.*

That the cost of replacing coals and engine-room stores consumed either in the repair of damage to a steamer, in working the engines or winches to assist in the repairs of damage, or in moving her to a place of repair within the limits of the port where she is lying, shall be charged to the underwriters on ship as particular average.

49. *Rigging Chafed (Custom of Lloyd's, 1876).*

Rigging injured by straining or chafing is not charged to underwriters, unless such injury is caused by blows of the sea, grounding, or contact; or by displacement, through sea peril, of the spars, channels, bulwarks, or rails.

50. *Sails Split or Blown Away (Custom of Lloyd's, 1876).*

Sails split by the wind, or blown away while set, unless occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent, are not charged to underwriters.

51. *Scraping and Painting.*

That when in consequence of damage by a peril insured against, a vessel's bottom has to be scraped and painted, the cost of such scraping and painting shall be charged to underwriters on ship, without any deduction on account of the vessel having become due for ordinary painting at any time subsequent to the accident.

52. *Dry Dock Expenses.*

That where repairs on owner's account which are immediately necessary to make the vessel seaworthy and which can only be effected in dry dock are executed concurrently with other

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repairs, for the cost of which the underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.

53. *Deduction of One-Third (Custom of Lloyd's, Amended,* 1890—91).

The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions:—

Anchors are allowed in full. Chain cables are subject to one-sixth only.

Metal sheathing is dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to one-third.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the expense of straightening bent ironwork, and to the labour of taking out and replacing it.

It does not apply to graving dock expenses and removals, cartages, use of shears, stages, and graving dock materials.

It does not apply to a ship's first voyage.

N.B.—Articles belonging to, or repairs done to, a ship, other than an iron ship, allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

PARTICULAR AVERAGE ON GOODS.

54. *Adjustment on Bonded Prices (Custom of Lloyd's,* 1876).

In the following cases it is customary to adjust particular average on a comparison of bonded, instead of duty-paid prices:—

In claims for damage to tea, tobacco, coffee, wine, and spirits imported into this country.

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55. *Adjustment of Average on Goods Sold in Bond.*

That in consequence of the facilities generally offered to bond goods at their destination, on which terms they are often sold, the term "Gross Proceeds" shall, for the purpose of adjustment, be taken to mean the price at which the goods are sold to the consumer, after payment of freight and landing charges, but exclusive of Customs duty, in cases where it is the custom of the port to sell or deal with the goods in bond.

56. *Apportionment of Insured Value of Goods.*

That where different qualities or descriptions of cargo are valued in the policy at a lump sum, such sum shall, for the purpose of adjusting claims, be apportioned on the invoice values where the invoice distinguishes the separate values of the said different qualities or descriptions; and over the net arrived sound values in all other cases.

57. *Under-insured Interest Made Good in General Average.*

That an underwriter who has paid for loss by jettison of the thing insured is entitled, in the proportion that the sum insured bears to the policy value, to whatever is recovered in general average in respect of such loss, although the amount so recovered may exceed the amount paid by him.

58. *Allowance for Water in Picked Cotton (Custom of Lloyd's,* 1876).

When bales of cotton are picked, and the pickings are sold wet, the allowance for water in the pickings (where there are no means of ascertaining it) is by custom fixed at one-third.

59. *Allowance for Water in Cut Tobacco (Custom of Lloyd's,* 1876).

When damaged tobacco is cut off, the allowance for water in the cuttings is one-fourth.

60. *Allowance for Water in Wool (Custom of Lloyd's,* 1876).

Damaged wool from Australia, New Zealand, and the Cape is subject to a deduction of 3 per cent. for wet, if the actual increase cannot be ascertained.

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61. *Franchise Charges* (*Custom of Lloyd's*, 1876).

The expenses of protest, survey, and other proofs of loss, including the commission or other expenses of a sale by auction, are not admitted to make up the percentage of a claim; and are only paid by the underwriters in case the loss amounts to a claim without them.

62. *Extra Charges* (*Custom of Lloyd's*, 1876).

Extra charges payable by underwriters, when incurred at the port of destination, are recovered in full; but when charges of the same nature are incurred at an intermediate port they are subjected to the same treatment, in respect of insured and contributory values, as general average charges.

63. *Adjustment of Return of Premium* (*Custom of Lloyd's*, 1876).

When the words "and arrival" follow the stipulation for a return of premium on a policy on goods, the particular average, but not the special charges, is deducted from the amount insured to arrive at the amount on which the return is taken.

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